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WHITE PAPER

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to: International Seafood Sustainability Foundation (“ISSF”)
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ISSF engaged Paul Hastings LLP to research and analyze whether to expand ISSF’s conservation and management measure (“CMM”) regarding illegal, unreported, and unregulated (“IUU”) fishing beyond its current role of requiring ISSA Members¹ to avoid purchases from vessels identified as “IUU” by regional fisheries management organizations (“RFMOs”).² This report is a product of that research and careful consideration. This report concludes that the current IUU CMM uses the only predictable measure of compliance, and ISSF should not expand its IUU measure beyond its current scope.

In reaching this conclusion, Paul Hastings attorneys assessed the current enforcement framework, which incorporates elements of due process and relies on international buy-in and flag State authority. They also considered that there is no established definition of the term “IUU” in the international community. In addition, they analyzed recent actions implementing this framework, including enforcement actions by flag States and coastal States, and a multilateral, multijurisdictional approach to promoting State enforcement where it may be lacking. The analysis made clear that ISSF should not and cannot supplant the unique and proper role of States and RFMOs.

This report finds that ISSF still plays a vital role in combating IUU fishing and promoting sustainable, transparent, and traceable fishing. ISSF can maximize its impact in achieving conservation and management goals by continuing (a) to encourage and monitor ISSA Member compliance with ISSF’s CMMs; (b) to promote market-based incentives, like the Proactive Vessel Register (“PVR”), for transparent validation that vessels have or have not implemented ISSF requirements; and (c) to support strengthened fisheries governance by States and RFMOs through (i) development and dissemination of best scientific information, (ii) capacity measures, (iii) expanded observer coverage and improvements in other forms of vessel monitoring, control, and surveillance, and (iv) other mechanisms that promote transparency, compliance, and traceability within RFMO competencies, national government implementation, and industry practices.

This report is intended to clarify the boundaries of ISSF’s current IUU measure. It proceeds with an introduction to the existing conservation framework, as a starting place for an analysis of ISSF’s role. It then outlines some of the examples of coastal and flag State enforcement actions, and international responses to perceived deficiencies in enforcement and oversight, which ISSF considered in its analysis. With this background, the report then explains ISSF’s current role in the IUU governance framework, and outlines the best role for ISSF in light of the presented analysis and ISSF’s mission and structure.

I. CONSERVATION FRAMEWORK

The current tuna conservation and management framework rests on four central premises.

¹ This memorandum refers to both “ISSA Member Companies” and “ISSF Participating Companies” as “ISSA Members” or “Member Companies.”

² See International Seafood Sustainability Foundation Resolution 09-01: IUU Fishing (requiring ISSA Members to refrain from transactions in tuna caught by vessels on the IUU list of any RFMO). All ISSF resolutions are available at <http://iss-foundation.org/category/news/conservation-measures/resolutions/>.

First, tuna RFMOs, through their implementing conventions and related agreements, set forth the primary international mechanisms for tuna conservation and management frameworks within the areas of their respective conventions (“Convention Areas”).³ RFMOs interpret State obligations under the framework of international treaties and develop conservation and management measures within that structure.⁴ The RFMO governance mechanisms satisfy basic notions of due process by (1) gathering information, (2) creating an opportunity for exoneration, and (3) imposing penalties consistent with the violation.

Second, RFMO member States and cooperating nonmember States (“CNMs”) generally bear responsibility for sanctioning noncompliant activity at the vessel level for vessels flying their flag and/or fishing in their waters.⁵ The system is governed by a range of factors including license agreements, access agreements, chartering arrangements, rules of the relevant RFMO, and treaties.

Third, RFMO member States are accountable to one another for their own compliance in establishing and implementing the rule of law required under the RFMO governance frameworks. All tuna RFMOs have annual monitoring mechanisms to assess the compliance of member States, and sometimes of CNMs, in implementing their RFMO obligations.⁶ Since 2011, all five of the tuna RFMOs have revised the mandates and procedures of their existing compliance committees and, in some cases, have added further tools to improve member and CNM compliance.⁷ States have also leveraged compliance pressure on one another through their own regulatory schemes.⁸

Fourth, through the RFMO conventions and related agreements, RFMO members and CNMs have authorized RFMOs to identify IUU vessels. International bodies, nongovernmental organizations, and

³ See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 *ILM* 1542 (1995), art. II.6(c)-(d) in force December 2001 (defining the term “regional fisheries management organization” to mean “an intergovernmental fisheries organization or arrangement . . . that has the competence to establish fishery conservation and management measures”; defining the term “conservation and management measure” to mean “measures to conserve one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law”).

⁴ See Holly R. Koehler, *Promoting Compliance in Tuna RFMOs: A Comprehensive Baseline Survey of the Current Mechanics of Reviewing, Assessing and Addressing Compliance with RFMO Obligations and Measures*, ISSF Technical Report 2013-02, at 4, International Seafood Sustainability Foundation Mar. 12, 2013 [hereinafter Koehler, *Promoting Compliance*], <http://iss-foundation.org/wp-content/uploads/downloads/2013/04/Substantial-Compliance-2013-02.pdf> (explaining that all of the tuna RFMOs “have adopted, over the years, measures to limit catch or effort, control or manage fishing capacity, mitigate bycatch of non-target species, require data reporting and establish monitoring, control and surveillance tools and programs”).

⁵ See, e.g., Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries, art. 8.2.7 (1995), <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf> (obligating flag States to cooperate in sustainably managing fisheries resources and to “take enforcement measures in respect of fishing vessels entitled to fly their flag, which have been found by them to have contravened applicable conservation and management measures”).

⁶ For a more detailed discussion of this process, see Koehler, *Promoting Compliance* at 2.

⁷ See *Id.* at 3.

⁸ See, e.g., NOAA 2013 Report to Congress; European Commission Memo IP/13/1053, *Questions and Answers on the EU’s Fight Against Illegal, Unreported and Unregulated (IUU) Fishing* (Nov. 26, 2013), [http://europa.eu/rapid/press-release MEMO-13-1053_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1053_en.htm).

other conservation stakeholders have conflicting interpretations regarding the definition of the term “IUU.” Although the Food and Agriculture Organization (“FAO”) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (“IPOA-IUU”) defines each element separately, it does not take a position on the proper reading of the terms in sequence. RFMO IUU lists often identify those vessels that have entirely escaped investigation and enforcement actions or are flagged to States outside of the RFMO framework that have not cooperated with the RFMO to investigate the alleged activities. Given the relatively severe consequence of an IUU listing, this process incorporates heightened due process elements by providing both the vessel’s owner and the flag State with ample notice and opportunity to rebut the presumption of IUU fishing.

II. THE CONSERVATION FRAMEWORK IN ACTION

To sample the performance of the international compliance framework in enforcing allegedly noncompliant action, ISSF has considered recent enforcement actions and multilateral and unilateral international action to address IUU and noncompliant fishing.

For instance, *Albacora Uno*, a tuna purse seine vessel owned by Albacora S.A. was implicated in four separate fishing violations since 2008. First, there were alleged violations in the U.S. Exclusive Economic Zone (“EEZ”), which resulted in a US\$5 million settlement.⁹ Second, there was an alleged violation of an IATTC resolution against dumping skipjack tuna, which was investigated by the Spanish Secretary General of Fisheries. Third, the *Albacora Uno* was fined US\$55,000 by the Marshall Islands for having violated the shark-sanctuary status of the Marshall Islands EEZ.¹⁰ Fourth, the vessel’s master and fishing master were charged with and pled guilty to illegal fishing in the Nauru EEZ in 2013.¹¹

As these examples demonstrate, in nearly all of these instances the coastal State alleging the violation investigated the vessel’s activities, brought an enforcement action when it deemed such action necessary, and levied a sanction accordingly. According to members of the conservation community, authorities from Spain, the flag State of the *Albacora Uno*, became especially alert to allegations once U.S. authorities identified Spain as a country engaged in IUU activity on the basis of violations of international conservation and management measures.¹²

In cases where flag and coastal States may lack the capacity or will to enforce fishing rules, the international community is instrumental. Although there are many possible examples, ISSF has particularly considered the international response to high rates of IUU and noncompliant fishing in West Africa.

The response to IUU and noncompliant fishing in West Africa has been multilateral and layered. Over the past several years, the International Commission for the Conservation of Atlantic Tunas (“ICCAT”), the

⁹ See Press Release, National Oceanic and Atmospheric Administration, \$5M Settlement Boosts Marine Conservation Plans in the Pacific (July 7, 2010), http://www.noaanews.noaa.gov/stories2010/20100707_albacora.html?+news,+noaa; Greenpeace Blog, Oct. 21, 2013; Shark Defenders, *Pirates Busted for Poaching Sharks in Marshall Islands*, July 10, 2012 [hereinafter *Shark Defenders*], <http://www.sharkdefenders.com/search?q=pirates+busted+for+poaching>; *Fishing Boat Owner Fined \$5M*, Honolulu Star-Advertiser, July 11, 2010, http://www.staradvertiser.com/news/20100711_Fishing_boat_owner_fined_5M.html?id=98191414.

¹⁰ See Shark Defenders, *Pirates Busted for Poaching Sharks in Marshall Islands* (July 10, 2012).

¹¹ Radio New Zealand International, *Nauru Court Fines Spanish Vessel and Crew US\$ 1Million* (Oct. 15, 2013), [http://www.rnzi.com/pages/news.php?op=read&id=79855\[12/12/2013 12:00:00AM\]](http://www.rnzi.com/pages/news.php?op=read&id=79855[12/12/2013 12:00:00AM])

¹² See NOAA 2013 Report to Congress at 29.

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RFMO with the competence for managing tuna fishing in the Atlantic Ocean, including within the EEZs of West African Contracting Parties, ICCAT has made efforts to work with West African nations to improve oversight of vessels, and significant ICCAT action has focused on the quality of the data that flag States are required to submit to ICCAT. ICCAT has provided funding and training and has facilitated coordination among States. In conjunction with these efforts, ICCAT has sent several letters of concern identifying ongoing noncompliance with ICCAT rules.¹³ These letters of concern are the first step in the process for ICCAT to levy trade sanctions against noncompliant States.

Individual States and the European Commission have also taken action in recent years. Although the European Commission is limited in its direct power over non-member States, it maintains significant power to affect international commerce. In the situation of IUU fishing in West Africa, it has been able to use its information-sharing platform to prevent certain imports into the European Union and has leveraged its market power as a tool to pressure West African nations to prevent IUU fishing. In particular, it has sent numerous mutual assistance messages regarding Guinean and Ghanaian vessels, providing detailed information about vessels and ports involved in alleged illegal fishing. This information was instrumental in prompting EU member States to request additional verification for West African tuna imports and refusing entry where verification was unsatisfactory. On November 26, 2013, the Commission identified Guinea as a third-country considered as non-cooperating in fighting illegal, unreported and unregulated fishing.¹⁴ On the same date, it issued a notice that Ghana was being investigated for the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.¹⁵ In March 2014, the European Union confirmed trade sanctions on Guinean fisheries products and other fisheries-related activities. The review period to determine whether Ghana will face similar sanctions is underway at the time of publication.

In addition, the United States has identified Ghana as a country that has fishing vessels engaged in IUU fishing activities.¹⁶ Once a nation is identified, NOAA enters a two-year consultation process to encourage that nation to take necessary measures to address the issue for which it was identified. Following these consultations, NOAA determines whether to negatively or positively certify the identified nation in the next Report to Congress. A positive certification is issued if the nation has provided evidence of actions that address the activities for which it was identified. A negative certification may result in denial of U.S. port access for fishing vessels of that nation and potential import restrictions on fish or fish products.

Following the international response to alleged noncompliant and IUU fishing, Ghana took action in August 2013 against 10 companies for illegal fishing activities.¹⁷ In addition, Ghana has pledged to

¹³ See, e.g., ICCAT letter, Feb. 21, 2012, available in ICCAT Circular # 634; ICCAT letter, Feb. 11, 2013, available in ICCAT Circular # 609.

¹⁴ Commission Implementing Decision of 26 November 2013 Identifying the Third Countries that the Commission Considers as Non-Cooperating Third Countries Pursuant to Council Regulation (EC) No. 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2013 O.J. C 346/2, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:346:0002:0025:EN:PDF>.

¹⁵ Press Release, Council of the European Union, Illegal fishing activities: trade measures decided by the Council (Mar. 24, 2014).

¹⁶ NOAA 2013 Report to Congress at 21-32.

¹⁷ *Report: Ghana Fines Ten Fishing Firms, Including MW Brands Subsidiary*, Undercurrent News, Aug. 8, 2013, <http://www.undercurrentnews.com/2013/08/08/report-ghana-fines-ten-fishing-firms-including-mw-brands-subsidiary/>.

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cooperate with other countries in the West African region, including Benin, Gabon, Liberia, and Sierra Leone, to forge a common strategy to combat IUU fishing.¹⁸

III. ISSF'S CURRENT ROLE IN COMBATING IUU FISHING

In contrast to the public sphere of State and RFMO authority, ISSF operates in a sphere of private influence over ISSA Members, who by their voluntary participation in the organization, each agree to comply with ISSF CMMs.¹⁹ Through this voluntary compliance mechanism, ISSF supports international efforts to end IUU and noncompliant fishing. As currently articulated, ISSF “develop[s] and implement[s] verifiable, science-based practices, commitments and international management measures that result in tuna fisheries meeting the [Marine Stewardship Council] certification standard without conditions, and becoming the industry standard for vessel owners, traders, processors and marketers.”²⁰ To achieve this core objective, ISSF “cooperate[s] with and support[s] [RFMOs], and vigorously advocate[s] to RFMO members for the adoption and implementation of science-based management measures so that tuna stocks and their ecosystem are managed comprehensively and sustainably.”²¹

Consistent with this purpose, ISSF does not prohibit membership or take remedial action against companies that violated ISSF CMMs before seeking membership in ISSA. Not only would ISSF frustrate its own conservation goals by denying membership to these companies, but doing so would contravene basic notions of due process by penalizing a company for violating a standard that did not apply to the company at the time of the violation (*i.e.*, before becoming a Member). By offering membership to these companies, ISSF promotes broader implementation of its CMMs and fosters best industry practices.

A. ISSF's Conservation and Management Measures Support and Supplement the Existing Conservation Framework

Through its CMMs, ISSF requires that ISSA Members honor RFMO obligations and support RFMO performance,²² promote tuna traceability and transparency regarding a vessel's activities²³ and refrain

¹⁸ *Ghana Combats Unregulated Fishing*, GhanaWeb, Dec. 16, 2013, http://www.ghanaweb.com/GhanaHomePage/business/artikel.php?ID=295345&goback=.gde_4153219_member_5818745224662380546#!.

¹⁹ Second Amended and Restated Bylaws of International Seafood Sustainability Trade Association, Inc. art. 3.2 (Apr. 25, 2013) (limiting ISSA Membership eligibility to, *inter alia*, tuna companies “in compliance with the seafood sustainability criteria verified, adopted or recommended by International Seafood Sustainability Foundation, Inc.”).

²⁰ *ISSF Objectives*, <http://iss-foundation.org/our-story/>.

²¹ *Id.*

²² International Seafood Sustainability Foundation (ISSF) Resolution 09-01(2): IUU Fishing; ISSF Resolution 09-04(2): Product Traceability; ISSF Resolution 10-01(1) (Amended): RFMO Authorized Vessel Records and Unique Vessel Identifiers; ISSF Resolution 10-01(2); ISSF Resolution 11-04: Support RFMO Participation; ISSF Resolution 13-02(B)(1): To Amend Resolution 13-01 to Establish Multi-Annual Commitments; ISSF Resolution 13-02(D); ISSF Resolution 12-01: To Prohibit Shark Finning; ISSF Resolution 10-02: Large-Scale Pelagic Drift Nets.

²³ ISSF Resolution 09-04(1): Product Traceability; ISSF Resolution 13-03: Enhance Reporting and Implementation of Purse Seine Fishing Best Practices; ISSF Resolution 13-02: To Amend Resolution 13-01 to Establish Multi-Annual Commitments.

from any transactions with tuna caught from purse seine vessels that engage in certain behavior that undermines the goals of sustainability, transparency, and traceability.²⁴

ISSF's core CMM addressing IUU activity appears in ISSF Resolution 09-01, which requires ISSA Members to refrain from transactions in tuna caught by vessels on the IUU list of any RFMO. ISSF Resolution 09-04 reinforces that conservation goal by requiring an ISSA Member to withdraw its tuna from the marketplace upon the discovery that the tuna originated with an IUU-listed vessel.

Collectively, these CMMs illustrate how ISSF incentivizes compliance at the vessel level without directly investigating or disciplining vessels. By limiting its investigation and enforcement role to ISSA Member Companies, ISSF maximizes its efficiency and impact. Current CMMs (1) leverage the information that RFMOs and States have already extracted through their investigation and enforcement actions, and (2) allocate the burden of proof on the party best suited to bear that burden—each ISSA Member. In other words, rather than assuming the burden of proving that a given vessel has engaged in noncompliant activity, ISSF's current model shifts that burden of proof to ISSA Members by requiring them to demonstrate that they have transacted only with compliant vessels. Forcing each Member to demonstrate its compliance spares the collective membership of the much higher administrative burden that would be involved in investigating one another's transactions and the activities of the originating vessels.

In addition to maximizing the efficiency of its investigation and enforcement function, the current ISSF framework encourages compliance at the vessel level by creating market-based incentives for vessels to comply with both (1) substantive protections and (2) procedures that render noncompliant activity more difficult to conceal and easier to detect by public authorities and private industry alike. Thus, through these measures, ISSF increases the rate of both substantive compliance and procedural safeguards, providing comprehensive support to the global governance framework.

B. ISSF's PVR Provides Additional Incentives for Vessel Compliance

ISSF creates additional incentives for vessel compliance through its PVR system, which requires Members to register all "controlled vessels" and thereby inform the public of whether those vessels currently comply with the majority of ISSF's CMMs. The PVR focuses on vessel compliance, providing vessel owners with an opportunity to identify themselves as active participants in meaningful tuna sustainability efforts. All ISSF participating companies have committed to register all controlled purse seine tuna vessels on the PVR by March 31, 2014. In addition, each participating company will develop and publish its individual plan for prioritizing and increasing purchases of tuna from vessels on the PVR, and report the percentage of annual purchases from PVR vessels. Although required for ISSA members, all owners of vessels that fish for tuna—regardless of gear type—can list their vessels on the PVR to publicly signify their ongoing commitment to sustainable fishing practices.

Although the PVR focuses on vessels, it does so through an audit function—not an investigatory function. Rather than allocating to ISSF the burden of proving whether a given Member's vessel complied with ISSF CMMs, as an investigatory function would do, ISSF's PVR audit process requires proof that vessels comply with applicable ISSF CMMs. By subjecting all PVR-listed vessels to this register-audit-list procedure, ISSF avoids subjecting Members with controlled vessels to a *de facto* higher standard involving additional elements of investigation and discipline.

Finally, the PVR honors the distinction between two separate spheres of jurisdiction. Within the public sphere, vessels must face RFMO and State disciplinary proceedings when vessels violate the rules of

²⁴ ISSF Resolution 13-02(C)(4); ISSF Resolution 13-02(A); ISSF Resolution 13-02(B)(2); ISSF Resolution 13-02(C)(1); ISSF Resolution 13-02(C)(3)(1); ISSF Resolution 13-02(C)(3)(2).

RFMO and State jurisdictions. When vessels have breached these rules, ISSF facilitates the identification of these vessels so that tuna companies can avoid tuna caught by the noncompliant vessels. This introduces the sphere of private jurisdiction, through which tuna companies must face market-based penalties and disciplinary proceedings by ISSF when tuna companies violate ISSF CMMs by virtue of their transactions. Consistent with the analysis above regarding the other questions presented, to the extent that ISSF blurs these separate spheres of jurisdiction, ISSF risks supplanting or undermining the functioning of the public governance framework already in process at the international, State, and multilateral level.

Thus, through these CMMs and the PVR, ISSF leverages its scientific and industry knowledge to support RFMOs in developing optimal conservation policies within their respective Convention Areas. In doing so, ISSF promotes the attainment of RFMO conservation goals without supplanting the RFMO administrative process.

IV. SUGGESTED ROLE OF ISSF IN COMBATING IUU FISHING

This study considered ISSF's role in the global conservation and management paradigm and whether it should expand its IUU conservation measures. As explained below, this report concludes that ISSF should not expand its IUU conservation measures and should continue to defer on RFMO determinations relating to IUU vessels. The existing multilateral framework is both operating and improving, and ISSF does not have the authority or resources to supplant that framework.

A. ISSF's CMMs Properly Defer to RFMOs for IUU Fishing Determinations

As discussed above, the international conservation community has not developed a single, common definition and interpretation of "IUU" fishing. In the absence of a consensus, ISSF should not confuse the existing framework by inserting its own unique "IUU" definition that does not rely on the judgments of governments and RFMOs. Doing so would introduce significant risks that ISSF is not prepared assume. For example, applying a broader interpretation of "IUU" would require ISSF to expand the list of IUU vessels under ISSF Resolution 09-01 that trigger market withdrawal under Resolution 09-04 beyond those listed on the IUU lists of RFMOs. Such a rule would not only require full analysis by ISSF in a very short time span, in order for withdrawal to be possible, but the result would be an unpredictable application of that severe measure. What is more, such expansion poses a significant risk of requiring ISSF to investigate potentially noncompliant vessels and establish its own "blacklist." For reasons outlined in greater detail below, such an expansion of ISSF's role would be neither feasible nor productive.

B. ISSF's Limited Role in a Larger IUU Framework

ISSF maintains a limited role in the larger conservation framework, particularly with regard to IUU vessels. Expanding ISSF's reach beyond its current role could require ISSF (1) to investigate vessels that potentially engage in noncompliant activity and (2) to discipline ISSA Members for engaging in transactions with those vessels. This vessel investigation and enforcement function belongs in the unique province of States, who exercise public authority to enter treaties, compel information, adjudicate decisions, and impose disciplinary actions.

1. The current framework incorporates the mechanisms necessary to improve the achievement of conservation and management goals

The coordination of actions and information among vessel owners, flag States, RFMOs, and other third parties is core to effective investigation. Through their public authority, States are particularly well suited to compel third parties to provide information, to cooperate in any investigation and prosecution effort, and to satisfy disciplinary requirements. Given the confidential nature of investigations and communications that are central to identifying and proving noncompliance, public authorities have the unique ability to achieve the necessary level of third-party cooperation.

For example, the European Commission was able to share information about Ghanaian vessels among its members without jeopardizing the information's confidentiality. This allowed Spain to take commensurate action and to request additional clarification from Ghanaian authorities.

Similarly, in the case of *Albacora Uno*, States exercising territorial jurisdiction over their EEZs compelled the vessel's owners and agents to participate in an adjudicatory process, which the States could then enforce by a fine and other commitments such as a limited prohibition on fishing activity and the implementation of a company-wide monitoring program. Because of the RFMO framework, Spanish authorities were also able to participate in the investigation process and assist in extracting any disciplinary requirement.

The West Africa and *Albacora Uno* examples also demonstrate the power of multilateral and intergovernmental backstops to address noncompliance by States and RFMOs in fulfilling their governance functions. These backstops take many forms, ranging from trade-based sanctions and port-State measures to adjustable, allowable-catch quotas, and intergovernmental mechanisms through which member States identify noncompliant States and try to bring them into compliance.

As described below, ISSF efforts to expand its current IUU measures creates the risk of interfering with this public process and undermining the core due process elements already in effect.

2. ISSF lacks public authority

ISSF's authority arises from the voluntary participation of private industry. By contrast, RFMO authority arises from intergovernmental participation and buy-in in the form of international conventions and customary international law, which evolve according to the stated and demonstrated consensus of constituent States. At the State level, State authority arises from the fundamental principle of State sovereignty. Given the pervasive and evolutionary nature of the public authority held by States and RFMOs, these entities are best suited to implement enduring governance mechanisms across a broad range of parties.

Although ISSF can request certain information from its own Members, ISSF lacks (1) the authority to compel information or cooperation from third parties (e.g., from vessel owners or operators, flag States, and RFMOs), (2) the administrative capacity to undertake investigatory or adjudicatory functions, and (3) the power to levy disciplinary actions or sanctions against third parties. Indeed, attempting to conduct investigations based on public information, or to extract sanctions on an *ad hoc* basis would impose enormous costs while dispensing justice with an unevenness that undermines basic notions of due process.

For example, expanding ISSF's current conservation measures regarding IUU fishing would raise serious practical and due process concerns. An RFMO's listing of a vessel as IUU is a narrow and harsh penalty levied with commensurate due process. Similarly, requiring market withdrawal is a grave penalty that should be required only where ISSA Members can proactively avoid tuna caught by prohibited vessels by

easily checking the RFMO IUU lists prior to purchase. Depriving tuna companies of that notice and opportunity would unduly penalize companies (who must withdraw their product) while allowing the transgressing vessel to evade any penalty by selling to the unknowing buyer.

While the RFMOs may change their IUU process according to the judgment of their members, the RFMO process is the only governance mechanism currently in place that affords appropriate due process to vessels, flag States, and tuna companies alike. The investigation of presumed IUU activity is unique in that it provides flag States and vessels with notice of the pending listing and an opportunity to present evidence rebutting the presumption of IUU activity. Only once the relevant parties fail adequately to rebut that presumption does the RFMO include that vessel on its IUU list. Once the vessel is listed, all of its activity is presumably IUU. Provided with notice of the list, companies can then take appropriate measures to ensure that none of its tuna is caught by those vessels.

Given ISSF's limited authority and resources, ISSF lacks both the power and the capacity to establish and ensure the due process elements provided by the RFMO IUU listing procedures. Because ISSF cannot provide these due process elements, expanding its IUU conservation measure to incorporate a broader set of vessels and activities would expose ISSA Members to undue hardship in the form of uncertainty in their purchasing decisions and the unnecessary and significant cost of withdrawing tuna product upon the delayed discovery of the IUU fishing—a delay that the tuna company can do little to avoid.

3. ISSF should not intervene with the bilateral or multilateral enforcement processes

ISSF intervention in the public governance framework would also risk skewing the balance of State authority while providing political cover for public authorities shirking their own enforcement efforts. ISSF must take care to avoid creating perverse incentives or rewards by, for example, penalizing countries that were not originally involved in the conservation framework, or penalizing high-transparency States on the basis of information that they voluntarily provide.

For example, a high-transparency State within the European Union may provide a public record of its administrative process in investigating and enforcing alleged noncompliance, while a low-transparency State may provide virtually no administrative record of these processes. ISSF would want to avoid a situation in which it unduly penalizes the EU State merely because the administrative record reveals that the State's investigation and enforcement process could have been better. Likewise, ISSF would want to avoid unduly rewarding a low-transparency State for shielding its administrative process, or any lack thereof, behind a veil of secrecy.

4. ISSF CMMs already promote improvements in the governance framework

Instead of undermining the international governance framework, ISSF should continue leveraging its market influence and its access to scientific knowledge, conservation data, and industry best practices to support the current framework and facilitate its ongoing development and effectiveness. As discussed above, ISSF's current CMMs already provide indirect deterrents to general compliance violations by, for example, prohibiting ISSA Members from transacting in tuna caught by non-RFMO authorized vessels or vessels flagged to a non-RFMO member or non-CNM States. All of ISSF's CMMs promoting traceability and transparency also deter violations by rendering the noncompliant activity more difficult to conceal and easier to detect.

5. ISSF should not investigate vessels

Finally, ISSF should not expand the IUU concept in any form that would require ISSF to assume an investigation role at the vessel level. For the reasons set forth above, ISSF is not adequately equipped to perform this function, as it lacks the authority and resources to investigate, prosecute, and enforce vessel compliance in a comprehensive and even-handed manner.

The question has been raised as to whether ISSF should, at a minimum, investigate the compliance of vessels owned either directly or indirectly by ISSA Members. In other words, the suggestion posits that if ISSA Members cannot transact in tuna caught by certain noncompliant vessels, then ISSA Members should also face disciplinary action when they beneficially own noncompliant vessels.

Again, although ISSF can require its Members to provide certain information, ISSF lacks the authority and resources to engage the full range of third parties necessary to investigate and enforce compliance issues. What is more, this suggestion implies that ISSA Members who beneficially own vessels should somehow be held to a higher standard than their non-vessel owning peers because, in addition to being held accountable for their transactions, they are also being held accountable for their vessels.

6. ISSF may further develop the PVR, with limits

ISSF may also consider ways to amplify the PVR tool. Currently, the PVR does not include a column indicating that a vessel has never had any past violations for which it was sanctioned, and it does not include a column indicating that the vessel has never been listed on an RFMO IUU list or has not been alleged to have been involved in IUU fishing. While this report concludes that such columns would not be consistent with the role of ISSF, ISSF may consider adding additional columns that are verifiable, maintain incentives for future compliance, and respect the authority of States and RFMOs.

This report advises against the addition of a PVR column to cover whether a vessel has faced allegations of IUU fishing, such as being subject of European Commission messages or being reported to an RFMO. With regard to un-remedied violations or alleged violations, the information would be difficult to obtain—both by ISSF for purposes of its audit, but more importantly, by the vessel itself. A vessel could not certify that it was never suspected of engaging in illegal activity, or that it never accidentally engaged in illegal activity, because it would not necessarily know. Requiring ISSA Members to demonstrate the compliance of vessels under all applicable authorities would create prohibitive administrative challenges. Even if some information were available, such a policy could bias vessels about which there is more public information.

This report also concludes that past, remedied violations or prior IUU listing should not be included on the PVR so long as the violation would not be the basis for an ISSA Member to violate a CMM. Otherwise, even one violation could cause a vessel to be forever labeled as a bad actor, reducing the incentive of vessels to comply going forward. Moreover, failing to give weight to flag and coastal State enforcement remedies and the RFMO delisting process undermines, rather than supports, the authority of those entities. Similarly, including a column for past violations would prejudice vessels flagged to States with frequent enforcement or under the competence of RFMOs with robust IUU listing processes. The perverse result here would be that vessels flagged to the most compliant States would appear to be the least compliant. For repeated violations, ISSF could consider incorporating this information into its PVR Audit protocols to trigger red flags for greater scrutiny by the auditors.

Subject to these limitations, ISSF may consider expanding the PVR to identify a broader range of vessel compliance with ISSF CMMs as well as best practices that are not governed by ISSF CMMs.

V. CONCLUSION AND NEXT STEPS FOR ISSF'S CONSIDERATION

For the reasons outlined above, Paul Hastings attorneys determined that it would be inappropriate and unproductive for ISSF to take on a larger role within the existing IUU governance framework. Instead, ISSF should continue to hone its existing tools to incentivize compliance and render noncompliance easier to detect. Rather than participating directly in the governance process at the vessel level, ISSF can best support the attainment of conservation and management goals by supporting the ongoing improvement of the governance framework at that State and RFMO level. By supporting, and not supplanting, the international governance framework, ISSF also promotes system legitimacy, reduces perceptions of unfairness, and fosters public and market confidence in sustainability and fishery management strategies implemented by RFMOs.

ISSF can best support the governance framework by:

1. enhancing its outreach to RFMOs member and cooperating non-member States and advocating for RFMOs to adopt and facilitate measures consistent with ISSF CMMs;
2. increasing the participation of purse seine vessels on ISSF's PVR;
3. continuing to drive and publish research on key conservation areas such as FADs and by-catch and to improve understanding within the conservation and industry communities regarding those issues;
4. disseminating best practices through, e.g., observer and skipper training programs;
5. promoting traceability and transparency practices; and
6. continuing to expand ISSA Membership.