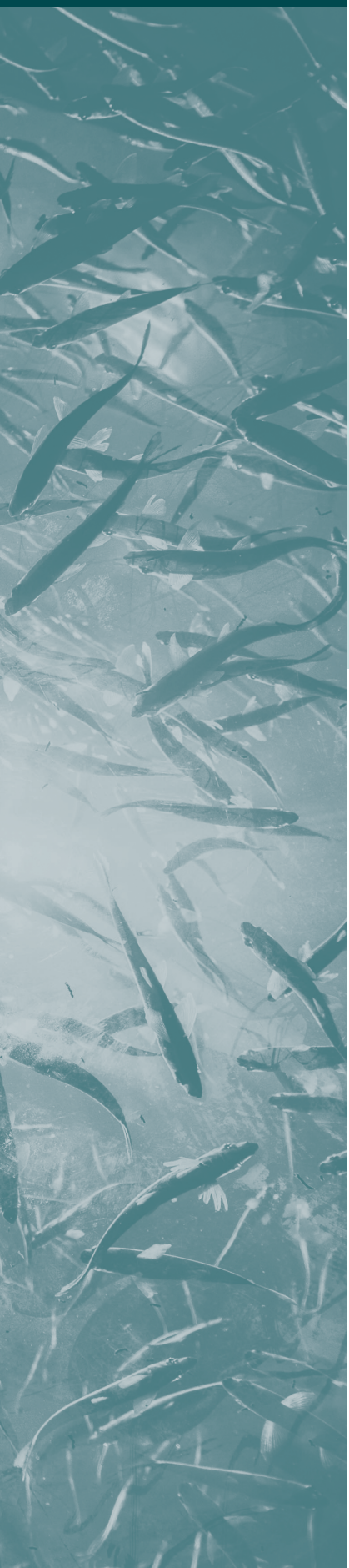
Future Fisheries Management Issue Brief



Advancing the International Law of the Sea to Address Illegal, Unreported, and Unregulated Fishing

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SUMMARY Successfully addressing illegal, unreported, and unregulated fishing requires a broad solution set because the contours of the problem are complex and the patterns that shape it are diverse and multifaceted. Effective implementation of international agreements such as the Biodiversity beyond National Jurisdiction Agreement and the World Trade Organization's Agreement on Fisheries Subsidies requires coordination and cooperation with regional fisheries management organizations and other instruments. The international Law of the Sea offers both opportunities and challenges as policymakers seek to solve the problem of global overfishing, and it suggests ways in which willing states might craft foreign policies to accomplish this goal.

Although a significant proportion of illegal, unreported, and unregulated (IUU) fishing is small-scale, coastal, and domestic, overfishing is in many ways an international problem. There are several reasons for this: Ocean space and marine resources are generally shared among states, especially on the high seas. Long-distance fishing has geopolitical and geostrategic implications for states. And fish and fish products are internationally traded, multiplying the economic opportunity of IUU fishing and dispersing the responsibility for IUU practices.

Because the problem of IUU fishing—and, more specifically, the problem of unsustainable fishing—has significant international elements, states should prioritize coordination and cooperation at the international level. Such cooperation may take the form of existing and emerging international institutions. It may also take the form of more informal arrangements between groups of like-minded states. Addressing IUU fishing at the international level will require states to engage their foreign policy apparatus in addition to the environmental and resource-management agencies that may traditionally take the lead on sustainability issues.

The World Trade Organization (WTO) Agreement on Fisheries Subsidies is an example of how an international forum can be utilized to address IUU fishing. As states prepare

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for the agreement's implementation phase, they should seek out parallel forums that could enable productive international cooperation to achieve the same goals. Which government actor takes the lead and what kind of activities states engage in will differ depending on the forum. This issue brief explores three areas in which international relations and formal international cooperation can improve the international community's approach to the problem of IUU fishing.

The United Nations Convention on the Law of the Sea is a critical foundation for shaping the dynamics, behaviors, and practices associated with fishing, because the political geography it enshrines in international law assigns the basic rights and duties pertaining to fishing in any and every part of the ocean. This issue brief highlights the potential for development of the Law of the Sea to address IUU fishing. States can activate, apply, interpret, and implement the Law of the Sea in new ways, exercising and deploying a broad set of tools, including economic leverage, moral authority, expanded representation, and institutional development.

CHINA AND THE "RULES-BASED INTERNATIONAL ORDER" AT SEA

China has received much attention for its role in global overfishing. It is generally understood that China is a so-called distant water fishing nation, which means that the Chinese government subsidizes a large fleet of industrial fishing vessels that ply distant waters, including the high seas and the exclusive economic zones of developing coastal states. China has recently shown a willingness to restrict its distant water fishing vessels from IUU fishing, to limit subsidies, and to prevent the growth of its distant water fleets.[1] But problematic practices continue, including practices that obscure both the owners and the activities of Chinese vessels.[2]

Chinese fishers continue to engage in IUU fishing. The United States has recently prioritized combating IUU fishing "to counter China's actions on the high seas, indirectly calling into question China's legitimacy as a world leader."[3] Much of the attention on US activities regarding IUU fishing has focused on the material capabilities marshaled in service of anti-IUU enforcement activities. But there is more the United States could do to put pressure on distant water fleets by applying pressure to their flag states.

This situation represents a foreign policy opportunity for the United States to frame itself as a leader in two areas: sustainability and the law of the sea. The law of the sea angle is seriously underplayed: most diplomatic communication about the "rules-based international order" at sea has focused on navigational freedoms and on the US Freedom of Navigation Program in particular. Meanwhile, criticism of China regarding the South China Sea has focused on China's rejection of the ruling by an arbitral tribunal in the *Philippines v. China* case. The United States lacks credibility on the two questions of navigational freedoms and international tribunals, for three basic reasons: (1) the United States' interpretation of navigational freedoms differs from that of many other states, including US partners; (2) the continuing US support for the British Indian Ocean Territory, demonstrated by the naval base at Diego Garcia, also violates international court rulings; and (3) the role of the United States as an external actor in the South China Sea makes it easy to characterize the United States as an interloper there.

Unlike the South China Sea, IUU fishing is an area where the United States can exercise both economic leverage *and* moral authority related to ocean governance. Fish caught on the high seas, such as tuna, are generally high value and destined for "luxury" markets primarily in the United States, the European Union, China, and Japan. This situation makes a small multilateral "club" approach viable as a new source of normative and regulatory intervention to address IUU fishing in the high seas.[4] And the argument in favor of a rules-based international order at sea is much stronger when it is applied to IUU fishing than when it is applied to navigational freedoms: there is more buy-in from other states, there is a clear connection to sustainability, and the United States has earned credibility from the successful management of domestic stocks.

The Biden administration could and should elevate the issue of IUU fishing by distant water fleets to be a foreign policy priority, connecting it to a broader vision of US leadership. Pressure on China could focus on bringing about China's good-faith participation in the international fisheries regime. Good-faith participation should entail its ratification of the Fish Stocks and Port State Measures Agreements, its creation of a Chinese high-seas boarding and inspection regime, and its participation in the creation of new regional fisheries management organizations (RFMOs).[5] Moreover, this pressure could be combined with a convincing characterization of Chinese distant water fleets as a form of neocolonialism—a line of criticism that has already been attached to China's Belt and Road Initiative but may be more persuasive among developing states in the context of distant water fleets.

EXPANSION OF REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS

Regional fisheries management plays a key role in overcoming the challenges described previously. The Law of the Sea, and especially its follow-on the Fish Stocks Agreement, obligates states to participate in the cooperative management of shared international fisheries through the creation and operation of RFMOs.[6] In many cases, the "unregulated" fishing included in the IUU label describes commercial fishing not regulated by an RFMO or fishing in an area that is not covered by an RFMO. The creation and extension of RFMOs has historically been reactive, occurring when newly emerging fishing activity is deemed in need of management. But the precautionary approach directs that new RFMOs can and should be established before exploitation occurs.

Those who intend to establish RFMOs could follow the model of the Central Arctic Ocean Fisheries Agreement, which essentially prohibits commercial fishing unless and until conservation and management measures are put into place. These efforts could be duplicated in, for example, the South Atlantic, where there is no management organization covering the Argentina shortfin squid fishery. Proactively establishing RFMOs could serve several important goals, such as centering and strengthening the precautionary approach, which "has yet to be fully accepted as a general principle of customary international law."[7] The establishment of new RFMOs also provides an important opportunity for fishing states to develop better models for cooperative decision-making about conservation and management measures—progress is especially needed in terms of implementation of an ecosystem approach, wherein the impacts on the broader ecosystem, rather than just commercial species, are foregrounded.[8]

Both policymakers and scholars should pay more attention to the "who" and "how" of RFMOs. The basic system of fisheries governance on the high seas is highly entrenched, and substantial changes (such as closing the high seas to fishing) are unlikely to succeed. Rather than reenvisioning the RFMO model, motivated states should prioritize improving its operation. One issue is how various interests are represented within these organizations. The officials representing member states at RFMO meetings are often subject to regulatory capture, meaning that they have close ties with, and pursue the interests of, the domestic fishing industry. To the degree that nongovernmental organizations (NGOs) are present at RFMO meetings, these also tend to represent the fishing industry.[9] Enhancing, encouraging, or sponsoring participation by environmental NGOs and environmental ministries (especially from developing countries) could improve decision-making in ways that make sustainable outcomes more likely. Changes to decision-making processes could be done internally as states formulate their positions and compose delegations to attend RFMO meetings. Or NGOs themselves could take the initiative to attend as observers and use their public communication channels to draw attention to RFMO decision-making. In general, diversifying and expanding NGO participation has tended to increase the transparency of RFMO processes.[10]

RFMOs regulate fisheries through *conservation and management measures*, which they update to account for new information, new activities, and the shifting interests of their members. These measures typically focus on fisheries, fish stocks, and fishing effort. Though RFMOs do not directly regulate trade in fish and fish products, some measures can support trade-based initiatives to restrain IUU fishing. These include vessel lists (positive or negative), observer requirements, and catch documentation schemes, all of which can help ports distinguish legally caught fish from illegally caught fish. For example, negative vessel lists identify repeat offenders for extra inspections and restrictions, whereas positive lists can be used to ensure that rule followers get access to ports and markets. These trade-related measures present a central challenge: the port states where the fish are landed must *use* the information provided.[11] RFMOs, which are small multilateral organizations, can create legally binding regulations only for their members. Banning RFMO members from importing fish caught by blacklisted vessels (or fish without the required catch documentation) has limited value in a world where fish can be landed in many, many different ports. In addition to increasing the use of trade-related RFMO measures, therefore, policymakers should promote attention to RFMO membership, coordination between RFMOs, and documentation schemes that go beyond the point of landing.

BIODIVERSITY BEYOND NATIONAL JURISDICTION

The World Trade Organization Agreement on Fisheries Subsidies is not the only new international mechanism for confronting overexploitation at sea. The new Biodiversity Beyond National Jurisdiction (BBNJ) agreement is especially promising as a potential mechanism for progress against IUU fishing. The BBNJ agreement was finalized in early 2023 and awaits sufficient ratifications (60 states) to enter into force. It was negotiated to fill gaps in the Law of the Sea, especially related to the conservation and sustainable use of biodiversity in the areas beyond national jurisdiction.[12] The proviso that the agreement "should not undermine" existing instruments, frameworks, and bodies essentially preserves the jurisdiction of RFMOs over high seas and transboundary fisheries.[13] There is no hierarchy between the

BBNJ agreement and RFMOs, meaning that the BBNJ agreement cannot directly mandate that RFMOs do anything differently. But there are several ways in which the BBNJ agreement could facilitate efforts related to fisheries regulation. The creation of Marine Protected Areas, for example, cannot directly regulate fisheries, but the BBNJ Conference of Parties (made up of all states that ratify the BBNJ agreement) is empowered to coordinate and consult with other bodies, and BBNJ members are required to work within other bodies to fulfill the objectives of the BBNJ agreement (conservation and sustainable use). In other words, the BBNJ agreement and its institutional mechanisms can be a forum for coordination with and between RFMOs.

The section of the BBNJ treaty titled Capacity Building and Transfer of Marine Technology (CBTMT) states the objective of developing "the marine scientific and technological capacity" of developing states to assist them in the pursuit of conservation and in the sustainable use of marine biodiversity in areas beyond national jurisdiction.[14] The treaty calls for the creation of a committee to oversee capacity-building and the transfer of marine technology. This committee will make recommendations to the Conference of Parties. One of the advantages the BBNJ agreement has over the Law of the Sea is more obligatory language around CBTMT (meaning that member states are obligated to do specific things), but exactly *how* and *what* and *to whom* CBTMT is directed remains relatively open-ended. CBTMT could be channeled to redress one of the key deficiencies of fisheries management: the fact that the fishing industry is "the main provider of fisheries data that forms that very basis of fisheries regulation."[15] Empowering coastal developing and island states to more fully and effectively participate in monitoring, verification, and enforcement can assist RFMOs by providing an independent, and less biased and more credible, source of information about high seas fishing.

Implementing the BBNJ agreement in these ways will require the concerted efforts of states. Sixty states must ratify the BBNJ treaty before it comes into force, after which the Conference of Parties will meet and make crucial decisions about its rules of procedure, its financial rules, and the modalities and operations of its subsidiary bodies. Individual states can formulate and propose Marine Protected Areas and propose and support them in both the BBNJ Conference of Parties and the other bodies (such as RFMOs) to which they are parties. Useful action can also be taken by the individuals, serving in their expert capacities, who will eventually sit on key BBNJ committees, such as the CBTMT committee and the Scientific and Technical Body. Although the treaty text is finalized, there is significant flexibility in how the BBNJ Conference of Parties, and the states that compose it, will drive implementation. The effectiveness of the agreement will in part depend on the use of other instruments—such as regional fisheries management organizations—in the implementation phase.

International law provides a robust foundation from which to address global overfishing, although the crowded space of ocean governance requires thoughtful navigation. As this policy brief has demonstrated, a significant aspect of the evolving Law of the Sea is the extent to which international legal agreements continue to reinforce the autonomy of regional fisheries arrangements. Improving opportunities for cooperation and coordination among these organizations, and within their basic legal frameworks, is critical to continued progress toward ending global overfishing.

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ABOUT THE SERIES

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NOTES

1. Sally Yozell, "Stimson Center's Sally Yozell: RFMOs, China Must Do More to Fight IUU," interview by Mark Godfrey, *SeafoodSource*, February 6, 2020, https://www.seafoodsource.com/news/environment-sustainability/stimson-center-s-sally-yozell-rfmos-china-must-do-more-to-fight-iuu.
2. Isabella Montecalvo et al., "Ocean Predators: Squids, Chinese Fleets and the Geopolitics of High Seas Fishing," *Marine Policy* 152 (June 2023): 105584, https://doi.org/10.1016/j.marpol.2023.105584.
3. Montecalvo et al., "Ocean Predators," 8.
4. Jessica F. Green and Bryce Rudyk, "Closing the High Seas to Fishing: A Club Approach," *Marine Policy* 115 (February 2020): 7, https://doi.org/10.1016/j.marpol.2020.103855.
5. Andrew Norris, "Fishy Business: The High Seas Boarding and Inspection Regime in the Western and Central Pacific Ocean," *Ocean Development & International Law* 46, no. 4 (October 2015): 340, https://doi.org/10.1080/00908320.2015.1089746.
6. United Nations Convention on the Law of the Sea art. 118; Fish Stocks Agreement art. 8.
7. Elizabeth A. Kirk, "The Ecosystem Approach and the Search for an Objective and Content for the Concept of Holistic Ocean Governance," *Ocean Development & International Law* 46, no. 1 (January 2015): 36, https://doi.org/10.1080/00908320.2015.988938.
8. Bianca Haas, Ruth Davis, and Quentin Hanich, "Regional Fisheries Management: Virtual Decision Making in a Pandemic," *Marine Policy* 125 (March 2021): 4, https://doi.org/10.1016/j.marpol.2020.104288.
9. J. Samuel Barkin et al., "Domestic Sources of International Fisheries Diplomacy: A Framework for Analysis," *Marine Policy* 94 (August 2018): 259, https://doi.org/10.1016/j.marpol.2018.04.030; Matilda Tove Petersson, "New Actors, New Possibilities, New Challenges—Nonstate Actor Participation in Global Fisheries Governance," in *Predicting Future Oceans: Sustainability of Ocean and Human Systems amidst Global Environmental Change,* ed. Andrés M. Cisneros-Montemayor, William W. L. Cheung, and Yoshitaka Ota (Amsterdam: Elsevier, 2019), 381.
10. Haas, Davis, and Hanich, "Regional Fisheries Management," 5.
11. Rosemary Rayfuse, "Regional Fisheries Management Organizations," in *The Oxford Handbook of the Law of the Sea,* ed. Donald R. Rothwell et al. (Oxford, UK: Oxford University Press, 2017).
12. Areas beyond national jurisdiction include both the high seas (the sea surface and water column) and the "area," which is the technical name for the international seabed. Referring to the BBNJ treaty as the "High Seas Treaty" is a misnomer and emphasizes the open access "freedom of the seas principle" (which underlies the legal framework for

the high seas) at the expense of the more progressive "common heritage of humankind" principle (which underlies the legal framework for the area).

13. United Nations General Assembly (UNGA), International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/72/249 (January 19, 2018), https://sdgs.un.org/documents/ares72249-international-legally-binding-instr-23175.
14. Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, art. 42.
15. Barkin et al., "Domestic Sources of International Fisheries Diplomacy," 258.