

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

President Biden Signs National Security Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses

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On June 27, 2022, President Joseph R. Biden, Jr. signed a National Security Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses.¹ The announcement coincided with the opening of the UN Ocean Conference in Lisbon, which focused on ocean sustainability.² It also came ten days after the adoption by the World Trade Organization (WTO) Ministerial Conference of the Agreement on Fisheries Subsidies, which banned government subsidies to “a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing.”³ IUU fishing and related practices, the National Security Memorandum notes, “are among the greatest threats to ocean health and are significant causes of global overfishing, contributing to the collapse or decline of fisheries that are critical to the economic growth, food systems, and ecosystems of numerous countries around the world.”⁴ Such fishing “often involves forced labor, a form of human

¹ Memorandum on Combating Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses, National Security Memorandum/NSM-11, at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/27/memorandum-on-combating-illegal-unreported-and-unregulated-fishing-and-associated-labor-abuses> [hereinafter NSM-11].

² The theme was based on Sustainable Development Goal 14. See Transforming Our World: The 2030 Agenda for Sustainable Development, at 23–24, UN Doc. A/RES/70/1 (Sept. 25, 2015). Monica Medina, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, revealed the signing of NSM-11 at the Ocean Conference’s Main Dialogue. See U.S. Dep’t of State Press Release, Remarks to the UN Ocean Conference Main Dialogue (June 29, 2022), at <https://www.state.gov/remarks-to-the-un-ocean-conference-main-dialogue>.

³ Agreement on Fisheries Subsidies, Art. 3.1, WTO Doc. WT/MIN(22)/33 (June 17, 2022). Ambassador Katherine Tai, the U.S. Trade Representative, said that with the agreement “WTO Members took a positive step forward to protect our fisheries resources for future generations by agreeing to the first ever multilateral trade agreement with environment at its core.” USTR Press Release, Statement from Ambassador Katherine Tai on the Groundbreaking Fisheries Outcome (June 17, 2022), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/june/statement-ambassador-katherine-tai-groundbreaking-fisheries-outcome>.

⁴ NSM-11, *supra* note 1. Under the Port State Measures Agreement Act and the Maritime SAFE Act, the definition of IUU fishing is the same as that used in Section 3 of the Food and Agriculture Organization’s *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) [hereinafter IPOA]. See Port State Measures Agreement Act, sec. 303(2), Pub. L. 114–81, tit. III (Nov. 5, 2015), 129 Stat. 649, 664; Maritime Security and Fisheries Enforcement (SAFE) Act, sec. 3532(6), Pub. L. 116–92, div. C, tit. XXXV, subtit. C (Dec. 20, 2019), 133 Stat. 1198, 2005 [hereinafter Maritime SAFE Act]. Section 3 of the IPOA defines “illegal” as including activities by certain vessels in contravention of national laws and regulations or in contravention of the conservation and management measures adopted by regional fisheries management organizations (RFMO). It defines “unreported” as fishing activities that “have not been reported, or have been misreported,” to national authorities or RFMOs, in contravention of national laws and regulations or RFMO reporting procedures. And it defines “unregulated” as fishing activities in an RFMO area by vessels without nationality or flagged by a non-party to the RFMO in a manner that contravenes that RFMO’s conservation and management measures or “in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.” IPOA, *supra* note 4, sec. 3. The High Seas Driftnet Fishing Moratorium Protection Act, as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (discussed in the text at notes 15–16 *infra*), and its implementing regulations contain a different definition of IUU fishing. See Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2006, sec. 403, Pub. L. 109–479 (Jan. 12, 2007), 120 Stat. 3575, 3629–3630 (adding a new Section 609 to the High Seas Driftnet Fishing

trafficking, and other crimes and human rights abuses.”⁵ For these reasons, the Memorandum explains, “IUU fishing and associated labor abuses undermine U.S. economic competitiveness, national security, fishery sustainability, and the livelihoods and human rights of fishers around the world and will exacerbate the environmental and socioeconomic effects of climate change.”⁶ To better meet the threat, the Memorandum, the first of its kind on the subject, systematically and in some detail “direct[s] agencies to increase coordination among themselves and with diverse stakeholders—public and private, foreign and domestic—to address” IUU fishing and associated labor abuses.⁷ The Memorandum’s goals are three-fold: “to work toward ending forced labor and other crimes or abuses in IUU fishing; promote sustainable use of the oceans in partnership with other nations and the private sector; and advance foreign and trade policies that benefit U.S. seafood workers.”⁸

The United States is the largest importer of seafood worldwide. Between 70–85 percent of the seafood consumed in the United States comes from imports.⁹ An estimated “\$2.4 billion worth of seafood imports [into the United States] [were] derived from [IUU] fishing in 2019, or nearly 11 percent of total U.S. seafood imports.”¹⁰ A substantial portion of those imports came from China, Indonesia, Mexico, Russia, and Vietnam.¹¹ Eliminating IUU imports, the International Trade Commission has concluded, “would increase total operating income of the U.S. commercial fishing industry by an estimated \$60.8 million.”¹² According to a 2021 National Oceanic and Atmospheric Administration (NOAA) report, 43 percent of audited U.S. seafood importing

Moratorium Protection Act, Pub. L. 104-43, tit. VI (Nov. 3, 1995)), codified at 16 USC § 1826j; 50 CFR 300.201. A proposed rule is pending that would make the Moratorium Protection Act’s definition consistent with that of the IPOA and other U.S. statutes and regulations. See note 31 *infra*.

⁵ NSM-11, *supra* note 1.

⁶ *Id.*

⁷ *Id.* Though this is the first National Security Memorandum, President Obama had issued a Presidential Memorandum establishing a Presidential Task Force on Combating Illegal, Unreported, and Unregulated Fishing and Seafood Fraud. See Presidential Memorandum—Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud (June 17, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreported>. The Task Force released fifteen recommendations and an action plan. See Recommendations of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud, 79 Fed. Reg. 75536 (Dec. 18, 2014); Presidential Task Force on Combating IUU Fishing and Seafood Fraud, Action Plan for Implementing the Task Force Recommendations (2015), available at https://www.iuufishing.noaa.gov/Portals/33/noaa_taskforce_report_final.pdf.

⁸ NSM-11, *supra* note 1, sec. 1.

⁹ NOAA Fisheries, 2020 Fisheries of the United States 24 (May 2022). The Memorandum refers only to the top end of the range (85%). See NSM-11, *supra* note 1, sec. 5.

¹⁰ U.S. International Trade Commission, Seafood Obtained Via Illegal, Unreported, and Unregulated Fishing: U.S. Imports and Economic Impact on U.S. Commercial Fisheries, at 11 (2021) [hereinafter ITC Report]. A different study concluded that IUU “catches represented 20–32% by weight of wild-caught seafood imported to the USA in 2011.” Ganapathiraju Pramod, Katrina Nakamura, Tony J. Pitcher & Leslie Delagran, *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 MARINE POL’Y 102 (2014). It is estimated that IUU fishing accounts for “20 percent of the world catch and up to 50 percent in some areas.” Sjarief Widjaja, Tony Long & Hassan Wirajuda, *Illegal, Unreported and Unregulated Fishing and Associated Drivers*, SUSTAINABLE OCEAN ECON., at 3 (2020), available at <https://oceanpanel.org/wp-content/uploads/2022/05/Illegal-Unreported-and-Unregulated-Fishing-and-Associated-Drivers.pdf>.

¹¹ ITC Report, *supra* note 10, at 11.

¹² *Id.*

permits were non-compliant, indicating deficiencies in chain of custody documentation suggestive of IUU fishing.¹³ The prevalence of labor abuses in IUU fishing is well-documented.¹⁴

Over the past two decades, U.S. law has gradually established, expanded, and prioritized the government's ability to combat IUU fishing, increasingly linking it with labor abuses. The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (2006) required the secretary of commerce to list "a nation if fishing vessels of that nation are engaged, or have been engaged at any point during the preceding 2 years [now 3 years], in illegal, unreported, or unregulated fishing."¹⁵ Such listing could result in the denial of U.S. port privileges to that nation's vessels.¹⁶ Accordingly, after Mexico was identified for IUU fishing in 2019 and received a negative certification in 2021, "Mexican fishing vessels that fish in the Gulf of Mexico . . . [were] prohibited from entering U.S. ports" effective February 7 this year, the first time such action has been taken.¹⁷ The Port State Measures Agreement Act (2015) permits the secretary of commerce to deny port entry to, among others, a listed IUU vessel or a vessel that the secretary "has reasonable grounds to believe . . . engaged in IUU fishing or fishing related activities in support of such fishing."¹⁸ The Seaford Import Monitoring Program (2016), instituted by regulation, "establishe[d] permitting, reporting and recordkeeping procedures relating to the importation of certain fish and fish products, identified as being at particular risk of illegal, unreported, and unregulated (IUU) fishing or seafood fraud."¹⁹ Currently, "more than 1,100 unique species, categorized in 13 species groups," amounting to about half of U.S. seafood imports, are covered by the Seafood Import Monitoring Program (SIMP).²⁰ The Maritime Security and Fisheries Enforcement (SAFE) Act (2019) made it U.S. policy to "take action to curtail the global trade in seafood and seafood products derived from IUU fishing, including its links to forced labor and transnational organized illegal activity."²¹ It outlined programs for doing so, such as coordination with international organizations, the engagement of diplomatic missions, law enforcement assistance to priority countries, information sharing, improvement of capacities for transparency and traceability, and promoting the use of technology.²² And it established

¹³ See NOAA Fisheries, *Improving International Fisheries Management: 2021 Report to Congress*, at 56 (Aug. 2021) [hereinafter NOAA 2021 Report].

¹⁴ UN Office on Drugs and Crime, *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking* (2011), available at https://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf; Environmental Justice Foundation, *Blood and Water: Human Rights Abuse in the Global Seafood Industry* (2019), available at <https://ejfoundation.org/resources/downloads/Blood-water-06-2019-final.pdf>.

¹⁵ Magnuson Stevens Fishery Conservation and Management Reauthorization Act, sec. 403 (High Seas Driftnet Fishing Moratorium Protection Act, sec. 609), codified at 16 USC 1826j.

¹⁶ *Id.* (codified at 16 USC § 1826j(d)(3)(A)(i)).

¹⁷ NOAA Fisheries, *U.S. Port Restrictions on Mexican Fishing Vessels* (Jan. 7, 2022), at <https://content.gov-delivery.com/accounts/USNOAAFISHERIES/bulletins/304985c>; see Kevin Sieff, *U.S. Blocks Mexican Fishermen from Ports, Cites Years of Illegal Fishing in U.S. Waters*, WASH. POST (Feb. 8, 2022), at <https://www.washingtonpost.com/world/2022/02/08/mexico-gulf-illegal-fishing>; NOAA 2021 Report, *supra* note 13, at 18.

¹⁸ Port State Measures Agreement Act, sec. 305(b)(3), 16 USC § 7404(b)(3).

¹⁹ See Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program, 81 Fed. Reg. 88975, 88975 (Dec. 9, 2016).

²⁰ NOAA Fisheries, *Seafood Import Monitoring Program*, at <https://www.fisheries.noaa.gov/international/seafood-import-monitoring-program>.

²¹ Maritime SAFE Act, *supra* note 4, sec. 3534(1).

²² *Id.*, secs. 3541–46.

an Interagency Working Group on IUU Fishing composed of twenty-one departments, agencies, and offices within the Executive Branch.²³

The Memorandum directs executive departments and agencies to take numerous actions to counter IUU fishing and abusive labor practices. Stating that the “United States is committed to promoting labor rights and human rights and fundamental freedoms through worker-centered trade policies, and to working to eliminate abusive labor practices, in particular forced labor, in supply chains,” agencies are to take actions such as engaging in trade negotiations, enhancing public diplomacy, conducting investigations, employing sanctions and visa restrictions, disseminating information, providing training and technical support, and raising public awareness.²⁴ Declaring that it is “the policy of [the] Administration to revitalize U.S. leadership in multilateral institutions, including regional bodies,” agencies are directed “to collaborate with these organizations,” including the Food and Agriculture Organization, the International Labor Organization, the International Maritime Organization, ASEAN, and regional fisheries management organizations.²⁵ Asserting that the “United States benefits from an unparalleled ability to shape global discourse and convene stakeholders from government, civil society, and the private sector,” agencies are instructed to cooperate with partner countries and private organizations, including “fishers, fish processing workers, port workers, and relevant trade unions.”²⁶ Finally, leveraging U.S. market power, agencies are to “combat abuses and to strengthen incentives for ethical behavior in the global seafood industry, including by limiting the market for products derived from IUU fishing, forced labor, or other abusive labor practices,” through, for example, expanding SIMP to include additional species groups and utilizing trade authorities such as countervailing duties and Section 301 of the Trade Act of 1974.²⁷

Concurrent with the issuance of the Memorandum, the administration announced additional actions to combat IUU fishing.²⁸ They included the launch at the UN Ocean Conference of the IUU Fishing Action Alliance, a partnership that now includes four members: Canada, Iceland, the United Kingdom, and the United States.²⁹ Action Alliance members “pledge to take urgent action to improve the monitoring, control, and surveillance of fisheries, increase transparency in fishing fleets and in the seafood market, and build new partnerships that will hold bad actors accountable.”³⁰ The White House also disclosed that

²³ *Id.*, sec. 3551.

²⁴ NSM-11, *supra* note 1, sec. 2.

²⁵ *Id.*, sec 3.

²⁶ *Id.*, sec. 4.

²⁷ *Id.*, sec. 5.

²⁸ See White House Press Release, Fact Sheet: President Biden Signs National Security Memorandum to Combat Illegal, Unreported, and Unregulated Fishing and Associated Labor Abuses (June 27, 2022), at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/27/fact-sheet-president-biden-signs-national-security-memorandum-to-combat-illegal-unreported-and-unregulated-fishing-and-associated-labor-abuses>.

²⁹ See U.S. Dep’t of State Press Release, Monica Medina, Assistant Secretary Bureau of Oceans and International Environmental and Scientific Affairs, Remarks at the UN Oceans Conference Side Event on Transparency, Technology and IUU Fishing (June 28, 2022), at <https://www.state.gov/remarks-at-the-un-oceans-conference-side-event-on-transparency-technology-and-iuu-fishing>; Illegal, Unreported and Unregulated Fishing Action Alliance Pledge (Aug. 17, 2022), at <https://www.gov.uk/government/publications/illegal-unreported-and-unregulated-fishing-action-alliance-pledge/illegal-unreported-and-unregulated-fishing-action-alliance-pledge> [hereinafter IUU Fishing Action Alliance Pledge].

³⁰ White House Press Release, *supra* note 28. For the full text of the Illegal, Unreported and Unregulated Fishing Action Alliance Pledge, see IUU Fishing Action Alliance Pledge, *supra* note 29.

NOAA would issue a proposed rule to the International Fisheries Regulations to enhance its ability to address IUU fishing and forced labor in the seafood supply chain. Among other things, the proposed rule broadens the definition of IUU fishing in the regulations implementing the High Seas Driftnet Fishing Moratorium Protection Act.³¹ It also expands the information that foreign vessels that seek to enter U.S. ports are required to provide.³²

Issuance of the Memorandum raised questions about its possible link to U.S. China policy, since China has a large and active distant water fishing fleet, has been ranked worst in an index of “vulnerability to, prevalence of and response to” IUU fishing, and was identified by NOAA for having vessels that are involved in IUU fishing.³³ A senior administration official emphasized that the Memorandum “is not about any one specific country.”³⁴ That said, the person continued, “The PRC is a leading contributor to IUU fishing worldwide, and it has impeded progress on the development of measures to combat IUU fishing and overfishing in international organizations. And the PRC has a responsibility to uphold these commitments as a flag state and actively monitor and correct the activities of [its] fishing fleet activities in other countries’ waters . . . including preventing its vessels from fishing outside coastal states’ license agreements or without a license to fish at all.”³⁵

INTERNATIONAL ECONOMIC LAW

The United States and Its Partners Struggle to Implement Global Tax Agreement

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On October 8, 2021, President Joseph R. Biden, Jr. praised the announcement that day of the global tax agreement—the “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy”¹—as a demonstration of

³¹ Implementation of Provisions of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015 and the Ensuring Access to Pacific Fisheries Act, 87 Fed. Reg. 40763, 40772 (July 8, 2022). The proposed rule would add two paragraphs to the definition of IUU fishing in 50 CFR 300.201 and bring the regulation into line with the definition of illegal fishing in Section 3.1.1 of the Food and Agriculture Organization’s *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001), which is also the definition under the Port State Measures Agreement Act and the Maritime SAFE Act. See note 13 *supra*.

³² 87 Fed. Reg. 40776 (proposing to add a new 50 CFR 300.304).

³³ See Poseidon Aquatic Resource Management Limited & the Global Initiative Against Transnational Organized Crime, *The Illegal, Unreported and Unregulated Fishing Index*, at 110 (Dec. 2021); NOAA 2021 Report, *supra* note 13, at 22–23; BRUCE VAUGHN & BEN DOLVEN, CHINA’S ROLE IN THE EXPLOITATION OF GLOBAL FISHERIES: ISSUES FOR CONGRESS, CONG. RES. SERV. R47065 (Apr. 12, 2022), at <https://crsreports.congress.gov/product/pdf/R/R47065>.

³⁴ White House Press Release, Background Press Call on the President’s National Security Memorandum on Illegal, Unreported, and Unregulated Fishing (June 27, 2022), at <https://www.whitehouse.gov/briefing-room/press-briefings/2022/06/27/background-press-call-on-the-presidents-national-security-memorandum-on-illegal-unreported-and-unregulated-fishing>.

³⁵ *Id.*

¹ OECD Press Release, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021), at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> [hereinafter Two-Pillar Solution].