

ARTICLE

Engaging Asian States on Combating IUU Fishing: The Curious Case of the State of Nationality in EU Regulation and Practice

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Abstract

Global common concerns – including combating illegal, unreported and unregulated (IUU) fishing – necessitate effective global action to avoid displacing illegal practices to under-regulated jurisdictions. The response in international law has therefore included the obligation upon all states to exercise jurisdiction, albeit with varying clarity regarding the existence and scope of duties for each jurisdictional basis. This article argues that, through its non-cooperating third country identification procedure, the European Union (EU) has sought unilaterally to crystalize and promote the implementation of an obligation upon states to exercise extraterritorial active personality-based jurisdiction over their own nationals engaged in IUU fishing. This is demonstrated through an analysis of EU practice relating to Asian states and remains true despite the EU's non-cooperating third country identification procedure only formally targeting flag, port, coastal, and market states. The EU and Asian states have improved their laws governing nationals engaged in IUU fishing, but concerns over legal certainty arise.

Keywords: Due diligence, Active personality, External fisheries policy, IUU Regulation, Unilateralism, UNCLOS

1. INTRODUCTION

Combating the environmental, economic, and social scourge of illegal, unreported and unregulated (IUU) fishing is – as described in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

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(IPOA-IUU)¹ – firmly established in contemporary international law as an issue that requires urgent and widespread global action. This remains the case despite the fact that the term ‘IUU fishing’ conflates numerous distinct fisheries challenges, excludes others and, as is the case with unregulated fishing in particular, may be subject to conflicting interpretations by states in practice.² Indeed, the UN General Assembly (UNGA) recognizes the ending of IUU fishing as one of its universal, indivisible, and integrated targets of the Sustainable Development Goals.³

A key difficulty in ending IUU fishing is in ensuring that states sufficiently regulate private actors and effectively enforce measures that dissuade IUU fishing.⁴ Without such control and enforcement, ending IUU fishing will remain, at best, a political aspiration. At worst, ending IUU fishing will remain yet another unfulfilled promise on fisheries governance.

In this light, several actors – including the European Union (EU) – have positioned themselves as self-proclaimed global leaders in combating IUU fishing. These actors have sought to improve their domestic regulations, while advocating multilateral and bilateral actions, to promote stronger governance over IUU fishing.⁵ This article examines how EU leadership takes shape in its relations with Asian states and, more specifically, how it addresses the regulation of nationals involved in IUU fishing. In this article the ‘state of nationality’ refers to the state of which a person is a national.

The article focuses on the EU procedure for identifying non-cooperating third countries (non-EU countries) in its fight against IUU fishing. Moreover, it canvasses the EU’s

¹ Food and Agriculture Organization of the United Nations (FAO), *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO, 2001), para. 3, available at: <http://www.fao.org/3/a-y1224e.pdf>.

² A. Serdy, ‘Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal’ (2017) 48(3–4) *Ocean Development & International Law*, pp. 345–64, at 353–6; E.R. van der Marel, ‘Problems and Progress in Combating IUU Fishing’, in R. Caddell & E.J. Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019), pp. 291–318, at 297–8. The practice discussed here could raise wider legitimacy concerns worth further research.

³ Target 14.4: UNGA Resolution 70/1, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (25 Sept. 2015), UN. Doc. A/RES/70/1 (2015), paras 2, 5 and 71, available at: <https://undocs.org/A/RES/70/1>. See also UNGA Resolution 74/18, ‘Sustainable Fisheries, including through the 1995 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, and Related Instruments’ (10 Dec. 2019), UN Doc. A/RES/74/18 (2019), para. 80, available at: <https://undocs.org/en/A/RES/74/18>. IUU fishing can increasingly be seen as involving maritime security concerns, but this is heavily contested, as evident in the caveat consistently added by the UNGA (‘bearing in mind the distinct legal regimes and remedies under international law applicable to illegal fishing and transnational organized crime’: *ibid.*, para. 109).

⁴ As recognized in the need to reform the existing EU Fisheries Control System: European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1224/2009, and amending Council Regulations (EC) No. 768/2005, (EC) No. 1967/2006, (EC) No. 1005/2008, and Regulation (EU) No. 2016/1139 as regards Fisheries Control, COM(2018) 368 final, 30 May 2018 (Commission Proposal), Recital 1.

⁵ EU, *Improving International Ocean Governance: Two Years of Progress* (EU, 2019), available at: <https://op.europa.eu/s/ovcY>. In July 2019, the EU and Canada established an Oceans Partnership Agreement ‘as a means to achieve stronger leadership of global governance issues and policy coherence vis-à-vis the oceans’: Declaration by the EU and Canada: Concerning the Establishment of an Ocean Partnership, 18 July 2019, p. 1, available at: https://ec.europa.eu/newsroom/mare/document.cfm?doc_id=60974.

engagement of – and assistance to – third countries,⁶ including the potential measures that the EU may adopt with regard to third countries that fail ‘to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing’.⁷

By reviewing EU non-cooperating notices and decisions concerning Asian states, this article argues that an established feature of the non-cooperating third country identification procedure is the regulation and enforcement of fisheries law by the state of nationality vis-à-vis its natural and legal persons.⁸ This applies, despite the state of nationality not being explicitly listed in Article 31(3) of the EU Regulation establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Regulation). To put this argument into context, Section 2 introduces the jurisdictional rights and obligations of the state of nationality and their use in EU regulations combating IUU fishing. This includes an analysis of the IUU Regulation’s treatment of the extraterritorial regulation of nationals by EU Member States and third countries. Relevant Asian states are defined as those that have been subject to formal dialogues under the EU’s non-cooperating third country procedure: Cambodia (2012), Sri Lanka (2012), South Korea (2013), the Philippines (2014), Thailand (2015), Chinese Taipei (2015), and Vietnam (2017).⁹

In assessing the implementation of the EU external fisheries policy, this article examines the substance of EU notices and decisions regarding Asian states on the subject of controlling nationals involved in IUU fishing. Section 3 reviews the extent to which the state of nationality features in EU notices and decisions, including the EU’s proposed international legal basis for obligations upon the state of nationality. Requests by the EU regarding Asian states can then be broken down into requests for greater prescriptive jurisdiction and requests for greater enforcement jurisdiction. Finally, this section canvasses some responses by Asian states to these requests. This final point suggests that EU practice not only influences the concept of the state of nationality in international fisheries law, but also its implementation. In conclusion, Section 4 brings this analysis full circle, charting the way forward for the state of nationality in the EU IUU Regulation.

2. THE ROLE OF THE STATE OF NATIONALITY IN THE EU IUU REGULATION

The combating of IUU fishing is recognized explicitly as an objective of both international fisheries law and the EU Common Fisheries Policy

⁶ Regulation (EC) No. 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L 286/1 (IUU Regulation), Ch. VI and Art. 38.

⁷ *Ibid.*, Art. 31(3).

⁸ The Asian region is selected because of the author’s personal interests and the possibility for comparative research resulting from the number of applicable EU non-cooperating notices and decisions. Other regions that are conducive to such comparative research currently include Africa or the Pacific.

⁹ See Appendix. Unpublished informal dialogues are likely to include further Asian states.

(CFP).¹⁰ This section discusses the specific provisions on regulating nationals. As a precursor, it is necessary to explain the current discretionary or obligatory exercise of active personality-based jurisdiction in international fisheries law.

2.1. *An International Legal Basis and Duty to Regulate Nationals Involved in IUU Fishing*

States have a right under international law to exercise extraterritorial prescriptive jurisdiction over the conduct, interests, status, and relations of their nationals through active personality-based jurisdiction.¹¹ This is one of the oldest bases of jurisdiction. It predates the Westphalian model of states, with its emphasis on territoriality, as the primary ordering principle of jurisdiction.¹² Today, both common law and civil law jurisdictions exercise active personality-based jurisdiction.¹³ Prescriptive jurisdiction applies in concurrence with other bases of jurisdiction, such as territory-based jurisdiction.¹⁴ So long as the perpetrator is a national or a permanent resident of the state, or in some cases has even acquired nationality after the fact,¹⁵ the active personality principle can provide an exhaustive basis for jurisdiction.

Therefore, in combating IUU fishing, the laws of the state of nationality are not limited thematically or geographically by the law of jurisdiction. While the state may not regulate whoever is involved, it may regulate whatever IUU fishing activity occurs, wherever it occurs. Unfortunately, attempts to enforce criminalization of IUU fishing can be neutered when the legislature does not explicitly adjust other domestic principles that limit extraterritorial jurisdiction. This occurred, for example, in the case of Spain's requirement for double criminality, which obstructed attempts to exercise extraterritorial active personality-based jurisdiction over Spanish nationals for IUU fishing.¹⁶

¹⁰ Regulation (EU) No. 1380/2013 on the Common Fisheries Policy, amending Regulations (EC) No. 1954/2003 and (EC) No. 1224/2009 and repealing Regulations (EC) No. 2371/2002 and (EC) No. 639/2004 and Decision 2004/585/EC [2013] OJ L 354/22 (CFP Regulation), Arts 2(1) and 28(2)(e).

¹¹ This is well established and hardly contested, according to C. Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford University Press, 2015), pp. 104–10. For legal persons, see the regulation of insurance providers and other ancillary industries: R. Caddell, G. Leloudas & B. Soyer, 'Emerging Regulatory Response to IUU Fishing', in R. Caddell & E.J. Molenaar, *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019), pp. 393–420.

¹² Authors who challenge its historic exclusivity nonetheless accept its predominance: K. Tuori, 'The Beginnings of State Jurisdiction in International Law until 1648', in S. Allen et al. (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press, 2019), pp. 25–39.

¹³ Commonwealth Secretariat, 'Criminal Jurisdiction: Is It Wide Enough?' (2008) 34(2) *Commonwealth Law Bulletin*, pp. 357–64; Research in International Law of the Harvard Law School, 'Article 5: Jurisdiction Over Nationals' (1935) 29(S1) *American Journal of International Law*, pp. 519–39, at 520–2.

¹⁴ For dual nationals, multiple states may exercise active personality-based jurisdiction; see S.Z. Feller, 'Concurrent Criminal Jurisdiction in the International Sphere' (1981) 16(1) *Israel Law Review*, pp. 40–74, at 45.

¹⁵ C. Ryngaert, 'Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction' (2014) 61(2) *Netherlands International Law Review*, pp. 243–8, at 245.

¹⁶ G.A. Oanta, 'Spain's Action to Control and Suppress Illegal, Unreported and Unregulated Fishing: Current Status and Future Prospects' (2019) 34(4) *The International Journal of Marine and Coastal Law*, pp. 642–67 (discussing STS 5654/2016 de 23 de diciembre de 2016 (RC 974/2016), ECLI:ES:TS:2016:5654, available at: [http://www.poderjudicial.es/stfsls/TRIBUNAL%20SUPREMO/DOCUMENTOS%20DE%20INTER%20C3%89S/TSPenal%2023.12.16%20\(1331-16\).pdf](http://www.poderjudicial.es/stfsls/TRIBUNAL%20SUPREMO/DOCUMENTOS%20DE%20INTER%20C3%89S/TSPenal%2023.12.16%20(1331-16).pdf) (in Spanish)).

The applicability of active personality-based jurisdiction to the conduct of a state's nationals at sea, regardless of their vessel's flag state, cannot be challenged. As valid enforcement jurisdiction is predicated on valid prescriptive jurisdiction,¹⁷ active personality-based jurisdiction is recognized in, for example, Articles 97(1) and 109(3)(c) of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁸ Active personality is employed as a mandatory basis of jurisdiction in Article 6(1)(c) of the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation,¹⁹ and on a discretionary basis in Article 15(2)(b) of the UN Convention against Transnational Organized Crime.²⁰ The latter treaty may address transnational fisheries crimes which, at times, overlap with IUU fishing.²¹ Beyond fisheries, the state of nationality should also exercise jurisdiction to regulate the exploitation of marine mammals by its nationals. Most notably, Article IX(1) of the International Convention for the Regulation of Whaling²² affirms the necessity of prescribing and enforcing measures concerning the operations of both persons and vessels.

While an exhaustive account of the developments in international fisheries law concerning active personality-based jurisdiction is beyond the scope of this article,²³ it is important to note that binding global fisheries instruments either loosely promote the exercise of discretionary, active personality-based jurisdiction, or include a general obligation to exercise sufficient jurisdiction.²⁴ This includes binding post-UNCLOS global instruments, which only touch upon the obligations of the state of nationality in Article 7 of the 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 (UNFSA),²⁵ and in the preambles to both the Agreement to Promote

¹⁷ E.g., coastal state enforcement under Art. 73 UNCLOS raised the question of whether an arrest made under the auspices of this provision was within the coastal state's prescriptive jurisdiction over living resources in its exclusive economic zone (EEZ): *M/V 'SAIGA' (Saint Vincent and the Grenadines v. Guinea)*, *Prompt Release*, Judgment, 4 Dec. 1997, International Tribunal for the Law of the Seas (ITLOS) 1, *ITLOS Reports* (1997), p. 16, paras 55–9; *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgment, 14 Apr. 2014, ITLOS 19, *ITLOS Reports* (2014), p. 4, paras 161, 217, 264–6.

¹⁸ *Montego Bay (Jamaica)*, 10 Dec. 1982, in force 16 Nov. 1994, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

¹⁹ *Rome (Italy)*, 10 Mar. 1988, in force 1 Mar. 1992, available at: <https://treaties.un.org/doc/db/terrorism/conv8-english.pdf>.

²⁰ *Palermo (Italy)*, 12 Dec. 2000, in force 29 Sept. 2003, available at: <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

²¹ P. Vrancken, 'State Jurisdiction to Investigate and Try Fisheries Crime at Sea' (2019) 105 *Marine Policy*, pp. 129–39. Focus remains on fishing vessels involved in interlinking transnational crimes – namely, trafficking and smuggling – as opposed to undermining conservation and management measures: D. Belhabib & P. Le Billon, 'Editorial: Illegal Fishing as a Trans-National Crime' (2020) 7 *Frontiers in Marine Science*, pp. 162–4.

²² *Washington, DC (United States (US))*, 2 Dec. 1946, in force 10 Nov. 1948, available at: <https://iwc.int/convention>.

²³ An ongoing research project and publication by A.N. Honniball & V. Schatz will address in more detail the responsibilities of the state of nationality to combat IUU fishing in international fisheries law.

²⁴ If broadly interpreted (without this article taking a position): Arts 58(3), 62(4), 117, 192, and 194 UNCLOS.

²⁵ *New York, NY (US)*, 4 Aug. 1995, in force 11 Dec. 2001, available at: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm. New Zealand has interpreted Art. 7 UNFSA

Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)²⁶ and the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA).²⁷ This absence of clear and detailed obligations carries through into case law, with both the *SRFC Advisory Opinion* and the *South China Sea Arbitration* cases suggesting that an obligation to ensure that nationals are not engaged in IUU fishing may flow from UNCLOS.²⁸ Some written submissions to the Tribunal in the *SRFC Advisory Opinion* case, including by the EU, support this broad interpretation of UNCLOS concerning the regulation of nationals by defining the obligation as one of due diligence.²⁹

More detailed and significant developments in the responsibilities to regulate nationals involved in IUU fishing are found in the practice of regional fisheries management organizations or arrangements (RFMOs or RFMAs). Constituent treaties may include general obligations upon contracting parties as the state of nationality, as exemplified in Article 10(3) of the Southern Indian Ocean Fisheries Agreement (SIOFA),³⁰ and Article 17(7)(a) of the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (NPFCA).³¹ Conservation and management measures subsequently adopted by an RFMO or RFMA may also elaborate or impose obligations upon the state of nationality to address IUU fishing, as is evident from the practices of the Indian Ocean Tuna Commission (IOTC)³² and the Commission for the Conservation of Antarctic Marine Living

as including obligations upon the state of nationality: *SRFC Advisory Opinion*, n. 28 below, Written Statement of New Zealand, 27 Nov. 2013, para. 34, available at: <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21>.

²⁶ Rome (Italy), 24 Nov. 1993, in force 24 Apr. 2003, available at: <http://www.fao.org/3/X3130M/x3130m.pdf>.

²⁷ Rome (Italy), 22 Nov. 2009, in force 5 June 2016, available at: <http://www.fao.org/3/a-i5469t.pdf>.

²⁸ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 Apr. 2015, ITLOS Case No. 21, *ITLOS Reports* (2015), p. 4, paras 123–4 (*SRFC Advisory Opinion*); *The South China Sea Arbitration (The Republic of The Philippines v. The People's Republic of China)*, Award, 12 July 2016, Permanent Court of Arbitration (PCA) Case No. 2013-19, paras 741–4, available at: <https://pcacases.com/web/sendAttach/2086>. Further ambiguities arise from the Tribunals' use of the term 'nationals', which is used both as analogous to vessels and as a term distinct from vessels. Therefore, at points it remains unclear if the Tribunals are referring to vessels or persons or both.

²⁹ *SRFC Advisory Opinion*, *ibid.*, Written Statement by the European Commission on behalf of the European Union, 29 Nov. 2013, para. 23; *SRFC Advisory Opinion*, *ibid.*, Written Statement of the Caribbean Regional Fisheries Mechanism, Nov. 2013, paras 122, 132, 143, 146 and 210; neutral – *SRFC Advisory Opinion*, *ibid.*, Written Statement of the International Union for Conservation of Nature and Natural Resources, 25 Nov. 2013, paras 24–5; all statements are available at: <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21>.

³⁰ Rome (Italy), 7 July 2006, in force 21 June 2012, available at: https://www.apsoi.org/sites/default/files/documents/SIOFA%20AGREEMENT_EN.pdf.

³¹ Tokyo (Japan), 24 Feb. 2012, in force 19 July 2015, available at: <https://www.npfca.int/system/files/2017-01/Convention%20Text.pdf>.

³² IOTC Resolution 07/01, 'To Promote Compliance by Nationals of Contracting Parties and Cooperating Non-Contracting Parties with IOTC Conservation and Management Measures', 18 May 2007, available at: https://iotc.org/sites/default/files/documents/compliance/cmm/iotc_cmm_07-01_en.pdf.

Resources (CCAMLR).³³ As a matter of treaty law, the more detailed measures on the regulation of nationals are binding only upon contracting parties of the RFMO or RFMA.³⁴ It is doubtful whether these measures have been accepted as custom, or even as ‘generally accepted international regulations, practices and procedures’ (GAIRS), which might be used to identify the ‘necessary measures’ required under UNCLOS.³⁵

Nonetheless, the winds of change are blowing in the direction of increasing the use of active personality-based jurisdiction to combat IUU fishing, not only as a right but also as a duty. Commentators have long highlighted and promoted the potential of the state of nationality to help in addressing IUU fishing.³⁶ Perhaps the most important soft law contribution is the highly persuasive IPOA-IUU.³⁷ The IPOA-IUU includes extensive measures expected of the state of nationality, including guidance on both prescriptive jurisdiction and enforcement measures.³⁸ Subsequent UNGA resolutions have continued to urge states to adopt active personality-based measures to address IUU fishing.³⁹ The issue has also penetrated into global policy agendas on sustainable development.⁴⁰ Regional soft law is similar, including the 2017 ASEAN Regional Forum Statement on IUU Fishing, which urges states to take ‘measures to ensure that their nationals do not support or engage in IUU fishing’.⁴¹ Some bilateral fisheries instruments agreed

³³ CCAMLR Conservation Measure 10-08 (2017), ‘Scheme to Promote Compliance by Contracting Party Nationals with CCAMLR Conservation Measures’, 27 Oct. 2017, available at: https://www.ccamlr.org/sites/default/files/10-08_8.pdf.

³⁴ E.g., South Pacific Regional Fisheries Management Organisation (SPRFMO) Conservation and Management Measure (CMM) 04-2020, ‘Establishing a List of Vessels Presumed To Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the SPRFMO Convention Area’, 31 Mar. 2020, paras 25–8, available at: <https://www.sprfmo.int/assets/Fisheries/Conservation-and-Management-Measures/2020-CMMs/CMM-04-2020-IUU-Vessel-List-31Mar20.pdf>. Note, however, the potential applicability to UNFSA contracting parties if Arts 8 and 17 UNFSA are broadly interpreted in line with expansive definitions of ‘fishing’.

³⁵ Contra, if nationality-based measures are GAIRS, one could apply the rule of reference methodology. Judge Paik suggests employing the rule of reference to identify fisheries measures that a flag state should adopt: *SRFC Advisory Opinion*, n. 28 above, Separate Opinion of Judge Paik, p. 102, paras 20–9, available at: <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21>.

³⁶ D. Erceg, ‘Deterring IUU Fishing through State Control over Nationals’ (2006) 30(2) *Marine Policy*, pp. 173–9; G.L. Rose & M. Tsamenyi, *Universalising Jurisdiction over Marine Living Resources Crime: A Report for WWF International* (World Wide Fund For Nature, 2013), pp. 55–66; North Atlantic Fisheries Intelligence Group, *Chasing Red Herrings: Flags of Convenience, Secrecy and the Impact on Fisheries Crime Law Enforcement* (Nordic Council of Ministers, 2018), p. 82.

³⁷ N. 1 above. E.g., the Commission’s critique of Thailand’s draft fisheries act for not incorporating IPOA-IUU principles and definitions: Commission Decision 2015/C 142/06 of 21 Apr. 2015 on Notifying a Third Country of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing [2015] OJ C 142/7, para. 80.

³⁸ IPOA-IUU, n. 1 above, paras 9.3, 15, 18–9, 21 and 73–4.

³⁹ UNGA Resolution 74/18, n. 3 above, paras 84–7.

⁴⁰ ‘Agenda 21: Programme of Action for Sustainable Development’, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992, paras 17.45 (high seas fishing), 17.52 (reflagging), available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>; UNGA Resolution 66/288, ‘The Future We Want’ (27 July 2012), UN Doc. A/RES/66/288 (2012), para. 170 (effective and coordinated measures by the state of nationality (among others) for beneficial owners and others who support or engage in IUU fishing), available at: <https://undocs.org/A/RES/66/288>.

⁴¹ ASEAN Regional Forum, ‘Statement on Cooperation to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’, adopted by the 24th ASEAN Regional Forum, Manila (The Philippines), 7 Aug. 2017, available at: <http://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Statement->

between countries in the region also promote the control of nationals for the purposes of deterring and eliminating IUU fishing.⁴²

To summarize, the question of due diligence obligations upon the state of nationality to address IUU fishing is certainly less clear, and is in a greater state of flux, than the more established duties of flag states, coastal states, and port states. Yet much of this historic overview mirrors the evolution of port state responsibilities.⁴³ This suggests that a dedicated instrument covering the state of nationality may now be necessary to develop the limited treaty-based obligations of contracting parties into generally accepted global standards.⁴⁴ This instrument would bolster the multilateral system and add credibility to the task of identifying non-cooperating states of nationality. As both results would serve the interests of the EU, the EU should pursue the development of such an instrument.

2.2. EU Fisheries Policy: The Regulation of EU Nationals in Respect of IUU Fishing

Described by some authors as one of the most significant developments in EU fisheries policy,⁴⁵ the scope of the CFP includes activities ‘by nationals of Member States, without prejudice to the primary responsibility of the flag State’.⁴⁶ That scope applies also to the framework on technical measures which supports implementation of the CFP.⁴⁷

The enforcement of rules governing nationals is intended to develop ‘a culture of compliance and cooperation among all operators and fishermen’.⁴⁸ For third-country states and operators, this should be read in conjunction with the EU’s external policy objective of ensuring a level playing field between Union operators and third-country operators.⁴⁹ Indeed, fostering a culture of compliance is not intended to be restricted to Union operators and fishers. Therefore, in addition to cooperating towards

[on-Cooperation-to-Prevent-Deter-and-Eliminate-Illegal-Unreported-and-Unregulated-Fishing-Manila-the-Philippines-7-August-2017.pdf](#).

⁴² Reportedly the control over nationals was an element of a draft memorandum of understanding between the Philippines and Indonesia on preventing deterring and eliminating IUU fishing: M.A. Palma & M. Tsamenyi, *Case Study on the Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Sulawesi Sea* (Asia-Pacific Economic Cooperation Secretariat, 2008), p. 45.

⁴³ J. Swan, ‘Port State Measures: From Residual Port State Jurisdiction to Global Standards’ (2016) 31(3) *The International Journal of Marine and Coastal Law*, pp. 395–421.

⁴⁴ To date, see the UNGA resolution encouraging regional guidelines for adequate sanctions: UNGA Resolution 74/18, n. 3 above, para. 179.

⁴⁵ R. Churchill & D. Owen, *The EC Common Fisheries Policy* (Oxford University Press, 2010), pp. 70–1; R. Long, ‘Stakeholder Participation in the European Fisheries Policy: Shifting the Legal Paradigm toward Rights and Responsibilities’, in C. Espósito et al. (eds), *Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime* (Brill, 2016), pp. 11–67, at 65–6.

⁴⁶ CFP Regulation, n. 10 above, Recital 2 and Art. 1(2)(d).

⁴⁷ Regulation (EU) No. 2019/1241 on the Conservation of Fisheries Resources and the Protection of Marine Ecosystems through Technical Measures, amending Council Regulations (EC) No. 1967/2006, (EC) No. 1224/2009 and Regulations (EU) No. 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022, and repealing Council Regulations (EC) No. 894/97, (EC) No. 850/98, (EC) No. 2549/2000, (EC) No. 254/2002, (EC) No. 812/2004 and (EC) No. 2187/2005 [2019] OJ L 198/105, Recital 5 and Art. 2(1).

⁴⁸ CFP Regulation, n. 10 above, Art. 36(2)(g).

⁴⁹ *Ibid.*, Recital 50 and Art. 28(2)(d).

compliance with any active personality-based measures of RFMOs or RFMAs,⁵⁰ the EU will promote a minimum level of regulation by third countries of their nationals so as to not disadvantage EU operators through the imposition of stricter levels of EU governance.

The EU Regulation establishing a Union Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy (Control Regulation)⁵¹ applies to the nationals of all EU Member States. It applies regardless of the connection of any other territorial state or flag state with an EU national.⁵² The Control Regulation provides that appropriate enforcement measures for non-compliance by natural or legal persons shall be established and implemented by EU Member States whenever a suspected breach of CFP rules arises.⁵³ The European Commission's proposed amendments to the Control Regulation also clarify and expand the chapter on enforcement measures against natural or legal persons, so as to 'ensure effective deterrence against the most harmful behaviours, in line with Union international obligations'.⁵⁴

Addressing the IUU fishing activities of EU nationals through greater control and enforcement has been one of the core elements of the EU Strategy to Combat IUU Fishing since its adoption in 2007.⁵⁵ Specifically, the EU IUU Regulation includes a Chapter VIII dedicated to regulating nationals, whereby:

Nationals subject to the jurisdiction of Member States (nationals) shall neither support nor engage in IUU fishing, including by engagement on board or as operators or beneficial owners of fishing vessels included in the Community IUU vessel list.⁵⁶

This is but one example of an EU provision addressing the regulation of nationals involved in IUU fishing. EU Member States shall cooperate in identifying nationals that support or engage in IUU fishing and take appropriate action and enforcement measures against identified nationals.⁵⁷ Indeed, the Recitals define the exercise of

⁵⁰ Ibid., Art. 30.

⁵¹ Regulation (EC) No. 1224/2009 establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008, and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 [2009] OJ L 343/1 (Control Regulation).

⁵² Ibid., Art. 2(1).

⁵³ Ibid., Title VIII and Arts 89–93, e.g. Art. 85 (vessel masters).

⁵⁴ Commission Proposal, n. 4 above, Recital 50 and Art. 1(69) (replacing Title VIII of the Control Regulation).

⁵⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'On a New Strategy for the Community to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing', COM(2007) 601 Final, 17 Oct. 2007, pp. 8–9.

⁵⁶ IUU Regulation, n. 6 above, Art. 39(1) and, more generally, Ch. VIII. Discussed in B. Soyer, G. Leloudas & D. Miller, 'Tackling IUU Fishing: Developing a Holistic Legal Response' (2018) 7(1) *Transnational Environmental Law*, pp. 139–63, at 154–5.

⁵⁷ IUU Regulation, n. 6 above, Arts 39(2)–(3). See further *ibid.*, Ch. IX, on enforcement and sanctions; Arts 41–7, including for serious infringements committed by nationals of EU Member States (Art. 41(2)). On the possibility for an expansive interpretation of nationals, but a lack of appropriate enforcement measures: Soyer, Leloudas & Miller, n. 56 above, pp. 155–8.

extraterritorial active personality-based jurisdiction as an essential role of EU Member States, stating that '[i]t is essential that nationals of Member States be effectively deterred from engaging in or supporting IUU fishing *by fishing vessels flying the flag of third countries and active outside the Community*'.⁵⁸

The European Commission proposed amendments to the IUU Regulation that would include cross-references to the Control Regulation amendments discussed above, addressing proceedings, enforcement, and sanctions.⁵⁹ Serious infringements under the IUU Regulation would then include, among others, 'being involved in the operation, management, ownership or hire of a vessel engaged in IUU fishing ... or supplying services to operators connected to a vessel engaged in IUU fishing', or 'conducting business directly connected to IUU fishing including trade, import, export, process, marketing of products from IUU fishing activities'.⁶⁰ The amendments would obligate Member States to establish administrative measures and a sanctions regime for serious infringements. This should be applied systematically, including through effective, proportionate, and dissuasive sanctions.⁶¹ Proposals include mandatory minimum fines of between three to five times the value of the fishery products obtained via the infringement, rising to between five to eight times that value for repeat offenders. These minimum fines are likely to be insufficient for the purposes of deterring repeat offenders if other profitable infringements go undetected. Nonetheless, they do represent an improvement over existing *maximum* fines.⁶²

The EU has therefore laid considerable groundwork for Member States to regulate their nationals involved in IUU fishing, with potentially greater enforcement obligations and specificity yet to come. In light of the EU policy objectives of stamping out IUU fishing globally and ensuring a level playing field among operators, regardless of nationality, one would anticipate that the EU might come to promote similar regulations in third countries as part of its external fisheries policy.⁶³

2.3. EU Fisheries Policy: Identifying Non-Cooperating States of Nationality in Combating IUU Fishing

The increasing duties upon the state of nationality within EU law and policy can be extended to the EU external fisheries policy regarding the regulation of foreign nationals by foreign states. This policy, as set out in the 2016 International Oceans Governance Agenda,⁶⁴ seeks to continue to strengthen the global role of the state of

⁵⁸ IUU Regulation, n. 6 above, Recital 33 (emphasis added). Further provisions partially address the reflagging of vessels by nationals, but are not the focus of discussion here: *ibid.*, Arts 38(3), 40(2) and 40(4).

⁵⁹ Commission Proposal, n. 4 above, Arts 4(11)–(15).

⁶⁰ *Ibid.*, Art. 4(12) (cross-referencing proposed Arts 90[h] and 90[j] of the Control Regulation, n. 51 above). 'Including' suggests the list is non-exhaustive.

⁶¹ *Ibid.*, Art. 4(13)–(14) (cross-referencing proposed Arts. 85 and 89a–92 of the Control Regulation, *ibid.*).

⁶² IUU Regulation, n. 6 above, Art. 44.

⁶³ Commission Proposal, n. 4 above, p. 4 (explanatory memorandum); a level playing field remained a critical issue for all stakeholders during public consultations held in 2016.

⁶⁴ European Commission, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'International Ocean Governance: An Agenda for the Future of Our Oceans', JOIN(2016) 49 final, 10 Nov. 2016.

nationality in combating IUU fishing, and emphasizes its role in addressing illegal fishing:

[T]he Commission is seeking to strengthen multilateral action on curbing IUU fishing by strengthening the instruments that allow to track and identify vessels *and nationals* engaging in illegal practices, and increasing the role of key international agencies such as Interpol.⁶⁵

According to EU reports, this external policy has already reaped benefits, contributing in part to improvements by RFMOs of their measures for regulating nationals involved in IUU fishing.⁶⁶ For example, following an EU proposal in 2017, CCAMLR expanded the scope of its active personality-based measures to include the regulation of insurance providers.⁶⁷ Such success stories may be contrasted with other areas of the CFP that have not been successfully exported to RFMOs, or the EU's past non-cooperation and non-compliance within RFMO frameworks.⁶⁸

The most notorious tool to date for addressing a specific third country's jurisdiction is the EU's non-cooperating third country identification procedure.⁶⁹ Following private bilateral dialogues, the European Commission may issue a pre-identification notification (or Yellow Card) if it believes that a third country is failing to discharge its duties under international law. This is accompanied by an Action Plan for those countries to rectify the situation.⁷⁰ A failure to introduce sufficient reforms will result in identification by the Commission (through issuing what is known as a Red Card I), which may be followed by the Council of the EU listing the offending country as a non-cooperating third country (otherwise known as a Red Card II). Listing will alert the Commission and EU Member States to implement the measures listed in Article 38 of the IUU Regulation. These may include restrictions on imports, bilateral fisheries agreements, fisheries partnership agreements, or other fisheries-related trade relations.⁷¹ In

⁶⁵ *Ibid.*, p. 11 (emphasis added).

⁶⁶ European Commission, Joint Staff Working Document Accompanying the Document Joint Report to the European Parliament and the Council, 'Improving International Ocean Governance: Two Years of Progress', SWD(2019) 104 final, 15 Mar. 2019, pp. 3–4; Commission Proposal, n. 4 above, p. 2 (explanatory memorandum). The domestic EU reform proposals discussed above are equally in part to implement the EU's external commitments against IUU fishing.

⁶⁷ CCAMLR Secretariat, *Report of the Thirty-Sixth Meeting of the Commission* (CCAMLR, 2017), paras 8.8, 107–10, available at: https://www.ccamlr.org/en/system/files/e-cc-xxxvi_0.pdf.

⁶⁸ See the discussion of shark finning, determining total allowable catches and overfishing quotas: P. Heckler, 'Regional Fisheries Management Organisations', in R.A. Wessel & J. Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar, 2019), pp. 429–45.

⁶⁹ Well documented in the literature: e.g., E.R. van der Marel, 'An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation', in L. Martin, C. Salonidis & C. Hioareas (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (JurisNet, 2017), pp. 237–56; A.N. Honniball, 'What's in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses' (2019) 35(1) *The International Journal of Marine and Coastal Law*, pp. 19–54.

⁷⁰ IUU Regulation, n. 6 above, Art. 32(1)(b).

⁷¹ Note the further denial of port entry on the ground of catch certificates being invalid: *ibid.*, Arts 38(1), 6(2) and 7(1).

order to avoid these restrictions, by receiving a ‘pre-identification revocation’ notice (Green Card), or their removal by way of a ‘delisting’ notice (Green Card), a third country must either rectify or refute the issues identified by the Commission.

To date, interstate cooperation – combined with the influence of the EU market and external policy – has resulted in notable successes.⁷² These include enhanced prescriptive and enforcement jurisdiction being exercised by third countries in order to address IUU fishing.⁷³ However, the non-cooperating third country procedure has not been without issue. Notable challenges include deficits in transparency,⁷⁴ legal certainty,⁷⁵ and compatibility with international trade law.⁷⁶ An important observation here is that the state of nationality is not listed as a factor upon which the Commission may base the identification of a third country. Instead:

3. A third country may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing.⁷⁷

Arguably, a state cannot be identified as non-cooperating solely on the basis of its failure to exercise sufficient jurisdiction over its nationals. However, the Commission’s parameters of review do include the third country’s regulation of its nationals. For example, Article 31 of the IUU Regulation states:

4. For the purposes of paragraph 3 [identification], the Commission shall primarily rely on the examination of measures taken by the third country concerned in respect of:

⁷² Market power and normative power are captured in the case study: A.M.M. Miller, S.R. Bush & A.P.J. Mol, ‘Power Europe: EU and the Illegal, Unreported and Unregulated Tuna Fisheries Regulation in the West and Central Pacific Ocean’ (2014) 45 *Marine Policy*, pp. 138–45.

⁷³ Port states: A.N. Honniball, n. 69 above. Flag states: O. Urrutia, ‘Combating Unregulated Fishing through Unilateral Trade Measures: A Time for Change in International Fisheries Law?’ (2018) 49(4) *Victoria University of Wellington Law Review*, pp. 671–96, at 679–85; A.N. Honniball, ‘Panama’s Second Yellow Card: Global Takeaways in Combatting IUU Fishing and EU Trade-Related Measures’, *EJIL: Talk!*, 21 Feb. 2020, available at: <https://www.ejiltalk.org/panamas-second-yellow-card-global-takeaways-in-combatting-iuu-fishing-and-eu-trade-related-measures>.

⁷⁴ A.N. Honniball, n. 69 above, p. 47; van der Marel, n. 2 above, p. 317; I. Lutchman, S. Newman & M. Monsanto, *An Independent Review of the EU Illegal Unreported and Unregulated Regulations: A Report Funded by the Oak Foundation* (Institute for European Environmental Policy, 2011), p. 21, available at: <https://ieep.eu/publications/independent-review-of-the-eu-illegal-unreported-and-unregulated-regulations>.

⁷⁵ M. Rosello, ‘Cooperation and Unregulated Fishing: Interactions between Customary International Law, and the European Union IUU Fishing Regulation’ (2017) 84 *Marine Policy*, pp. 306–12.

⁷⁶ M. Tsamenyi et al., *Fairer Fishing? The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries* (Commonwealth Secretariat, 2009), pp. 62–4; M.A. Young, ‘International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing’ (2016) 69 *Marine Policy*, pp. 209–19; K. Auld, ‘Trade Measures to Prevent Illegal Fishing and the WTO: An Analysis of the Settled Faroe Islands Dispute’ (2018) 17(4) *World Trade Review*, pp. 665–92.

⁷⁷ IUU Regulation, n. 6 above, Art. 31(3). E.g., Cambodia, ‘the Commission analysed the duties of Cambodia as flag, port, coastal or market State’: Commission Decision 2012/C 354/01 of 15 Nov. 2012 on Notifying the Third Countries that the Commission Considers as Possible of Being Identified as Non-cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate IUU Fishing [2012] OJ C 354/1, para. 74.

- (a) recurrent IUU fishing suitably documented as carried out or supported by fishing vessels flying its flag or by its nationals, or by fishing vessels operating in its maritime waters or using its ports; or
- (b) access of fisheries products stemming from IUU fishing to its market.

5. For the purposes of paragraph 3, the Commission shall take into account:

[...]

- (b) whether the third country concerned has taken effective enforcement measures in respect of *the operators* responsible for IUU fishing, and in particular whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.⁷⁸

To understand the non-cooperating third country analysis and process, one must look beyond the Council's formal listing decisions and include the Commission's Decisions and Notices. In respect of the state of nationality, the reasoning of the EU will be found only in the Commission's statements because it would be impermissible for the Council to formally identify a third country on the basis of failing its duties as the state of nationality.

Nonetheless, while only Commission Decisions and Notices refer explicitly to controlling nationals, it is important to note that Council Decisions reiterate that they are based on – and share – the Commission's investigations, dialogue, and reasoning.⁷⁹ The Council's listing therefore implicitly incorporates the pressures upon third countries to exercise active personality jurisdiction. The lack of open and explicit requests, however, raises transparency issues beyond those previously identified in the literature.

The term 'operators' is not defined in Article 31(5)(b) for the purpose of identifying third countries but should be interpreted in line with its use throughout the IUU Regulation so as to implicitly include enforcement by the state of nationality. The EU's own nationality-based measures include the regulation of operators, irrespective of the flag state of the vessel on which they operate.⁸⁰ Therefore, by analogy, the review of a third country's enforcement in respect of its operators is broadly conceived to apply regardless of the vessels' flag states on which the operators act. 'Effective' enforcement will thus include the enforcement of nationality-based measures.

⁷⁸ IUU Regulation, n. 6 above, Art. 31(4)–(5) (emphasis added). E.g., Cambodia, '[f]or the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation': Commission Decision, *ibid.*, para. 74. E.g., Commission Decision 2017/C 364/03 of 23 Oct. 2017 Notifying the Socialist Republic of Vietnam of the Possibility of Being Identified as a Non-cooperating Third Country in Fighting IUU Fishing [2017] OJ C 364/3, para. 14 (linking Art. 31(4)(a) of the IUU Regulation to regulating nationals).

⁷⁹ Council Implementing Decision (EU) 2015/200 of 26 Jan. 2015 amending Implementing Decision 2014/170/EU establishing a List of Non-Cooperating Third Countries in Fighting IUU Fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate IUU Fishing as regards Sri Lanka [2015] OJ L 33/15, para. 13.

⁸⁰ IUU Regulation, n. 6 above, Art. 39(1) (cross-referencing the Community IUU Vessel List, which also includes third-country flagged vessels); see IUU Regulation, Art. 1(3), on its scope. 'The IUU Regulation applies to all IUU fishing activities in any waters *in as much they are related to the EU through trade flows, or the flag of fishing vessels, or the nationality of operators*' (emphasis added): European Commission, EC Regulation 1005/2008 to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing: Information Note, 14 Oct. 2010, p. 3, para. 3(1)(a), available at: https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/information_note01_en.pdf.

The striking aspect of Articles 31(4) and 31(5) of the IUU Regulation is that the Commission's examination of measures taken by the third country to address IUU fishing, apart from measures to address IUU fishing carried out or supported by its nationals, corresponds to the list of duties set out in Article 31(3). For example, measures to address IUU fishing vessels 'using its ports' are examined under Article 31(4)(a) for the purposes of identifying port states under Article 31(3). The context of nationals in Article 31(4) and operators in Article 31(5), without including duties incumbent upon the state of nationality in Article 31(3), makes apparent that the regulation of nationals is considered by subsequent Commission practice in the context of flag state duties. For example, Fiji's failure to regulate the involvement of nationals in extraterritorial IUU fishing, or to ensure a sufficient level of sanctions for nationals involved in IUU fishing, was considered by the Commission as inconsistent with the IPOA-IUU on the state of nationality.⁸¹ This conclusion, however, was formally used to establish 'that Fiji ha[d] failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement effort'.⁸²

In sum, the role of the state of nationality in the IUU Regulation lacks clarity. The absence of a distinction between the responsibilities of the state of nationality and the responsibilities of the flag state is unfortunate. The persons considered for the purpose of exercising state of nationality jurisdiction will necessarily be more numerous than those persons traditionally associated with a flag state's responsibilities – namely, those involved in the flagged vessels as a 'unit'.⁸³ A flag state's responsibilities would include regulating the owners or operators of vessels flying its flag, but not its nationals who own or operate foreign-flagged vessels.

The EU is not unique in conflating the duty to regulate nationals with the flag state's responsibilities.⁸⁴ However, while it may be politically more convenient to push an expansive interpretation of existing flag state responsibilities so as to include the state of nationality, this approach compromises legal certainty and clarity. The state of nationality and the flag state are distinct jurisdictional nexuses, with different prescriptive and enforcement reach under international law, and thus different international responsibilities. As a practical matter, different legal provisions are necessary to regulate the natural or legal persons falling under the state of nationality versus those persons falling under flag state jurisdiction. Until the EU's identification procedure and grounds are explicitly clarified with regard to the state of nationality, only a

⁸¹ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 115, 117–8.

⁸² *Ibid.*, para. 123.

⁸³ A series of cases consistently affirm that the 'unit' of a vessel includes 'crew, all persons and objects on board, as well as its owner and every person involved or interested in it are included': *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award, 5 Sept. 2016, PCA Case No. 2014-07, para. 150 (and cases cited therein), available at: <https://pcacases.com/web/sendAttach/1915>. E.g., on Cambodia's flag state responsibilities, 'over each ship flying its flag and its master, officers and crew': Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 95–6.

⁸⁴ Environmental Justice Foundation et al., 'Achieving Transparency and Combating IUU Fishing in RFMOs: Reinforcing the EU's Multilateral Actions to Promote Best Practices', May 2019, p. 15, available at: https://eu.oceana.org/sites/default/files/combating_iuu_fishing_in_rfmos.pdf.

comparative analysis of implementing practice will illuminate the current scope of external fisheries policy in relation to the exercise of active personality-based jurisdiction.

3. THE EU IUU REGULATION AND ASIAN STATES IN PRACTICE

The second half of this article focuses on the EU's unilateral non-cooperating identification procedure and interactions between the EU and Asian states concerning the regulation of nationals involved in IUU fishing.

3.1. *A Duty for Asian States to Exercise Active Personality-Based Jurisdiction*

Despite the plethora of multilateral practice, the implementation of active personality-based jurisdiction to combat IUU fishing has yet to reach its full potential. Many states are simply unwilling or unable to exercise adequate jurisdiction to control their nationals suspected of engaging in or supporting IUU fishing. In as early as 2006, the Ministerially Led Task Force on IUU Fishing on the High Seas identified the strengthening of control over nationals as a key area in which unilateral contributions could be made 'even if other countries are not similarly minded'.⁸⁵

If one considers the implementation of the EU's non-cooperating third country identification procedure, it becomes plain that the EU has moved forward with unilateral contributions to the strengthening of control over nationals where, until formal dialogues were initiated, it believed third countries were not similarly minded. Based on an analysis of Commission Decisions, Commission Notices and Council Implementing Decisions relating to Asian states, this article demonstrates that EU concerns over the sufficient exercise of jurisdiction by the state of nationality have been raised in six out of the seven formal processes (detailed in the Appendix to this article).

In the cases of Chinese Taipei,⁸⁶ South Korea,⁸⁷ Sri Lanka,⁸⁸ Vietnam,⁸⁹ and Cambodia, the Commission recognizes the regulation of nationals and the regulation of vessels as distinct elements of a flag state's international duties. With regard to Cambodia, for example, the Commission stated the following:

⁸⁵ High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas', Mar. 2006, p. 96, available at: https://wfeu.awsassets.panda.org/downloads/high_seas_task_force_report.pdf.

⁸⁶ Commission Decision 2015/C 324/10 of 1 Oct. 2015 on Notifying a Third Country of the Possibility of Being Identified as a Non-Cooperating Third Country in Fighting IUU Fishing [2015] OJ C 324/17, paras 46, 60.

⁸⁷ Commission Decision 2013/C 346/03 of 26 Nov. 2013 on Notifying the Third Countries that the Commission Considers as Possible of Being Identified as Non-Cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate IUU Fishing [2013] OJ C 346/26, para. 29.

⁸⁸ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, para. 300; Commission Implementing Decision 2014/715/EU of 14 Oct. 2014 Identifying a Third Country that the Commission Considers as a Non-Cooperating Third Country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate IUU Fishing [2014] OJ L 297/13, para. 43.

⁸⁹ Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 32.

[I]t could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Cambodia has failed to discharge the duties incumbent upon it under international law *as a flag State* in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels *flying its flag or by its nationals* and has not taken sufficient action to counter documented and recurring IUU fishing by vessels flying its flag.⁹⁰

To date, the most explicit inclusion of responsibilities over nationals under flag state responsibilities happens in the context of due diligence obligations:

The concept of flag state responsibility and coastal state responsibility has been steadily strengthened in international fisheries law and is today envisaged as an obligation of ‘due diligence’, which is an obligation to exercise best possible efforts and to do the utmost to prevent IUU fishing, including the obligation to adopt the necessary administrative and enforcement measures to ensure that fishing vessels flying its flag, *its nationals*, or fishing vessels engaged in its waters are not involved in activities which infringe the applicable conservation and management measures of marine biological resources, and in case of infringement to cooperate and consult with other states in order to investigate and, if necessary, impose sanctions which are sufficient to deter violations and deprive offenders of the benefits from their illegal activities.⁹¹

Indeed, the Commission has gone so far as to identify specific cases where interstate reports indicate that Asian states have failed to regulate their nationals or exercise adequate enforcement. The Commission Decision on Korea included alleged transshipment by Korean-owned vessels in third-country exclusive economic zones (EEZs),⁹² and the involvement of Korean nationals in illegal activities undertaken by Ghanaian-flagged vessels in foreign EEZs.⁹³ Furthermore, Chinese Taipei nationals were allegedly involved in IUU fishing under the International Commission for the Conservation of Atlantic Tunas (ICCAT),⁹⁴ while Vietnamese nationals were responsible for the operation of Vietnamese vessels in breach of the fisheries law of coastal states.⁹⁵

This practice raises the question whether Asian states engaged by the EU on the basis of regulating nationals have accepted the notion that they have international legal responsibilities to govern their nationals engaged in or supporting IUU fishing. One possibility for a state to express its consent to be bound by said responsibilities is to become a contracting party to the fisheries instruments discussed above, which have included an obligation to exercise sufficient active personality-based jurisdiction. At the level of global instruments, apart from Cambodia and Chinese Taipei, the

⁹⁰ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, para. 81; Commission Implementing Decision 2013/C 346/02 of 26 Nov. 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 IUU Fishing [2013] OJ C 346/2, para. 98 (emphasis added).

⁹¹ Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 7 (emphasis added).

⁹² Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, paras 28, 38.

⁹³ *Ibid.*, paras 41, 49, 59–60.

⁹⁴ Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, paras 85, 92, 51 (noting the investments and operation of 238 foreign-flagged vessels by its nationals).

⁹⁵ Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 20.

EU-targeted states were contracting parties to UNCLOS and UNFSA.⁹⁶ Cambodia is a signatory to UNCLOS and has since ratified UNFSA.⁹⁷ At the level of regional instruments, apart from South Korea and to a lesser extent Chinese Taipei, the membership of RFMOs and RFMAs and, therefore, acceptance of their nationality-based obligations, is woefully low.⁹⁸

Furthermore, with regard to the other global instruments that recognize the duty to regulate nationals in their preambles but not in the main body of text imposing rights and obligations upon contracting parties, the situation is less clear. Only South Korea is party to the Compliance Agreement,⁹⁹ and Sri Lanka was the only state which had accepted the PSMA prior to EU engagement.¹⁰⁰ Nonetheless, all bar Chinese Taipei are now contracting parties to the PSMA.¹⁰¹ While Chinese Taipei cannot become a contracting party to these instruments, it voluntarily accepts obligations set out in global fisheries instruments, including the actions to regulate nationals.¹⁰²

Therefore, the basis of the obligation to regulate nationals may be a mere EU assertion that flag states must take measures concerning nationals and high seas resources.¹⁰³ On other occasions the Commission refers to the recommendations of the IPOA-IUU for prescribing measures for nationals that support or engage in IUU fishing. While the Commission consistently affirms that actions inconsistent with soft

⁹⁶ UN, 'Status (12/03/2020): United Nations Convention on the Law of the Sea', available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>; UN, 'Status (13/03/2020): 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 1995', available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-7.en.pdf>.

⁹⁷ Ibid. UNCLOS ratification may be forthcoming: M. Dara, 'National Assembly Approves UN Convention on Sea Law', *Phnom Penh Post*, 24 Dec. 2019, available at: <https://www.phnompenhpost.com/national/national-assembly-approves-un-convention-sea-law>.

⁹⁸ Membership: Cambodia (none); Chinese Taipei (Commission for the Conservation of Southern Bluefin Tuna (CCSBT), International Commission for the Conservation of Atlantic Tunas (ICCAT), NPFC, South Pacific Regional Fisheries Management Organisation (SPRFMO), Western and Central Pacific Fisheries Commission (WCPFC)); South Korea (CCAMLR, CCSBT, ICCAT, IOTC, Northwest Atlantic Fisheries Organization (NAFO), North Pacific Anadromous Fish Commission (NPAFC), NPFC, SIOFA, SPRFMO, WCPFC); Sri Lanka (IOTC); Thailand (SIOFA, WCPFC); the Philippines (formerly CCSBT (Cooperating Non-Member status ceased 12 Oct. 2017), ICCAT, WCPFC); Vietnam (WCPFC).

⁹⁹ N. 26 above. The Philippines has since become a party in 2018, but was not engaged by the EU on regulating nationals: FAO, 'Status (02/07/2018): Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas', available at: http://www.fao.org/fileadmin/user_upload/legal/docs/012s-e.pdf.

¹⁰⁰ Note that Sri Lanka's Yellow Card was issued in 2012 prior to entry into force of the PSMA.

¹⁰¹ FAO, 'Status (13/03/2020): Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing', available at: <http://www.fao.org/treaties/results/details/en/c/TRE-000003>.

¹⁰² Fisheries Agency of the Council of Agriculture (FA.COA), 'National Plan of Action of the Republic of China (Taiwan) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, Mar. 2013, pp. 6–7, available at: <https://www.fg.gov.tw/upload/456/2016040714524636661.pdf>; Memorandum of Understanding between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan concerning Cooperation in Fisheries and Aquaculture, Washington, DC (US), 18 June 2013, in force 18 June 2013, Preamble and Joint Plan, paras 7–8, available at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=Y0110527>.

¹⁰³ Commission Decision 2015/C 142/06 of 21 Apr. 2015, n. 37 above, para. 32.

law instruments are used as supportive evidence to identify non-cooperating third countries – but not as the basis for identification – the non-compliance with the IPOA-IUU is used as evidence of non-compliance with broadly defined framework provisions of UNCLOS.¹⁰⁴ Commission decisions are not explicit on the reasoning to link the IPOA-IUU as ‘supportive evidence’ for the Commission’s interpretation of UNCLOS. In the cases of Cambodia and Sri Lanka this connection between the IPOA-IUU and UNCLOS is made without any reference to specific provisions of UNCLOS in which these duties may be found.¹⁰⁵

When the European Commission does refer to legally binding provisions, these references by the Commission are used to suggest that a lack of necessary nationality-based measures by the third country undermines the third country’s ability to fulfil its obligations, as opposed to a violation of its obligations *per se*. However, when the third country has assumed obligations under an RFMO or an RFMA, the EU uses stronger non-compliance language. In particular, this has occurred when an RFMO body also has expressed written concerns about the third country’s compliance.¹⁰⁶ When the European Commission discusses the activities of Asian nationals in foreign EEZs, references to Article 62(4) UNCLOS suggest that the Commission interprets the relevant obligations as applying to the governance of both nationals and vessels.¹⁰⁷ More controversially, it also suggests that the conduct of nationals could, by itself, breach Article 62(4) UNCLOS, even though international law traditionally does not bind non-state actors.¹⁰⁸ For activities on the high seas, it is less clear if the Commission’s references to Article 94,¹⁰⁹ or Articles 117 and 118 UNCLOS,¹¹⁰ cover both vessels and nationals.

Turning to enforcement obligations, the Commission emphasizes the guidance in paragraph 21 of the IPOA-IUU rather than any treaty provision binding the third country in question.¹¹¹ The lack of reference to specific treaty provisions suggests that the EU

¹⁰⁴ E.g., Commission Implementing Decision 2013/C 346/02 of 26 Nov. 2013, n. 90 above, para. 75; Council Implementing Decision 2014/170/EU of 24 Mar. 2014 establishing a List of Non-Cooperating Third Countries in Fighting IUU Fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate IUU Fishing [2014] OJ L 91/43, para. 23; Commission Implementing Decision 2014/715/EU of 14 Oct 2014, n. 88 above, para. 21.

¹⁰⁵ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 84, 304. On Chinese Taipei the Commission refers to para. 18 IPOA-IUU without linking the IPOA-IUU to UNCLOS: Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 73.

¹⁰⁶ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, paras 59–60; Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, paras 69, 92.

¹⁰⁷ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 28; Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 20.

¹⁰⁸ See n. 163 below. Many interpret Art. 62(4) UNCLOS as referring to the coastal state’s prescriptive jurisdiction as opposed to imposing any obligations: *SRFC Advisory Opinion*, Separate Opinion of Judge Paik, n. 35 above, para. 15.

¹⁰⁹ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 41 (referring to activities of Korean nationals); Commission Implementing Decision 2013/C 346/02 of 26 Nov. 2013, n. 90 above, paras 91, 95–6 (referring to owners and operators of Cambodian-flagged vessels); Commission Decision 2015/C 142/06 of 21 Apr. 2015, n. 37 above, paras 32, 36–7 (referring to Thai-flagged vessels, as well as to operators of unregistered vessels).

¹¹⁰ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, para. 325.

¹¹¹ *Ibid.*, paras 81 (Cambodia) and 307 (Sri Lanka); Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 39; Commission Decision 2015/C 142/06 of 21 Apr. 2015, n. 37 above, para. 80.

either supports an inclusive interpretation of UNCLOS,¹¹² in line with the international jurisprudence and literature referred to above, or is of the view that this soft law repeats a customary law duty binding upon all states.

In short, the EU has taken a broad approach in identifying non-cooperating third countries in Asia, including questions about the sufficiency of regulation of nationals. However, the depth of its engagement with active personality-based jurisdiction needs also to be considered.

3.2. *The Content of Active Personality-Based Measures*

Firstly, soft law instruments can be used to nudge Asian states towards considering the necessity of regulating nationals. Such consideration may be part of a National Plan of Action on IUU Fishing (NPOA-IUU), which includes reflecting and reporting on a state's control of its nationals.¹¹³ The Commission promotes the adoption by Asian states of such national plans,¹¹⁴ which require them specifically and adequately to address the control of nationals in a timely manner.¹¹⁵ Third countries which already possess an NPOA-IUU, in turn, are expected to review and update their plans to the same effect.¹¹⁶

Secondly, Commission Decisions demonstrate that this duty, at its most general, requires third countries to prescribe *specific* measures to ensure that their nationals do not support or engage in IUU fishing.¹¹⁷ This contrasts with the EU's general placement of said duties under the umbrella of flag state duties. Sanctions prescribed must also be of 'sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from their illegal activities'.¹¹⁸

In terms of the range of specific measures required, the Commission often highlights the need for measures in respect of operators of foreign-flagged vessels.¹¹⁹ Necessary

¹¹² However, in other cases Art. 62(4) UNCLOS has been interpreted by the EU as declaratory of a coastal state's jurisdiction, only to be rejected by the European Court of Justice: Joined Cases C-103/12 and C-165/12, *Parliament and Commission v. Council*, ECLI:EU:C:2014:2400, paras 54–66.

¹¹³ FAO, Fisheries Department, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO Technical Guidelines for Responsible Fisheries No 9 (FAO, 2002), p. 68, available at: <http://www.fao.org/3/a-y3536e.pdf>.

¹¹⁴ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 97 (Cambodia) and 334 (Sri Lanka).

¹¹⁵ Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 64 (specifically concerning nationals and the timeline of measures to be adopted); Commission Implementing Decision 2014/715/EU of 14 Oct. 2014, n. 88 above, para. 31 (demonstrating discussions over the timeline of the NPOA-IUU).

¹¹⁶ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 33; IPOA-IUU, n. 1 above, para. 26.

¹¹⁷ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, para. 84; Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, paras 72–3.

¹¹⁸ Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 84 (Cambodia) and 307 (Sri Lanka); Commission Implementing Decision 2013/C 346/02 of 26 Nov. 2013, n. 90 above, para. 100; Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 39; Commission Decision 2015/C 142/06 of 21 Apr. 2015, n. 37 above, para. 80. The language that states 'ensure' sanctions 'are of' sufficient severity point to prescription in domestic law.

¹¹⁹ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 37; Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 72.

measures have included defining IUU fishing in domestic law,¹²⁰ adopting legislation on high seas fishing operations,¹²¹ addressing illegal activities in the Gulf of Guinea,¹²² fully implementing the ICCAT recommendation on compliance by nationals,¹²³ and prescribing laws to address fish laundering in breach of the law of a foreign flag state.¹²⁴

3.3. *The Enforcement of Active Personality-Based Measures*

The creation of offences and sanctions of sufficient severity could be construed as part of the due diligence obligation upon the state of nationality.¹²⁵ However, due diligence would equally require a certain level of implementation.¹²⁶ Commission Decisions also address the latter and identify cases where a third country has been notified of potential IUU fishing by its nationals, but has failed to take enforcement measures.¹²⁷

The choice of enforcement mechanism in domestic law remains largely within the discretion of the state. Nonetheless, Commission Decisions are suggestive of what the EU sees as *insufficient* enforcement mechanisms. One Commission Decision criticized a state for lack of clarity in the applicability of fines and their non-mandatory nature.¹²⁸ Another state's administrative sanctions were deemed to lack sufficient deterrence.¹²⁹ In a third, the deregistration of a vessel without fines (or other sanctions) for the owner or operator was considered inadequate and failed to address the problem of 're-flagging' (that is, changing a vessel's flag to avoid national or international standards, usually registering in a state unable or unwilling to control fishing activity adequately).¹³⁰ More generally, practice should include a clear definition of serious

¹²⁰ Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, paras 36, 39; Commission Decision 2015/C 142/06 of 21 Apr. 2015, n. 37 above, para. 80.

¹²¹ Commission Implementing Decision 2014/715/EU of 14 Oct. 2014, n. 88 above, para. 31 (responding to 'established shortcomings'); Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 36 (law addressing the conduct of nationals on both the high seas and waters of third countries).

¹²² Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 60.

¹²³ *Ibid.*, para. 59; ICCAT Recommendation 06-14, 'To Promote Compliance by Nationals of Contracting Parties, Cooperating Non-Contracting Parties, Entities, or Fishing Entities with ICCAT Conservation and Management Measures', 26 Nov. 2006, available at: <https://www.iccat.int/Documents/Recs/compendiopdf-e/2006-14-e.pdf>.

¹²⁴ Highlighting existing practice as welcome but incomplete: Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 72.

¹²⁵ *Ibid.*, para. 7, due diligence including 'imposing' sanctions upon nationals when necessary; Honniball, n. 73 above.

¹²⁶ E.g., Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 37; Commission Decision 2012/C 354/01 of 15 Nov. 2012, n. 77 above, paras 100 and 307 (the application of sanctions is clearly also reviewed).

¹²⁷ Commission Decision 2013/C 346/03 of 26 Nov. 2013, n. 87 above, para. 38; Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, paras 43, 85.

¹²⁸ Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 72.

¹²⁹ Commission Decision 2017/C 364/03 of 23 Oct. 2017, n. 78 above, para. 39; Commission Implementing Decision 2014/715/EU of 14 Oct. 2014, n. 88 above, para. 31 (reporting on its inter-ministerial request for increased sanctions).

¹³⁰ Commission Implementing Decision 2013/C 346/02 of 26 Nov. 2013, n. 90 above, para. 101 (following deregistration this would require active personality-based restrictions for any Cambodian owner or operator).

infringements and a domestic provision that addresses repeat offenders.¹³¹ Whenever legitimate concerns are raised, these should be investigated.¹³² Moreover, if an RFMO expects the third country to report on its practice to promote compliance by nationals, the Commission may also include this requirement within its pre-identification.¹³³

In sum, the lack of clear stipulations in international law on the minimum standard of enforcement by the state of nationality has not prevented the EU from exerting influence over third-country enforcement. Again, these specific requests in practice extend beyond what could conceivably be within a flag state's duties. The practice therefore reveals a distinct trajectory towards strengthening the enforcement obligations of the state of nationality within EU external policy, a policy objective that might otherwise remain elusive if one purely interprets the IUU Regulation.

3.4. *Active Personality-Based Measures in Selected Asian Practice*

If the state of nationality becomes the subject of a due diligence obligation under international fisheries law on IUU fishing, state practice in Asia, in fulfilling international fisheries law obligations, could become similar to the EU law or proposals discussed above. Equally, it may be that retaining access to EU markets, ports and fisheries partnerships is more important to Asian states than leaving nationals under-regulated or unregulated in the eyes of the EU.

Attempts at legal reform in Asia could be centred on flag, port, coastal, or market states, as these are the explicit bases in the IUU Regulation. Such reform would leave the state of nationality as a secondary concern. However, while a state may not be identified based solely on the inadequate regulation of nationals, once a formal dialogue has started no presumption exists against the necessity to exercise active personality-based jurisdiction to combat the involvement of nationals in IUU fishing. This is because, among the shortcomings identified by the Commission, including the regulation of nationals, no reform priorities or distinctions are identified for the third country to undertake to ensure that its pre-identification (Yellow Card) or identification (Red Card) is lifted.¹³⁴

Action Plans sent to third countries might include 'suggested actions'¹³⁵ but they will not address priorities for implementation or discuss the consequences of non-implementation for the EU's non-cooperating state procedure. Significantly, Action Plans are informative as to regulatory trends, but not authoritative as guidelines because they are unpublished. Citizens may request access to these documents, but

¹³¹ Commission Decision 2015/C 324/10 of 1 Oct. 2015, n. 86 above, para. 72.

¹³² *Ibid.*, para. 7; Commission Implementing Decision 2014/715/EU of 14 Oct. 2014, n. 88 above, para. 31 (reporting on inter-ministerial request for 'investigations of nationals involved in IUU fishing under flags of other states').

¹³³ Commission Decision 2013/C 346/03 of 26 Nov 2013, n. 87 above, para. 59.

¹³⁴ Lack of clarity in the decision-making process: Tsamenyi et al., n. 76 above, pp. 51–2.

¹³⁵ See the identical introduction to each Action Plan: European Commission, 'South Korea Action Plan' (on file with author).

their disclosure is made on a case-by-case basis and, in the experience of this author, is granted inconsistently.¹³⁶

More importantly, following the initiation of formal dialogues with the EU, there are indications that selected state practice in Asia takes the regulation of nationals seriously, as evidenced in the adoption of measures that address nationals engaged in or supporting foreign-flagged vessels. Even within this limited scope, it is possible to discern some practice which correlates with the above-mentioned prescription and enforcement requirements. For example, Chinese Taipei has extensive provisions to regulate nationals who invest in or operate foreign vessels.¹³⁷ These include permit requirements and prohibitions to engage in or support IUU fishing.¹³⁸ Vessels operated by Taiwanese nationals must fly the flag of an RFMO or RFMA contracting party or that of a cooperating non-contracting party when operating within the competence of the RFMO or RFMA.¹³⁹ Further laws require licences for employment in distant water fishing, and either prohibit or punish any nationals hired aboard foreign vessels involved in IUU fishing.¹⁴⁰

South Korean law defines IUU fishing and broadly prohibits its conduct by nationals.¹⁴¹ An extensive list of serious offences by operators includes non-compliance with RFMO or RFMA conservation and management measures. On repeat offenders, vessels within the ‘high risk group’ include those of a national found guilty of IUU fishing.¹⁴² Sri Lankan law, too, now provides that nationals cannot work aboard a foreign-flagged vessel without a permit.¹⁴³ Permits will not be issued for employment

¹³⁶ Public disclosure of the Action Plans for Cambodia, Chinese Taipei, and Vietnam were denied in May 2019 because of sensitivity of ongoing investigations. The Action Plan for Cambodia was disclosed in response to an earlier request during the same investigation: European Commission Directorate-General for Maritime Affairs and Fisheries, ‘Your Application for Access to Documents: Ref GestDem No 2019/2042’, 29 May 2019 (on file with author).

¹³⁷ C.T. Tsai & C.H. Yi, ‘Taiwan Delisted from European Union IUU Fishing List and Developments in Taiwanese Ocean Law’ (2019) 4(2) *Asia-Pacific Journal of Ocean Law and Policy*, pp. 253–61 (discussing the 2016 reforms and earlier practice responding, in part, to ICCAT concerns).

¹³⁸ Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels, Presidential Order Hua-Tsung (1) Yi-Tzu No. 09700271591, 17 Dec. 2008, amended by Presidential Order Hua-Tsung (1) Yi-Tzu No. 10500078591, 20 July 2016, available at: <https://www.fa.gov.tw/en/LegalsActs/index.aspx> (Act to Govern Investment); Regulations on the Investment in or the Operation of Foreign Flag Fishing Vessels, Council of Agriculture Order No. Nung-yu-tzu 0981333843, 15 Jan. 2010, amended by Order No. Nung-yu-tzu 1061332127, 20 Jan. 2017, and Order No. Nung-yu-tzu 1071332152, 23 Jan. 2018, available at: <https://www.fa.gov.tw/en/LegalsRegulation/index.aspx> (Regulations on Investment).

¹³⁹ Act to Govern Investment, Art. 4(3); Regulations on Investment, Arts 3 and 6.

¹⁴⁰ Act for Distant Water Fisheries, Presidential Order Hua-Tsung (1) Yi-Tzu No. 10500079291, Arts 6 and 14, available at: <https://www.fa.gov.tw/en/LegalsActs/index.aspx>.

¹⁴¹ Distant Waters Fisheries Development Act, Act No. 8626, 3 Aug. 2007, amended by Act No. 8852, 29 Feb. 2008, Act No. 9627, 22 Apr. 2009, Act No. 10122, 17 Mar. 2010, Act No. 11690, 23 Mar. 2013, Act No. 11982, 30 Jul. 2013, Act No. 12486, 18 Mar. 2014, Act No. 13001, 6 Jan. 2015, Act No. 14741, 21. Mar. 2017, Arts 2(2)–(5), 2(12)–(14), 12-2 and 33(2), available at: <http://extwprlegs1.fao.org/docs/pdf/kor160014.pdf>.

¹⁴² *Ibid.*, Arts 13 and 15-2(3). See generally, Ministry of Oceans and Fisheries, ‘National Plan of Action of the Republic of Korea to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’, Aug. 2014, pp. 4, 8–9, available at: <http://extwprlegs1.fao.org/docs/pdf/kor163041.pdf>.

¹⁴³ Minimum Standards for the Citizen of Sri Lanka Engaged in Fishing Operations in Foreign Flagged Fishing Boats, (2015) No. 1945/7 *Official Gazette of Sri Lanka (Extraordinary)*, pp. 1A–5A, Regs 4–6, available at: <http://extwprlegs1.fao.org/docs/pdf/srl172478.pdf>.

by any person found guilty of IUU fishing.¹⁴⁴ Thai reform measures define IUU fishing and distinguish the jurisdictional nexus of coastal state, flag state, and state of nationality.¹⁴⁵ Operations owned by Thai nationals or Thai beneficiaries are specifically regulated,¹⁴⁶ as is evident in the recent criminal proceedings against the natural and legal owners of the *Chotchainavee 35*, a Djibouti-flagged vessel involved in IUU fishing in Somalian waters, which returned to Thailand.¹⁴⁷ Other interesting provisions include the prohibition of Thai persons using a stateless vessel in fishing operations,¹⁴⁸ using a listed IUU fishing vessel,¹⁴⁹ or participating in or supporting IUU fishing.¹⁵⁰ As in EU practice, ‘supporting’ IUU fishing is broadly defined by a non-exhaustive indicative list of types of conduct. Prescribed sanctions follow the language of global and regional instruments, whereby sanctions should discourage violations and deprive offenders of the benefits accrued.¹⁵¹

Vietnamese law broadly defines 14 activities as ‘illegal commercial fishing’,¹⁵² with violations by organizations and individuals to be subject to administrative or criminal penalties in implementing regulation.¹⁵³ The Vietnamese NPOA-IUU calls for the creation by 2020 of ‘a strict sanction regime for vessel owners, captains, fishers and persons who assist in the activities of the fishing, trading and transportation of products from IUU fishing vessels’.¹⁵⁴ Finally, even though the Philippines’ pre-identification did not include explicit state of nationality concerns, some reforms are under way. An offence of engaging in unregulated fishing includes ‘vessels without nationality but operated by Filipino and/or Filipino corporation’,¹⁵⁵ a nexus that could be based only on active personality-based jurisdiction.

¹⁴⁴ *Ibid.*, Regs 2(iii) and 3.

¹⁴⁵ Royal Ordinance on Fisheries B.E. 2558 (2015), amended by Royal Ordinance on Fisheries (No. 2) B.E. 2560 (2017), ss. 5 and 8, available at: <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC195358> (Royal Ordinance on Fisheries).

¹⁴⁶ *Ibid.*, ss. 166 (supporters or beneficiaries of an offence) and 168 (persons directing a juristic person).

¹⁴⁷ Violating *ibid.*, s. 94, and sanctioned under s. 159; Ministry of Foreign Affairs of the Kingdom of Thailand, ‘The Criminal Court Issued a Fine and Seized the Vessel and Catch of the Convicted in the Prosecution of the Fishing Vessel “Chotchainavee 35”’, Press Release, 10 May 2019, available at: <https://www.mfa.go.th/en/content/5d5bd25a15e39c3060029160?cate=5d5bcb4e15e39c3060006842>; Ministry of Foreign Affairs of the Kingdom of Thailand, ‘The Prosecution of the Fishing Vessel “Chotchainavee 35” and the Rescue Missions of the Thai Fishing Crews on “Chotpattana 51” and “Chotpattana 55”’, Press Release, 1 Feb. 2018, available at: <https://www.mfa.go.th/en/content/5d5bd0ee15e39c306002229d>.

¹⁴⁸ Royal Ordinance on Fisheries, n. 145 above, s. 10. This is a serious offence subject to administrative measures and fines: *ibid.*, ss. 114(1), 113 and 123.

¹⁴⁹ *Ibid.*, ss. 116–117.

¹⁵⁰ *Ibid.*, ss. 114(13) and 113.

¹⁵¹ *Ibid.*, s. 121.

¹⁵² Law on Fisheries 2017, Law No. 18/2017/QH14, Art. 60(1), available at: <http://extwprlegs1.fao.org/docs/pdf/vie171855Eng.pdf>.

¹⁵³ *Ibid.*, Art. 60(2).

¹⁵⁴ The Prime Minister of Vietnam, ‘National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing up to 2025’, Decision No. 78/QD-TTg, 2018, p. 4, available at: <http://extwprlegs1.fao.org/docs/pdf/vie185691.pdf>.

¹⁵⁵ Philippine Fisheries Code of 1998, Republic Act No. 8550, amended by Republic Act No. 10654, ss. 4(87)(a) and 90, available at: <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC153082>.

It would be presumptuous to claim a full understanding of the legislative intent of six independent and different states. Nonetheless, I argue that the strong correlation between EU Yellow Cards, specific EU requests on regulating nationals, and third-country legislative amendments are indicative of the identification procedure playing an influential role. The question now rests on whether these third countries will align their enforcement regimes to the objective of combating nationals engaged in or supporting IUU fishing. Looking further afield, the greater representation of active personality-based measures provides subsequent practice *towards* interpreting or modifying international fisheries law,¹⁵⁶ notably the duty to take measures concerning the ambiguous ‘nationals’ mentioned in Article 117 UNCLOS. While the UNCLOS drafting history suggests that the term ‘nationals’ referred to vessels and the flag state’s duty, the decision to deviate from former practice and exclude a provision defining nationals as flagged vessels¹⁵⁷ has left the door open to progressive interpretation and modification.¹⁵⁸ Indeed, for large, complex multilateral treaties like UNCLOS, interpretation through subsequent practice is an integral element of remaining a responsive and living legal instrument.¹⁵⁹ Subsequent and consistent practice should carry significant weight in the contemporary interpretation and application of UNCLOS,¹⁶⁰ especially as it is prohibitively difficult to amend the treaty formally.¹⁶¹

4. CONCLUSION

This article has highlighted developments in active personality-based jurisdiction at the international and regional levels. Developments are characterized by slow progress and patchwork applicability.¹⁶² The strong political will to address IUU fishing through all available forms of jurisdiction has been matched by an uneven adoption of active personality-based measures by fishing states to regulate, prevent, or punish natural and legal persons involved in or supporting IUU fishing. The response of RFMOs

¹⁵⁶ Vienna Convention on the Law of Treaties, Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, Art. 31(3)(b), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

¹⁵⁷ Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva (Switzerland), 29 Apr. 1958, in force 20 Mar. 1966, Art. 14, available at: https://treaties.un.org/doc/Treaties/1966/03/19660320%2002-16%20AM/Ch_XXI_01_2_3_4_5p.pdf.

¹⁵⁸ E.g., contrast the flag state focus of the entry in the Virginia Commentaries with the later, more expansive, entry in the Proelss Commentaries: Center for Oceans Law and Policy, University of Virginia, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill, 2013), pp. 290–5, para. 117.9(a)–(c); R. Rayfuse, ‘Article 117’, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart, 2017), pp. 803–18.

¹⁵⁹ See the seminal work on this topic: I. Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press, 2018) pp. 186–7 (highlighting the susceptibility of UNCLOS conservation provisions to modification by subsequent practice).

¹⁶⁰ Subject to explicit prohibitions, e.g., an inconsistent example being subsequent derogation from Art. 136: UNCLOS, Art. 311(6).

¹⁶¹ UNCLOS, Arts 312–4.

¹⁶² Fuelling the need for unilateral transnational environmental law: G. Shaffer & D. Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 31–41, at 32–3.

and RFMAs, arbitral tribunals, and the EU has been to chisel away at state discretion by strengthening the responsibilities upon the state of nationality to exercise jurisdiction.¹⁶³ The EU is not unique in this regard; the United States also has addressed the regulation of nationals by third countries, including in a case identical to one covered by the EU.¹⁶⁴

The EU positions itself as a global leader and has incorporated stronger regulation of EU nationals within its own legal framework. Further measures governing EU nationals are on the horizon. However, when exporting greater control over nationals to third countries through the non-cooperating third country identification procedure, two key challenges arise. Firstly, the responsibilities of the state of nationality within international fisheries law remain hazy at best. Secondly, there is no explicit basis on which to identify a third country as a non-cooperating state of nationality within the IUU Regulation.

The first challenge has not prevented the Commission from using a combination of soft law, broad interpretations of UNCLOS and the practice of RFMOs to press forward with unilateral contributions that could develop the content of a general duty in international fisheries law.¹⁶⁵ A staggering 85.7% of EU practice concerning Asian states demonstrates formal engagement on the regulation of nationals involved in IUU fishing (see the Appendix to this article). This includes identifying specific cases of failure, followed by cases of necessary reform. This reform must be enforced to a sufficient degree.

The overwhelmingly positive responses of Asian states have been equally persuasive, with the majority adopting or strengthening their domestic laws governing nationals involved in IUU fishing. While Vietnam's pre-identification has not yet been revoked and Cambodia remains listed, all other states were delisted or had their pre-identifications revoked. This suggests, in the eyes of the Commission, that the concerns expressed – including over the regulation of nationals – have been remedied.¹⁶⁶

The second challenge has been overcome by examining the regulation of nationals in the context of flag state responsibilities. However, when addressing the regulation of

¹⁶³ An alternative approach, as envisaged in the South China Sea award, is that international law imposes obligations directly upon nationals to not fish illegally in foreign EEZs: *South China Sea Arbitration*, n. 28 above, paras 739–40. Whether persons are objects or subjects of international law has been a perpetual debate and the tribunal provides no support for such a conclusion. See V. Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47(4) *Ocean Development & International Law*, pp. 327–45, at 329–30. Tellingly, the EU practice here adopts the classical approach of focusing on a state's 'responsibility to ensure'.

¹⁶⁴ See US practice, noting the inadequate control of nationals, as well as the Korean reporting on efforts during consultation: National Oceanic and Atmospheric Administration (NOAA), 'Improving International Fisheries Management: Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006', Jan. 2013, p. 26, available at: <https://www.fisheries.noaa.gov/webdam/download/69038209>; NOAA, 'Improving International Fisheries Management: February 2015 Report to Congress', Feb. 2015, p. 47, available at: <https://www.fisheries.noaa.gov/webdam/download/69038212>.

¹⁶⁵ Complementing, J. He, 'Do Unilateral Trade Measures Really Catalyze Multilateral Environmental Agreements?' (2019) 19(6) *International Environmental Agreements: Politics, Law and Economics*, pp. 577–93.

¹⁶⁶ IUU Regulation, n. 6 above, Arts 32(4) and 34(1).

nationals investing in or aboard foreign-flagged vessels, this practice is clearly beyond flag state responsibilities.¹⁶⁷ The practice therefore becomes highly problematic in terms of legal certainty and basic rules of interpretation, which leaves the EU open to allegations of pursuing hidden policy goals and objectives.

Moving forward in legal research, the practice regarding active personality-based jurisdiction demonstrates that any future analysis of the EU's non-cooperating identification procedure based purely on a textual reading of the IUU Regulation will be incomplete. To appreciate fully the scope of jurisdictions subject to EU 'leadership', the existing practice of notices and decisions must also be considered. Moving forward in state practice, the question of whether the list of jurisdictional bases in Article 31(3) of the IUU Regulation is exhaustive will only increase in importance as international law continually expands the concurrent jurisdictional bases of states subject to obligations to combat IUU fishing. A careful balance will need to be struck between evolving EU practice to reflect the breadth of international fisheries law, while not departing from the text of the IUU Regulation such that legal certainty and legitimacy are called into question.

Considerations of transparency, legal certainty, and due process for third countries may necessitate reform of Article 31(3) of the IUU Regulation to separate explicitly the duties incumbent upon the state of nationality from the duties incumbent upon the flag state. Article 31 of the IUU Regulation could either explicitly refer to the state of nationality or refer to the listed capacities as non-exhaustive. The latter approach may be preferable in order for the instrument to remain responsive to increasingly fast developments in international fisheries law.

Finally, it is useful to remember that self-appointed global leaders should be held to a high standard of objectivity, non-discrimination, and legal certainty.¹⁶⁸ Moreover, this is in the EU's interest, as perceived legitimacy is essential for the long-term viability of its identification procedure.¹⁶⁹ So long as states compete for the economic and social benefits that arise from fishing activities within their jurisdiction, there will be incentives to overlook, or poorly implement, obligations under fisheries law. Counterbalancing unilateral measures, such as those issued by the EU, may therefore be necessary for the foreseeable future. The developments charted in this article should be welcomed but, moving forward, procedural and substantive legitimacy should be given greater importance.

¹⁶⁷ E.g., E.R. van der Marel, 'Evaluating Market Conditionality in Fisheries: Interactional Law and Global Administration' (Ph.D. Thesis, University of Tromsø (Norway), Jan. 2020), p. 206, offers a flag state interpretation of EU practice on Chinese Taipei. The Commission's explicit references to Taiwanese owning or operating foreign-flagged vessels unfortunately undermines that possibility.

¹⁶⁸ On the importance of societal status for norm diffusion, see H.J. Kim, 'Inducing State Compliance with International Fisheries Law: Lessons from Two Case Studies Concerning the Republic of Korea's IUU Fishing' (2019) 19(6) *International Environmental Agreements: Politics, Law and Economics*, pp. 631–45, at 641–2.

¹⁶⁹ Many of Scanlon's insights on vessel listing procedures would similarly apply in the context of country identifications: Z. Scanlon, 'Safeguarding the Legitimacy of Illegal, Unreported and Unregulated Fishing Vessel Listings' (2019) 68(2) *International & Comparative Law Quarterly*, pp. 369–98.

APPENDIX

EU-Asia Non-Cooperating Third Country Formal Dialogues on IUU Fishing

Third Country	EU Practice	Duties as the State of Nationality
Cambodia (2012)	Commission Decision of 15 Nov. 2012 (2012/C 354/01) [2012] OJ C 354/1; Commission Implementing Decision of 26 Nov. 2013 (2013/C 346/02) [2013] OJ C 346/2; Council Implementing Decision of 24 Mar. 2014 (2014/170/EU) [2014] OJ L 91/43.	Issues raised
Sri Lanka (2012)	Commission Decision of 15 Nov. 2012 (2012/C 354/01) [2012] OJ C 354/1; Commission Implementing Decision of 14 Oct. 2014 (2014/715/EU) [2014] OJ L 297/13; Council Implementing Decision (EU) 2015/200 of 26 Jan. 2015 [2015] OJ L 33/15; Council Implementing Decision (EU) 2016/992 of 16 June 2016 [2016] OJ L 162/15; Commission Implementing Decision (EU) 2017/1949 of 25 Oct. 2017 [2017] OJ L 276/62.	Issues raised
South Korea (2013)	Commission Decision of 26 Nov. 2013 (2013/C 346/03) [2013] OJ C 346/26; Commission Notice (2015/C 142/04) [2015] OJ C 142/5.	Issues raised
The Philippines (2014)	Commission Decision of 10 June 2014 (2014/C 185/03) [2014] OJ C 185/17; Commission Notice (2015/C 142/05) [2015] OJ C142/6.	
Thailand (2015)	Commission Decision of 21 Apr. 2015 (2015/C 142/06) [2015] OJ C 142/7; Commission Notice (2019/C 6/07) [2019] OJ C 6/6.	Issues raised
Chinese Taipei (2015)	Commission Decision of 1 Oct. 2015 (2015/C 324/10) [2015] OJ C 324/17; Commission Notice (2019/C 221/02) [2019] OJ C 221/2.	Issues raised
Vietnam (2017)	Commission Decision of 23 Oct. 2017 (2017/C 364/03) [2017] OJ C 364/3.	Issues raised