

Unilateral Trade Measures and the Importance of Defining IUU Fishing: Lessons from the 2019 USA “Concerns” with China as a Fishing Flag State

Arron N. Honniball

Structured Abstract

Article Type: Research Paper.

Purpose—Existing scholarship addresses difficulties with international law’s “definition” of IUU fishing but not those arising from unilateral definitions. This article examines the legal consequences of the USA’s IUU definition, including the lessons thereof for all port and market states.

Design, Methodology, Approach—The 2019 Report to Congress provides a case study on limitations to U.S. trade measures addressing foreign states facilitating IUU fishing. Comparative analysis to international fisheries law and other unilateral practice provides wider lessons. Analyzing historic U.S. practice suggests forthcoming reform.

Findings—Excluding illegal fishing in foreign EEZs from the identification and certification procedure is inconsistent with domestic and international policy objectives. Experimentation with a broader interpretation of “genuine link” when identifying foreign flag states is highly questionable. Procedural transparency and non-discrimination are improved when market states highlight legislative gaps or report on states considered but not identified.

Centre for International Law, National University of Singapore; 469A Bukit Timah Road, Tower Block #09-01, 259770 Singapore; phone: +6566015734; fax: +65 64692312; email: cilhan@nus.edu.sg



Journal of Territorial and Maritime Studies / Volume 7, Number 2 / Summer/Fall 2020 / pp. 7–26 /
ISSN 2288-6834 (Print) / DOI: 10.2307.JTMS.7.2.7 © 2020 Yonsei University

Practical Implications—The definition of IUU fishing is instrumental in the design of trade measures. Reform of the U.S. definition may broaden trade measures affecting foreign states wishing to retain market access.

Originality, Value—This analysis assists scholars and policy makers in evaluating the rights of market states. Unilateral and regional trade measures are shaping the evolving role of market states in fisheries law.

Keywords: due diligence, EEZ, flag state, IUU Fishing, Moratorium Protection Act, stateless vessel, trade measures

I. Introduction¹

On September 19, 2019, the USA's National Oceanic and Atmospheric Administration (NOAA) publicly released its 2019 biennial report to Congress, *Improving International Fisheries Management*,² identifying Ecuador, Mexico and the Republic of Korea as states whose vessels are reportedly engaged in illegal, unreported or unregulated (IUU) fishing activities under Section 609(a) of the *High Seas Driftnet Fishing Moratorium Protection Act*.³

The biennial identification of foreign states is the first step in the USA's unilateral three-step identification and certification procedure which analyzes the enforcement of international fisheries law by foreign states. The USA will take measures against any state receiving a negative certification, including the closure of U.S. ports and U.S. markets to that state's fishing vessels, catch and fishery products.⁴ Additional economic sanctions may also be imposed.⁵ The USA is not unique in imposing such trade measures. The EU,⁶ as well as numerous Regional Fisheries Management Organizations (RFMOs),⁷ also identify non-cooperating or non-compliant states that may be subject to comparable trade measures.

Nonetheless, unilateral measures in pursuit of a global common interest, i.e., "ending" IUU fishing,⁸ may raise questions of legitimacy, sufficiency or coherence if domestic laws and policies substantially differ from their purported international law and policy basis. Systemic differences may first and foremost arise from different definitions of IUU fishing. Unlike the EU's practice, which largely follows the international law "definition" of IUU fishing in the *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU),⁹ the USA has prescribed a definition of IUU fishing that is fundamentally different in scope. To highlight this difference and its legislative impact, this article first introduces the USA's identification and certification procedure (Part II). More specifically, this article addresses the consequences and acceptability of the U.S. definition of IUU fishing as not including vessels engaged in illegal fishing in the waters under the jurisdiction of a foreign state.

A novel section in the *2019 Report to Congress* entitled "Concerns with China's Fishing Practices"¹⁰ is then both demonstrative of such a legislative gap and the currently hobbled U.S. response (Part III). When the USA implements the identification

and certification procedure, the U.S. definition of IUU fishing precludes consideration of alleged widespread illegal fishing by Chinese-flagged vessels in the exclusive economic zones (EEZs) of foreign states. States have a certain degree of flexibility in defining IUU fishing.¹¹ However, this practice demonstrates that the current definition results in an identification and certification procedure that is inconsistent with U.S. interests and is insufficient to address the USA's global policy objectives and responsibilities. The lessons learned should promote U.S. legislative reform and equally assist other market states in designing unilateral measures that properly address a global common interest.

The *2019 Report to Congress* also raises concerns with IUU fishing by stateless vessels with the "characteristics" of Chinese flagged vessels (Part IV). The identification and certification procedure seeks to address poor governance by foreign states. Given the lack of an attributable flag state for vessels without nationality, state-to-state trade measures targeting flag states should exclude IUU fishing by vessels without nationality. Any possible trade measures against a flag state on the basis of the "characteristics" of stateless vessels is inappropriate.

This article concludes with the way forward for the USA and other states adopting unilateral trade measures to combat IUU fishing (Part V). Wider lessons on ensuring transparent and unbiased implementation of market state measures are also raised.

Finally, this article focuses on China because it is the subject of the new "concerns" section of the *2019 Report to Congress*. An independent *IUU Fishing Index* also ranked China as the worst performing flag state in 2019 (excluding landlocked states).¹² But, it is not the objective of this paper to address the factual basis of NOAA's concerns, nor the Chinese response. The arguments below concern the appropriate substantive design of trade measures. These design arguments do not affect the market states' procedural discretion in implementation, nor suggest China must be identified.

II. Existing Tools: U.S. Identification and Certification of States Engaged in IUU Fishing¹³

Through the *High Seas Driftnet Fisheries Enforcement Act*¹⁴ and the *High Seas Driftnet Fishing Moratorium Protection Act*¹⁵ the USA has given itself a legal tool to address foreign states or fishing entities that engage in IUU fishing.¹⁶ This mechanism involves three steps.

First, having collected and analyzed data from various sources, the USA will identify foreign states "whose vessels engaged in illegal, unreported, or unregulated fishing."¹⁷ States may also be identified for certain violations of RFMO measures to which the USA is a party, or for not effectively regulating IUU fishing in a fishery where no RFMO exists.¹⁸

U.S. legislation sets minimum standards on what should be in the U.S. definition of IUU fishing.¹⁹ Implementing regulation then defines IUU fishing:

Illegal, unreported, or unregulated (IUU) fishing means:

(1) In the case of parties to an international fishery management agreement to which the United States is a party, fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, bycatch reduction requirements, shark conservation measures, and data reporting;

(2) In the case of non-parties to an international fishery management agreement to which the United States is a party, fishing activities that would undermine the conservation of the resources managed under that agreement;

(3) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures, or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(4) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.

(5) Fishing activities by foreign flagged vessels in U.S. waters without authorization of the United States.²⁰

The U.S definition delineates the scope of identification and thus the U.S procedure and trade measures. This definition differs from the international definition found in the IPOA-IUU. The IPOA-IUU does not provide a universally accepted legal definition of IUU fishing, but it does provide an “authoritative description of the types of activities that states wish to legally constrain.”²¹ IUU fishing is defined as:

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying

the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.²²

For example, the U.S. paragraph 4 on unregulated fishing activities that impact vulnerable marine ecosystems is arguably broader in some respects than paragraph 3.3.2 of the IPOA-IUU. In the words of one objecting state, it goes beyond internationally agreed binding standards and a failure to meet non-binding standards found in UNGA resolutions or FAO guidelines should not be defined as IUU fishing.²³ This author does not take a position on that debate, but it does highlight the differences of opinion on whether an activity is conducted “in a manner inconsistent with State responsibilities”—an explicit requirement under the IPOA-IUU definition but not the U.S. definition. For proponents of treating some unregulated fishing as similar to illegal fishing for the purposes of imposing measures, that requirement is a necessity of the IUU definition.²⁴ For others,²⁵ imposing U.S. standards without any reference to flag state responsibilities would likely be circumspect as supporting an assertion to high seas fishing denied to foreign states.

There are two relevant points for this paper on which the U.S. definition of IUU fishing is narrower than the international definition. First, the conduct of vessels without nationality is not included. As NOAA points out, the international definition may, for example, be used to identify vessels engaged in IUU fishing that should be denied port entry under the *Port State Measures Agreement*²⁶ and U.S. law.²⁷ That would include the conduct of vessels without nationality. But these vessels would be inappropriate to include in any definition of IUU fishing used to identify responsible flag states. Vessels without nationality are by definition lacking in the “genuine link” required to hold any flag state accountable.²⁸ This demonstrates that the definition of IUU fishing in domestic law need not be identical to the international definition.

Second, the U.S. definition includes illegal fishing activities in waters under the jurisdiction of the USA (para. 5), but does not, in general, include illegal fishing in the waters under the jurisdiction of a foreign state (IPOA-IUU, para. 3.1.1). This also excludes fishing activities that are unreported or misreported to foreign coastal states (IPOA-IUU, para. 3.2.1), which for convenience is treated by this article as a form of illegal fishing.²⁹

Therefore, by design, the U.S. identification procedure can only consider illegal fishing in foreign EEZs if that conduct is also in violation of (U.S., para. 1; IPOA-IUU, paras. 3.1.2–3.1.3, 3.2.2)—or undermines the effectiveness of (U.S., para. 2; IPOA-IUU, para. 3.3.1)—conservation and management measures (CMMs) adopted by an RFMO to which the USA is a party.³⁰ In light of the *2019 Report to Congress*, this paper will return to the topic of whether it remains appropriate to exclude illegal fishing in the waters under the jurisdiction of a foreign state (Part III) or vessels

without nationality (Part IV) from a definition of IUU fishing that “establishes a process to identify and certify nations [...] to promote sustainable fishing activities by their vessels.”³¹

In short, the U.S. definition of IUU fishing is limited to fishing activities that directly infringe upon U.S. fisheries interests, apart from activities that impact vulnerable marine ecosystems (VMEs) located outside an RFMO area. Foreign flag states undermining sustainable fisheries globally, in fisheries in which the USA does not have a stake, cannot be identified—with the exception of deep-sea fishing shown to impact VMEs.

Following identification, the second stage involves notification and consultation of the identified state. The purpose is to encourage the state “to take the appropriate corrective action.”³²

The third and final stage involves U.S. certification of whether the foreign state has taken sufficient corrective action to address the IUU fishing activities.³³ The next *Report to Congress* after identification should include this certification; positive for states that address the IUU fishing activities, negative for those which cannot provide sufficient evidence of actions taken. If a certification decision cannot be reached in time, a discretionary shipment-by-shipment market entry procedure could apply to fish or fish products from the vessels of the identified but uncertified state.³⁴

When a state receives a negative certification, its flagged-vessels and the state’s catch and fishery products may be subject to U.S. restrictions on importation³⁵ and the denial of port entry or other port privileges.³⁶ Additional economic sanctions may be imposed if the previous measures prove unsuccessful, or the targeted state retaliates.³⁷ Additional economic sanctions may “prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization [...] or the multilateral trade agreements.”³⁸

By denying a foreign state market access for its fish or fish products, or ports access for fishing vessels flying its flag, the USA hopes to persuade the foreign state to adopt reform and to exercise effective flag state jurisdiction. The USA has, in principle, the right to exercise jurisdiction over foreign vessels or products seeking access to American ports or the American market.³⁹ Furthermore, if the USA limits itself to exercising its own international law rights, in a manner consistent with its other obligations under international law, these measures are an exercise of retorsion and not countermeasures.⁴⁰ As an internationally lawful—but unfriendly—act, retorsion is distinguishable from countermeasures by the fact retorsion does not require any prior violation of international law by the targeted state.⁴¹

A clear legal basis and the lack of any need to demonstrate the foreign state violated international law would provide the U.S. with considerable discretion in which states it identifies and the process or threshold it uses for identification. Hence, the USA may use a broader definition of IUU fishing for its identification and certification procedure. Defining deep-sea fishing that impacts VMEs as IUU fishing only imposes stricter conservation standards for fishery products exported to the U.S.

market, or for fishing vessels visiting U.S. ports. It does not define IUU fishing for the purposes of any extraterritorial regulation,⁴² nor impose any countermeasures that would require demonstrating the flag state has first violated international law.

Questions of legality may however arise upon whether these rights are implemented in a manner consistent with the USA's other obligations under international law, notably limitations in international trade law. Similar port state and market state measures have been challenged under the *General Agreement on Trade and Tariffs* (GATT).⁴³ Of particular contention are the requirements in the chapeau to Article XX, whereby a measure must not be unduly restrictive on trade and must not unjustifiably discriminate against GATT parties. World Trade Organization (WTO) law appears to allow considerable space for unilateral trade measures combatting IUU fishing, if properly designed and implemented.⁴⁴

The USA implements other comparable identification and certification procedures to address other global common interests. These may overlap with the IUU fishing identification procedure. For example, the highly destructive nature of large-scale pelagic driftnet fishing is recognized by the international community.⁴⁵ The proactive response of the USA, including its unilateral trade measures, played no small part in building multilateral consensus and giving effect to the global moratorium found in non-binding UNGA resolutions.⁴⁶ States "whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation" may therefore be identified.⁴⁷ Again, the applicable fish and products from that state may be subject to import prohibitions or greater documentation requirements. The fishing vessels of identified states are denied port entry or other port privileges. Additional economic sanctions are again possible.⁴⁸

Another comparable procedure addresses the bycatch of protected living marine resources (PLMR).⁴⁹ This includes very specific requirements for reviewing foreign laws, such as "in the case of pelagic longline fishing, includes mandatory use of circle hooks."⁵⁰ It is interesting to note the *2019 Report to Congress* also highlights the possible expansion of this procedure to address seabird conservation as a "global concern."⁵¹ In the case of special interests such as shark conservation, identification by the USA may actually occur under the procedure for IUU fishing, PLMR or an additional high seas shark conservation comparability procedure.⁵²

Finally, in practice the USA has rarely resorted to imposing measures because foreign states are generally given a positive certification in the *Report to Congress* following identification for IUU fishing. An exception occurred in 2017 when Mexico received a negative certification for IUU fishing (U.S. definition, paras. 3 and 5).⁵³ Mexican-flagged vessels fishing in the Gulf of Mexico were subject to denial of U.S. port access and services.⁵⁴ An earlier case involving Italian large-scale driftnet fishing vessels resulted in Italy being identified, but an agreement on measures necessary "to effect the immediate termination of Italian large-scale high seas driftnet fishing" resulted in trade sanctions being avoided.⁵⁵ From 1996 to 2015, Italian exports of applicable fish and fish products to the USA were nonetheless subject to additional documentation requirements.⁵⁶ Turning to previous U.S. practice on China, the *2009 Report to Congress* identified China as having vessels engaged in IUU fishing activ-

ities.⁵⁷ As China took appropriate corrective measures, it was given a positive certification in the *2011 Report to Congress*.⁵⁸

III. Existing Gaps: States Having Vessels Engaged in Illegal Fishing in Foreign EEZs

The *2019 Report to Congress* is the first occasion in which NOAA has included a section highlighting allegations of IUU fishing by the vessels of one state which do *not* fall within the U.S. definition of IUU fishing. The report summarizes alleged illegal fishing and related activities by Chinese-flagged vessels in the EEZs of Argentina, Senegal, Guinea, Sierra Leone, Guinea Bissau, Vanuatu, Micronesia, Ecuador and Peru. NOAA's research raised further examples indicating "a possible pervasive problem from Chinese-flagged fishing vessels."⁵⁹ Previous reports included "countries of interest," but these were states that adequately responded to avoid identification and not those responsible for IUU fishing activities excluded from the U.S. definition.⁶⁰

This is also a notable escalation in attention by *Reports to Congress* on illegal fishing in foreign EEZs. Previously, at most the *2013 Report to Congress* made passing references to the activities of Ghanaian-flagged and Korean-flagged vessels in Liberian waters,⁶¹ and the *2009 Report to Congress* raised concerns over activities excluded by "the geographic scope and nature of alleged IUU fishing."⁶² NOAA's increasing interest in China correlates with rising political and economic tensions between the USA and China. But it also correlates with the significant expansion of China's distant water fleet in terms of vessels and their catch, distance and fishing efforts in foreign EEZs.⁶³

The major drawback of some forms of IUU fishing falling outside the identification framework is that the formal procedure and consultations cannot be triggered. In prescribing this geographic limitation in the U.S. definition of IUU fishing, the trade measures, by design, discriminate between foreign states facilitating illegal fishing that directly infringes upon U.S. fisheries interests and foreign states facilitating other illegal fishing. Including U.S. fisheries interests within the design of trade measures, as opposed to NOAA's discretion in the implementation of those trade measures, is distinguishable and results in practices difficult to rationalize on any other basis. Comparable EU practice does not discriminate between illegal fishing in its design of trade measures, but still retains EU discretion in where it focuses its attention for implementation.⁶⁴ EU fisheries interests could be a factor for consideration during implementation.

A comparison between China and Korea in the *2019 Report to Congress* is illustrative of this disconnect between NOAA's IUU fishing concerns and the current design of trade measures purportedly "to promote sustainable fishing activities by their vessels."⁶⁵ NOAA's significant concerns with China's control of a large number of vessels illegally operating across a large number of maritime zones (IPOA-IUU, para. 3.1.1) is prohibited from being considered for identification. And yet, Korea is identified

because of NOAA's relatively minor concerns with the adequacy of Korean sanctions applied against two vessels (IPOA-IUU, para. 3.1.2; U.S. definition para. 1).⁶⁶ International law does not dictate that state-to-state trade measures must combat all forms of IUU fishing. Nonetheless this article will now argue that this discrimination in the design of trade measures between states facilitating different forms of illegal fishing does not serve the interests of the USA or the international community.

Reform is possible as the USA is not prohibited by international law from using state-to-state trade measures to address states facilitating illegal fishing in foreign EEZs. Indeed, Vietnam was notified under the EU's non-cooperating states procedure for, among other reasons, not controlling its vessels illegally fishing in foreign EEZs.⁶⁷ The same can be said of U.S. domestic legislation, whereby the *Moratorium Protection Act* does not prohibit NOAA from defining illegal fishing in foreign EEZs as IUU fishing for the purposes of identification and certification.⁶⁸

In (re)designing trade measures, it was noted that the domestic definition of IUU fishing is flexible (Part II). However, in using a holistic definition as the starting point envisaged by the IPOA-IUU,⁶⁹ states should then avoid significant differences in definition without reason. States should be moving toward greater specificity on the activities that constitute IUU fishing. Any unreasoned exception for an entire form of IUU fishing further risks a fragmented and ineffective global response to IUU fishing.⁷⁰ In particular, exceptions that are inconsistent with the recognized threats of IUU fishing—including in non-U.S. EEZs—will diminish the genuine and rationale link between the identification and certification procedure and its objectives.⁷¹ This disconnect can result in *prima facie* arbitrary and unjustified discrimination, as highlighted in the 2019 China/Korea example.

More generally, Swan argues that ensuring consistency in defining basic terms such as IUU fishing is one objective of domestic fisheries legislation.⁷² Departures from consistency in basic terminology is discouraged because this may undermine wider compliance with—and enforcement of—fisheries conservation and management measures. The USA could hypothetically persuade all flag states to not facilitate IUU fishing as currently defined in U.S. law. However, this could result in illegal fishing under flags of non-compliance simply migrating to waters under the jurisdiction of foreign states, safe in the knowledge that identification and trade measures are inapplicable. Rather than assisting those developing states without the necessary resources and infrastructure to protect their waters from foreign illegal fishing,⁷³ the current design of U.S. trade measures could perversely exacerbate their struggle.⁷⁴

The question therefore becomes whether there are justified reasons for this significant divergence in the definition of IUU fishing when adopting state-to-state trade measures? For example, reasoning is apparent in the decision to exclude, as a basis for identification, non-compliance with CMMs of RFMOs to which the USA is not a party. From the perspective of U.S. interests, "it could result in a nation's identification for violations of international measures to which the United States is not bound, and was not involved in developing."⁷⁵ That reasoning follows international practice recognizing that a state is not necessarily bound by the measures of such RFMOs,⁷⁶ although certain states may still be bound via the *UN Fish Stocks*

Agreement (including the USA).⁷⁷ In terms of international interests, GATT may otherwise raise concerns of discriminatory restrictions being applied to the foreign state's access to a fishery that the USA does not impose on itself.⁷⁸

These concerns do not arise in respect of the flag states' obligations on illegal fishing in foreign EEZs. The coastal state's law provides the conservation and management measures binding upon all vessels conducting fishing activities in the EEZ, regardless of flag state.⁷⁹ In turn, both the *SRFC Advisory Opinion* and the *South China Sea Award* held that UNCLOS imposes on flag states a due diligence obligation to ensure its vessels are not illegally fishing in a foreign state's EEZ.⁸⁰ Soft law instruments support this conclusion,⁸¹ and EU notifications under the non-cooperating states procedure interpret the flag state's obligation as customary international law.⁸² Within the IPOA-IUU definition, para. 3.1.1 is the most well-defined and universally accepted form of IUU fishing, including multilaterally agreed obligations on the flag state. The U.S. definition thus excludes trade measures building on the clearest case of a flag state not meeting established international obligations.⁸³

This also undermines further U.S. objectives, namely, to remain a global leader in sustainable fisheries where combatting IUU fishing is a global threat requiring coordinated global action.⁸⁴ As a key market state in "the exploitation of fisheries products globally,"⁸⁵ the USA recognizes it has a responsibility to combat IUU fishing. Other large market states, including the EU, share this responsibility to not allow their markets to support IUU fishing.⁸⁶ The role of market states in international fisheries law is in a state of flux, so market state leadership on state-to-state trade measures is first and foremost gained through their appropriate design. The *2019 Report to Congress* is further evidence that the current identification procedure unnecessarily excludes a potential global threat to sustainable fisheries.⁸⁷ A design that should not be followed by other market states.

Furthermore, it is generally accepted that environmental trade measures are not purely altruistic but serve domestic economic interests such as protecting local businesses and consumers.⁸⁸ This is not inherently wrong. Flag states also conduct distant water fishing for geostrategic reasons unconnected to their economic or social fisheries interests.⁸⁹

However, limiting trade measures to IUU fishing activities that directly infringe U.S. fisheries interests does not necessarily protect the domestic market or consumers. For the U.S. fishing industry, foreign vessels may gain an unfair advantage by operating under flag states unwilling or unable to enforce international fisheries conservation and management measures.⁹⁰ The current U.S. definition excludes using trade measures to address the unfair advantages provided by flag states *unwilling* to enforce legal requirements for fishing in foreign EEZs. By contrast, the more recent *Maritime SAFE Act*⁹¹ provides capacity building to foreign flag states that are *unable* to enforce international fisheries conservation and management measures.⁹² Being based on the IPOA-IUU definition, this includes capacity development on the ability to address illegal fishing in foreign EEZs.⁹³ The current design of U.S. trade measures is comparatively insufficient to level the playing field for the U.S. fishing industry.

NOAA is aware that this fundamental gap in the design of U.S. trade measures arises from the domestic definition of IUU fishing in NOAA's implementing regulation and not the *Moratorium Protection Act*.⁹⁴ In this author's opinion, questions of where unilateral action and resources should focus is a question best left to the implementation of trade measures as opposed to their design. The *2019 Report to Congress* suggests that NOAA agrees. NOAA intends to redesign the identification and certification procedure to include the flag state responsibilities for vessels illegally fishing in the EEZ of foreign states:

NOAA will undertake a regulatory action to broaden, consistent with the statute, its regulatory definition of IUU fishing for the purposes of identification under the MPA to include situations where there is a clear pattern of vessels flagged to a nation conducting fishing activities in the EEZ of other nations without authorization of the respective coastal state. This will enable us, in future reports to Congress, to identify any nation that meets those criteria.⁹⁵

An analysis of previous *Reports to Congress* and subsequent domestic amendments suggest that legislative reforms do actually occur after gaps are identified by NOAA's *Reports to Congress*. Early *Reports to Congress* included subsections on "other" information. These noted a state's non-compliance with RFMO reporting requirements, but also that this was not used for identification.⁹⁶ This was because U.S. law was unclear upon whether such non-compliance could form the basis of identification "in the absence of some linkage to the activity of vessels."⁹⁷ In 2013, NOAA clarified its position by opting for the broader interpretation,⁹⁸ followed by amendments in 2015 explicitly providing for the identification of states on the basis of their own acts or omissions.⁹⁹

Other limitations to the identification procedure have also been addressed once they came to light. In 2015, the years of practice reviewed for identification was expanded from two to three years.¹⁰⁰ The possibility of identifying a fishing entity was also added.¹⁰¹ Finally, in 2016, the number of IUU fishing vessels required for identification was dropped to one.¹⁰²

Until the U.S. definition is reformed, NOAA's concerns with China's flag state jurisdiction will still be subject to follow-up engagement and analysis by NOAA:

NOAA will engage with China to seek information on its efforts to exercise responsible flag state control over its distant water fishing vessels and to confirm that it is taking the necessary steps to ensure compliance by its fleet. We will also continue to take steps to ensure that the United States is not importing seafood derived from this type of IUU fishing activity.¹⁰³

Thus, NOAA's reporting on its issues with Chinese-flagged vessels also represents a possible willingness to address a major fishing state subject to significant IUU fishing concerns. In international fisheries law this can only be a welcome development. A repeat criticism of the EU's comparable non-cooperating states procedure has been the uneven distribution of its identifications when compared to the distribution of IUU fishing practices.¹⁰⁴ Among others, Odom argues "there is significant commonality between the nations who ranked poorly in *IUU Fishing Index* and the

nations that have received yellow and red cards,” but the lack of yellow cards for “big offenders” (China, Japan or Russia) could demonstrate systemic discrimination.¹⁰⁵ The USA appears here more willing to identify major fishing states, but only time will tell if the USA expands its very limited negative certification practice and the consequences therewith. Ecuador has been identified in 2011, 2013, 2015, 2017, and 2019, yet never negatively certified. The lasting impact of identifications alone, without negative certifications in practice, is therefore questionable. Until then, it is even less clear what “steps” will be taken regarding non-identified China.¹⁰⁶

IV. Existing Gaps: Vessels Without Nationality Engaged in IUU Fishing

The *2019 Report to Congress* also highlights many cases of IUU fishing by stateless vessels (vessels without nationality) “that have characteristics of Chinese registration but which China has denied are Chinese-flagged vessels.”¹⁰⁷ Given the significant number of stateless “Chinese characteristic” vessels on the North Pacific Fisheries Commission (NPFC) *IUU Vessel List*,¹⁰⁸ this raises the question whether it remains suitable that the identification and certification scheme cannot address the activities of vessels without nationality.

As noted above (Part II), the conduct of vessels without nationality is not normally attributable to a flag state. The fact that this practice is included in a section on “China’s practices” may demonstrate experimentation with a broader interpretation of the “genuine link” and thereby knock-on effects for the breadth of vessels covered by a flag state’s due diligence obligation.¹⁰⁹ This interpretation would include, in addition to the state’s formal response, the weighing of the “characteristics” of registration. This could prevent states using ambiguities in the legal status of a vessel to raise uncertainties in the applicable principles of international law.¹¹⁰ For example, a state may be deterred from interdicting fishing vessels on the high seas under Article 110(d) of UNCLOS if it is unsure whether the vessel is without nationality. Compensation is due if suspicions are unfounded.¹¹¹ If political tensions with China exist, the possibility of further dispute may discourage interdiction unless Article 110(d) clearly applies.

However, a very solid counter argument is that any subjective element on whether “characteristics” are sufficient to raise flag state obligations is also open to misuse. For example, the lack of transparency in identification thresholds under the EU’s non-cooperating states procedure has resulted in uncertainty as to whether the EU actually goes beyond international standards, and its stated objectives thereof.¹¹²

The NPFC Convention Area concerns the high seas. Therefore, only the failure to fulfill the jurisdictional duties of port states or states of nationality¹¹³ could facilitate vessels without nationality conducting IUU fishing therein. A more readily available response by the USA would be to take enforcement action directly against the vessels without nationality.¹¹⁴

If NOAA was set on using the identification procedure it should look beyond

identifying a flag state responsible, instead focusing on “actions of nation” that violate and undermine CMMs to which the USA is party.¹¹⁵ If the relevant RFMO has a CMM on the control of nationals, a state of nationality could be identified if it failed to investigate or take appropriate action against a national reportedly engaged in IUU fishing. This has never been the basis of identification, although it has been discussed by NOAA in the cases of Korea, Spain and Russia.¹¹⁶

In contrast, the EU non-cooperating states procedure would be more readily applicable. The EU procedure reviews states fulfilling their responsibilities as flag states, coastal states, port states and market states.¹¹⁷ The EU had developed extensive practice on its interpretation of port states duties in international fisheries law and has not hesitated in notifying states of possible EU trade measures if these duties are not fulfilled.¹¹⁸ Concerning China, it is an NPFC member and denies these listed vessels are Chinese flagged vessels. Apart from allowing port entry for inspection or other enforcement action, China’s port state duties include an obligation under international law and the *NPFC Convention* to deny port entry to these vessels—regardless of the Chinese homeports painted on the vessels’ hulls.¹¹⁹ Proactive states are best monitoring and assisting China in meeting its clearer port state obligations.

V. Conclusion

The U.S. identification and certification procedure principally aims to address one of several driving forces of global IUU fishing, namely poor governance by flag states. Until international cooperation is fully forthcoming,¹²⁰ there will be a place for unilateral trade measures by states concerned that non-compliant or non-cooperating states are undermining their interests, or those of the international community.¹²¹

The *2019 Report to Congress* represents an invaluable lesson to all states on the importance of how IUU fishing is defined when designing state-to-state trade measures. A number of benefits arise from following the international definition of IUU fishing, but states are not bound to do so.

Designing state-to-state trade measures to exclude flag states facilitating illegal fishing in foreign EEZs was seen as unnecessary and inconsistent with international and national interests. From the international perspective, it excludes the most well-defined and universally accepted form of IUU fishing, which is also subject to multilaterally agreed flag state obligations. If unilateral trade measures are building on the primary responsibility of flag states,¹²² they should first and foremost apply here. Domestically, this exclusion undermines U.S. “global leadership” and fails to protect the U.S. market and operators from the unfair advantages provided to foreign operators illegally fishing in foreign EEZs. The 2019 concerns with China highlight that this limitation should be discouraged and reform is necessary.

If one takes a broader perspective, the subsequent *Maritime SAFE Act* states U.S policy as including “develop[ing] holistic diplomatic, military, law enforcement, economic, and capacity-building tools to counter IUU fishing [as defined in IPOA-

IUU].¹²³ On law enforcement, the *Lacey Act* punishes, among others, persons importing into the USA the fisheries catch or products resulting from illegal fishing in foreign EEZs.¹²⁴ On economic tools, the *Seafood Import Monitoring Program* progresses toward closing the U.S. market to fish or products resulting from IUU fishing, including illegal fishing in foreign EEZs.¹²⁵ Now, these measures address the personal economic advantages of IUU fishing and not poor flag state governance. Yet they do reiterate the anomalous nature of narrowly designing trade measures within an IUU fishing policy and toolbox which endeavors to be integrated and holistic.¹²⁶

In contrast, the exclusion of vessels without nationality from the U.S. definition of IUU fishing rightly reflects the lack of any flag state responsible for exercising jurisdiction and thus possible U.S. identification. The *2019 Report to Congress* controversially raises attribution on the basis of a vessel's "characteristics" similar to a flag state's vessels. This carries inherent risks of abuse and existing responses in international law are more appropriate. Trade measures against flag states facilitating IUU fishing should continue to exclude vessels without nationality, by design.

Moving forward, the USA should amend the identification and certification procedure to include flag states responsible for illegal fishing in foreign EEZs. This will remove an unnecessary and discriminatory distinction in the design of U.S. trade measures combating IUU fishing. If necessary, the USA may then still exercise its discretion in implementation to focus identifications on fishing activities that directly infringe upon U.S. fisheries interests. Any question of identifying flag states for IUU fishing by stateless vessels with "characteristics" of that flag state should be dropped. If the USA wishes to make progress here, it will need to follow the EU's example and design trade measures that address coastal states, port states, market states and states of nationality that are facilitating IUU fishing.

For the EU moving forward, the non-cooperating states procedure follows the IPOA-IUU definition of IUU fishing. The critiques of bias or discrimination in EU trade measures therefore result not from design, but implementation.¹²⁷ This is in part due to the initial audits and informal dialogues remaining confidential. Commentators and states only have access to the EU's reasoning in the more limited cases of a foreign state being issued a pre-identification notification ("yellow card"). Perhaps the EU has or is engaging China in confidential dialogue. The lack of transparency on which states are subject to continuing informal dialogues or have implemented reforms necessary to avoid a yellow card therefore increases the perceived discrimination. It would be in the interest of the EU and its partners to follow the transparency evident in the *Reports to Congress*. Similar to NOAA's "concerns," the EU could list its ongoing informal dialogues and omit any substantive details that could jeopardize the process. Informal dialogues that conclude in a yellow card being unnecessary could then be reported in detail similar to NOAA's reporting on states considered but not identified. These minor reforms would greatly improve procedural transparency and shed further light on how states interpret their obligations to combat IUU fishing in international law.

Finally, whether trade measures are substantively and procedurally fit for purpose and whether they should then be implemented against a foreign state are sep-

arate questions. The difficult and potentially controversial task of identifying states—including if this should include China—is left to NOAA.

Notes

1. The author is indebted to Gilles Hosch, Vu Hai Dang, Dita Liliansa and the three reviewers for their insightful comments on an earlier draft. All faults remain that of the author.

2. “Improving International Fisheries Management: 2019 Report to Congress,” NOAA, 2019, <https://www.fisheries.noaa.gov/foreign/international-affairs/identification-iuu-fishing-activities>, accessed March 22, 2020.

3. Pub. L. 104–43, 3 November 1995, as added Pub. L. 109–479, Jan. 12, 2007, 120 Stat. 3630; amended Pub. L. 111–348, Jan. 4, 2011, 124 Stat. 3669; Pub. L. 114–81, Nov. 5, 2015, 129 Stat. 654, 655; Pub. L. 114–327, Dec. 16, 2016, 130 Stat. 1995. A line office of NOAA is responsible for identification and certification (National Marine Fisheries Service). For simplicity this article refers to NOAA or the USA.

4. 16 United States Code [2018] ss. 1826j(d)(3), 1826a(b)(3)(A)(i), 1826a(a)(2)(a).

5. 16 United States Code [2018] s. 1826a(b)(4).

6. Council Regulation (EC) No 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (as amended and consolidated 09/03/2011) OJ L 286/1, 29/10/2008, chap. 6.

7. Stretching back to the 1990s, Linda A. Chaves, “Illegal, Unreported and Unregulated Fishing: WTO Consistent Trade Related Measures to Address IUU Fishing,” in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15–19 May 2000*, FAO, (Rome, FAO Fisheries, 2001), Report No. 666 para. 20; Arron N. Honniball, *Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing* (Dissertation, Utrecht University, 2019), pp. 230–232, <http://dspace.library.uu.nl/handle/1874/375223>, <https://doi.org/10.2139/ssrn.3527434>, accessed March 22, 2020.

8. UNGA, “Transforming Our World: The 2030 Agenda for Sustainable Development,” (2015), A/RES/70/1, Sustainable Development Goals 14.4.

9. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome: FAO, 2001); IUU Regulation, Article 2(2)–(4).

10. NOAA 2019 (n 2), p. 37.

11. Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Brill, 2010), p. 37, <https://doi.org/10.1163/ej.9789004175754.i-341>.

12. Poseidon Aquatic Resource Management and Global Initiative Against Transnational Organized Crime “IUU Fishing Index, Rankings,” <http://www.iuufishingindex.net/ranking>, accessed March 22, 2020; Note, Zhang Chun, “China Targets Distant-Water Criminals with New Fisheries Law,” *Chinadialogue Ocean*, January 21, 2020, <https://chinadialogueocean.net/12714-china-fisheries-law-distant-water-fishing/>, accessed March 22, 2020.

13. Part II substantially revises and expands part 6.2.4 of Honniball, 2019.

14. Pub. L. 102–582, Nov. 2, 1992, 106 Stat. 4901; Pub. L. 109–479, Jan. 12, 2007, 120 Stat. 3632; Pub. L. 114–81, Nov. 5, 2015, 129 Stat. 656.

15. See note 3. All future references to U.S. law in this paper use the codified version, as found in the *United States Code [2018]*, and *United States Code of Federal Regulations [2018]*.

16. Fishing entities (e.g., Chinese Taipei), 16 U.S.C. [2018] s. 1826j(a)(3). Overview of practice until 2015, Gilles Hosch, *Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches* (Geneva: International Centre for Trade and Sustainable Development, 2016), pp. 38–43; discussing advantages and disadvantages of expanding this practice, Katrina Wyman, “Unilateral Steps to End High Seas Fishing,” *Texas A&M Law Review* 6(1) (2018), p. 259.

17. 16 U.S.C. [2018] s. 1826j(a)(1); 50 United States Code of Federal Regulations [2018] s. 300.202.

18. 16 U.S.C. [2018] s. 1826j(a)(2).

19. 16 U.S.C. [2018] s. 1826j(e)(3).

20. 50 CFR [2018] s. 300.201.
21. Seokwoo Lee, Anastasia Telesetsky and Clive Schofield, “Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing?” in *Freedom of Navigation and Globalization* Myron H. Nordquist et al. (Leiden: Brill 2014), pp. 95–96, https://doi.org/10.1163/9789004284081_007.
22. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome: FAO, 2001); IUU Regulation, para. 3; affirmed, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature November 22, 2009, UNTS No 54133 (entered into force June 5, 2016) Article 1(e). Note the caveat in IPOA-IUU, para. 3.4.
23. NOAA, “High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures to Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources,” *Federal Register* 76(8) (2011), p. 2017.
24. Jens T. Theilen, “What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing,” *The International Journal of Marine and Coastal Law* 28(3) (2013), pp. 542–543, <https://doi.org/10.1163/15718085-12341284>; Osvaldo Urrutia, “Combating Unregulated Fishing Through Unilateral Trade Measures: A Time for Change in International Fisheries Law?” *Victoria University of Wellington Law Review* 49(4) (2018), <https://doi.org/10.26686/vuwlr.v49i4.5346>.
25. Andrew Serdy, “Pacta Tertii and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal,” *Ocean Development & International Law* 48(3–4) (2017), pp. 355–356, <https://doi.org/10.1080/00908320.2017.1349525>.
26. PSMA Article 9; NOAA, “High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures to Address Shark Conservation,” *Federal Register* 78(11) (2013), p. 3341.
27. 16 U.S.C. [2018] s. 7402(2), using the IPOA-IUU definition.
28. *United Nations Convention on the Law of the Sea*, opened for signature December 10, 1982, 1833 UNTS 3 (entered into force November 16, 1994) Articles 91(1), 94; M/V “Virginia G,” (Panama/Guinea-Bissau), Judgment [2014] ITLOS 19, ITLOS Reports 2014 4 [110–113].
29. Theilen 2013, p. 541.
30. E.g., Taiwan and its vessel fishing in the Marshall Islands’ EEZ in violation of a WCPFC CMM; U.S. Department of Commerce, *Implementation of Title IV of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006: Biennial Report to Congress* (Washington, D.C.: U.S. Department of Commerce, 2011), p. 107.
31. NOAA 2013 (n 26), p. 3341.
32. 16 U.S.C. [2018] ss. 1826j(b)–(c); 50 CFR [2018] ss. 300.202(b)–(c).
33. 16 U.S.C. [2018] s. 1826j(d); 50 CFR [2018] s. 300.202(d).
34. 50 CFR [2018] s. 300.207.
35. 16 U.S.C. [2018] ss. 1826j(d)(3), 1826a(b)(3)(A)(i).
36. 16 U.S.C. [2018] s. 1826a(a)(2)(a).
37. 16 U.S.C. [2018] s. 1826a(b)(4)(A).
38. 16 U.S.C. [2018] s. 1978; NOAA 2013 (n 26), p. 3340.
39. Most literature equates the denial of a privilege that is enforced in the territory of the port state or market state as territorial prescriptive jurisdiction, period. As conditions of extra-territorial conduct are often imposed, recent PhDs challenge this assumption for both port states and market states and offer alternative basis; Honniball 2019, pp. 71–88; Eva Romée van der Marel, *Evaluating Market Conditionality in Fisheries: Interactional Law and Global Administration* (Dissertation, University of Tromsø, 2020), pp. 271–281.
40. Thomas Giegerich, “Retorsion,” in *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2011), <https://doi.org/10.1093/law:epil/9780199231690/e983>.
41. International Law Commission, “Responsibility of States for Internationally Wrongful Acts,” United Nations, 2001, UN Doc A/RES/56/83 (Annex) Article 49.
42. See the distinction between regulation and import standards raised in discussions on another comparable U.S. trade measure; NOAA, “Fish and Fish Product Import Provisions of the Marine Mammal Protection Act,” *Federal Register* 81(157) (2016), p. 54397.
43. General Agreement on Tariffs and Trade, October 30, 1947, 55 UNTS 308 (entered into force January 1, 1948); *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body* (1998) WTO DSB DS58, WT/DS58/AB/R; *Chile—Measures Affecting*

the Transit and Importing of Swordfish, Request for the Establishment of a Panel by the European Communities (2000) WTO DSB DS193, 00–4761; *European Union—Measures on Atlanto-Scandian Herring, Request for the Establishment of a Panel by Denmark in Respect of the Faroe Islands* (2014) WTO DSB DS469, 14-0096.

44. Margaret A. Young, “International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing,” *Marine Policy* 69 (2016), p. 209, <https://doi.org/10.1016/j.marpol.2016.01.025>; Robin Churchill, “International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing,” in *Strengthening International Fisheries Law in an Era of Changing Oceans*, eds. Richard Caddell and Erik J Molenaar (Oxford: Hart, 2019), <https://doi.org/10.5040/9781509923373.ch-014>.

45. 16 U.S.C. [2018] ss. 1826(b)(5)–(6).

46. Donald R. Rothwell, “The General Assembly Ban on Driftnet Fishing,” in *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: OUP 2000), <https://dx.doi.org/10.1093/acprof:oso/9780199270989.003.0006>.

47. 16 U.S.C. [2018] s. 1826a.

48. 16 U.S.C. [2018] ss. 1826a–1826b.

49. 16 U.S.C. [2018] s. 1826k; 50 CFR [2018] ss. 300.200–300.209.

50. 16 U.S.C. [2018] s. 1826k(c)(1)(A); 50 CFR [2018] s. 300.203(e)(1)(i); NOAA, 2011 (n 23), p. 2016.

51. NOAA, 2019 (n 2), p. 14.

52. 16 U.S.C. [2018] ss. 1826j(a)(1), 1826k(a)(1), 1826k(a)(2). For the latter see, 50 CFR [2018] s. 300.204.

53. NOAA, *Improving International Fisheries Management: January 2017 Report to Congress* (2017), p. 29.

54. NOAA, *Notification to Mexican Fishing Vessels Subject to Port Denial Under the High Seas Driftnet Fishing Moratorium Protection Act* (2017).

55. NOAA, *2015 Report of the Secretary of Commerce to the Congress of the United States Concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing* (2015), p. 12.

56. NOAA, “Determination That Italy Is Not a Large-Scale High Seas Driftnet Nation,” *Federal Register* 80(112) (2015), p. 33245.

57. U.S. Department of Commerce, *Implementation of Title IV of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006: Biennial Report to Congress 2009* (Washington, D.C.: U.S. Department of Commerce, 2009), pp. 94–96.

58. U.S. Department of Commerce 2011 (n 30), pp. 84–86.

59. NOAA 2019 (n 2), pp. 37–38.

60. NOAA, *Improving International Fisheries Management: February 2015 Report to Congress* (2015), pp. 30–33; U.S. Department of Commerce 2011 (n 30), pp. 100–109.

61. 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* (2013), pp. 23, 26.

62. U.S. Department of Commerce 2009 (n 57), p. 86.

63. Reniel B. Cabral et al., “Rapid and Lasting Gains from Solving Illegal Fishing,” *Nature Ecology & Evolution* 2(4) (2018), p. 650, pp. 650–651, <https://doi.org/10.1038/s41559-018-0499-1>; Douglas J. McCauley et al., “Wealthy Countries Dominate Industrial Fishing,” *Science Advances* 4(8) (2018), p. 4, <https://doi.org/10.1126/sciadv.aau2161>.

64. IUU Regulation Ch. VI procedural requirements do not impact the EU’s initial selection of third countries.

65. NOAA 2013 (n 26), p. 3341.

66. NOAA 2019 (n 2), pp. 29–30.

67. EU Commission Decision 2017/C 364/03 2017 (OJ C 364, 27/10/2017, P 3–9) paras. 14–19, 42.

68. 16 U.S.C. [2018] s. 1826j(e)(3).

69. FAO, *IPOA-IUU* 2001, paras. 3, 8, 9.3, 16.

70. Lee, Telesetsky and Schofield 2014, pp. 97–98.

71. The significant relationship between the level of illegal fishing and indices of coastal state governance suggest benefits would best be achieved by improving governance in foreign

EEZs. David J. Agnew et al., “Estimating the Worldwide Extent of Illegal Fishing,” *PLOS ONE* 4(1) (2009), p. 4, <https://doi.org/10.1371/journal.pone.0004570>.

72. Judith Swan, “IUU Fishing and Measures to Improve Enforcement and Compliance,” in *The Future of Ocean Governance and Capacity Development*, ed. International Ocean Institute-Canada (Leiden: Brill, 2019), p. 359, https://doi.org/10.1163/9789004380271_060.

73. Chaves 2001, para. 7 where the most egregious examples occur.

74. See IUU fishing’s impacts on coastal communities, assisted by open international markets: U.R. Sumaila et al., “Illicit Trade in Marine Fish Catch and Its Effects on Ecosystems and People Worldwide,” *Science Advances* 6(9) (2020), pp. 1–3, <https://doi.org/10.1126/sciadv.aaz3801>.

75. NOAA 2013 (n 26), p. 3342. The foreign state need not be a member of the RFMO, e.g., Nigeria identification; NOAA 2015 (n 60), p. 18.

76. Most recently, PSMA Article 4(2)–(3).

77. *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*, adopted December 4, 1995, 2167 UNTS 3 (entered into force December 11, 2001) Articles 8 and 17.

78. Serdy 2017, p. 356.

79. UNCLOS Articles 56, 61(1)–(2), 62(4); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* [2015] ITLOS 21, ITLOS Reports 2015 4 [98, 104–106]; *The South China Sea Arbitration (The Republic of Philippines V the People’s Republic of China)*, Award [2016] PCA 2013–19 (Arbitral Tribunal [UNCLOS, Annex VII]) [736–740].

80. UNCLOS Articles 58(3), 62(4), 192–193; *SRFC Advisory Opinion* 2015, paras. 121–129; *South China Sea, Award* 2016, paras. 741–744.

81. FAO, *Code of Conduct for Responsible Fisheries* (Rome, FAO 1995) paras. 7.6.2, 8.1.1., 8.2.2, 8.2.7; FAO, *IPOA-IUU* 2001, paras. 34, 45, 48; FAO, *Voluntary Guidelines for Flag State Performance* (Rome, FAO 2015) paras. 6, 9, 35, 42.

82. Commission Decision 2015/C 324/10 (OJ C 324, 2/10/2015, pp. 17–28) para. 36.

83. U.S. trade measures against the more subjective and ill-defined unregulated fishing, Urrutia 2018, pp. 688–689.

84. “National Ocean Council Committee on Combating IUU Fishing and Seafood Fraud: Accomplishments,” NOAA, January 2017, pp. 1–7, https://www.iuufishing.noaa.gov/Portals/33/2017_NOC%20Accomplishments%20Report.pdf?ver=2017-01-19-144636-010, accessed March 22, 2020.

85. *Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing*, Washington, D.C., September 7, 2011.

86. IUU Regulation preamble [9].

87. Using market dominance to promote sustainable fishing globally would have included fisheries in EEZs. The high seas only accounts for 5–10% of global catch, Sumaila et al., 2020, p. 5.

88. Rothwell 2000, p. 134; Juan He, “Do Unilateral Trade Measures Really Catalyze Multi-lateral Environmental Agreements?” *International Environmental Agreements: Politics, Law and Economics* 19(6) (2019), pp. 584–585, <https://doi.org/10.1007/s10784-019-09453-8>.

89. Enric Sala et al., “The Economics of Fishing the High Seas,” *Science Advances* 4(6) (2018), p. 7, <https://doi.org/10.1126/sciadv.aat2504>.

90. NOAA, *Leveling the Playing Field: NOAA’s Priorities to Combat Global IUU Fishing in 2013*, <https://www.fisheries.noaa.gov/webdam/download/66787749>, accessed March 22, 2020.

91. *National Defense Authorization Act for Fiscal Year 2020*, Pub. L. 116-92, December 20, 2019, Title XXXV, Subtitle C.

92. *Ibid.*, ss. 3532(9) priority flag states, 3552(b)(3) selection criteria, 3542–3546 capacity development.

93. *Ibid.*, s. 3532(6).

94. NOAA 2019 (2), p. 22.

95. *Ibid.*

96. E.g., on China, U.S. Department of Commerce 2009 (n 57), pp. 95–96.

97. *Ibid.*, pp. 83–89.

98. NOAA 2013 (n 26), p. 3338.
99. 16 U.S.C. [2018] s. 1826j(a)(2); NOAA 2019 (n 2), p. 18 identifying Ecuador and Korea on this basis.
100. NOAA 2017 (53), pp. 17–18, 21.
101. U.S. Department of Commerce 2009 (n 57), pp. 83–84; 16 U.S.C. [2018] s. 1826j(a)(3).
102. U.S. Department of Commerce 2009 (n 57), p. 83; NOAA 2019 (n 2), p. 18. Likewise, a flag state may violate its due diligence obligations concerning a single vessel, *SRFC Advisory Opinion* 2015, paras. 146–150.
103. NOAA 2019 (n 2), p. 38.
104. Hosch 2016, pp. 36–38. On the disturbing pursuit of goals other than combating IUU see the examples provided by van der Marel 2020, pp. 185, 202.
105. Jonathan G. Odom, “Europe’s Double Standard for China’s Overfishing,” *EJIL: Talk!* April 16, 2020, <https://www.ejiltalk.org/europes-double-standard-for-chinas-overfishing/>, accessed March 22, 2020.
106. “Nathan Rickard (Trade Counsel to the Southern Shrimp Alliance) Witness Statement to Hearing: Oversight of NOAA’s Report on Illegal, Unreported, and Unregulated Fishing,” Subcommittee on Water, Oceans, and Wildlife (U.S. House of Representatives Committee on Natural Resources), 2019, 1324 LHOB 13, <https://docs.house.gov/meetings/II/III3/20191114/110213/HHRG-116-III3-Wstate-RickardN-20191114.pdf>, accessed March 22, 2020.
107. NOAA 2019 (n 2), p. 38.
108. *Ibid.*, and subsequent practice, *NPFC IUU Vessel List for 2019* (entered into force November 29, 2019), <https://www.npfc.int/system/files/2020-02/NPFC%20IUU%20Vessel%20List%20for%202019.pdf>, accessed March 22, 2020.
109. A topic that continues to resurface as requiring “clarification,” in order to combat IUU fishing and flag states of non-compliance; UNGA, “Resolution 73/125: Sustainable Fisheries [...],” 2018, A/RES/73/125 para. 86.
110. The use of maritime militias equally relies upon legal ambiguities, Rob McLaughlin, “The Law of the Sea, Status and Message Ambiguity,” in *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges*, eds. Donald R. Rothwell and David Letts (London: Routledge, 2019), <https://doi.org/10.4324/9780429021053-8>.
111. UNCLOS Article 110(3).
112. Eva Romée van der Marel, “An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries Under the EU IUU Regulation,” in *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas Under National Jurisdiction and Beyond*, eds. Lawrence Martin, Constantinos Salonidis and Christina Hioureas (Huntington, NY: Juris, 2017); IUU Regulation preamble [30–31], Chapter VI.
113. A state exercising jurisdiction over natural or legal persons independent of the flag state concerned.
114. NPFC, *Conservation and Management Measure on Vessels Without Nationality*, CMM 2016-06 (in force January 16, 2017), paras. 3–4.
115. 16 U.S.C. [2018] s. 1826j(a)(2)(A).
116. NOAA 2013 (n 61), pp. 26, 30, 34.
117. IUU Regulation Article 31(3).
118. Arron N. Honniball, “What’s in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses,” *The International Journal of Marine and Coastal Law* 35(1) (2020), p. 19, <https://doi.org/10.1163/15718085-23341067>.
119. NPFC, *CMM 2017-02 to Establish a List of IUU Vessels* 2017 paras. 24(c), 24(f); *Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean*, February 24, 2012, U.S. Senate Treaty Doc. 113–2 (entered into force, 19 July 2015), Articles 14, 17.
120. Multilateralism is preferred, FAO, *IPOA-IUU* 2001, para. 66.
121. See generally; Gregory Shaffer and Daniel Bodansky, “Transnationalism, Unilateralism and International Law,” *Transnational Environmental Law* 1(1) (2012), p. 31, <https://doi.org/10.1017/S2047102511000033>.
122. FAO, *IPOA-IUU* 2001, para. 9.1.
123. *National Defense Authorization Act for Fiscal Year 2020*, ss 3534, and 3551(c) on a working group’s responsibilities to ensure an integrated response to IUU fishing globally.

124. E.g., Jan Glazewski, “United States V. Bengis: A Victory for Wildlife Law and Lessons for International Fisheries Crime,” *The International Journal of Marine and Coastal Law* 29(1) (2014), p. 173, <https://doi.org/10.1163/15718085-12341302>.

125. Juan He, “From Country-of-Origin Labelling (COOL) to Seafood Import Monitoring Program (SIMP): How Far Can Seafood Traceability Rules Go?” *Marine Policy* 163(96) (2018), p. 166, <https://doi.org/10.1016/j.marpol.2018.08.003>.

126. *Ibid.*, p. 172 also calls for proactive market state measures, aligned with other MSC.

127. The differences of discrimination in form or fact; Honniball 2019, pp. 181–185, 256.

Biographical Statement

Arron N. Honniball is a Research Fellow in the Oceans Law and Policy Team at the Centre for International Law (NUS). He obtained a Bachelor of Laws from University College London and Master of Laws in public international law at Utrecht University. His Utrecht University doctoral thesis (2019) concerned the legal basis and limits of port state jurisdiction. His current research and interests include IUU fishing, freedom of navigation, shipping emissions and international maritime crimes.