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## “Nationals” at Forty: From an Undefined UNCLOS Term to Due Diligence Obligations on the State of Nationality to Combat IUU Fishing

*Arron N. Honniball and Valentin J. Schatz*

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# “Nationals” at Forty: From an Undefined UNCLOS Term to Due Diligence Obligations on the State of Nationality to Combat IUU Fishing

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## I. INTRODUCTION

“One aspect of the [IUU International Plan of Action] that has not received much attention—state control over nationals—merits closer study.”<sup>1</sup>

Almost twenty years since David Balton’s observation, commentators reiterate the potential for States to regulate nationals involved in, or supporting, illegal, unreported, and unregulated (IUU) fishing.<sup>2</sup> Literature and practice have arguably turned their focus to indirectly addressing the involvement in—or support of—IUU fishing through the prescription and prosecution of associated crimes such as corruption, document fraud, tax evasion, money laundering, human trafficking, and drug trafficking.<sup>3</sup> Nonetheless, as a combination of regulatory tools are required to effectively address IUU fishing, the need to directly regulate one’s nationals should not be overlooked.<sup>4</sup> This article analyzes the current state of play in international fisheries law concerning the State of nationality’s role in combating IUU fishing. It begins by establishing a definition of IUU fishing for the purposes of the subsequent analysis. Next, it briefly introduces the jurisdiction of the State of nationality. The larger part of this article is then dedicated to how international fisheries law—as reflected in legal instruments and practice at the global and regional

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1. David Balton, *IUU Fishing and State Control Over Nationals*, in *FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING* 51, 52 (2004).

2. While many touch upon regulating nationals, detailed articles include: Diane Erceg, *Deterring IUU Fishing Through State Control Over Nationals*, 30 *MARINE POLICY* 173 (2006); High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas* (Mar. 2006); GREGORY ROSE & MARTIN TSAMENYI, *UNIVERSALIZING JURISDICTION OVER MARINE LIVING RESOURCES CRIME: A REPORT FOR WWF INTERNATIONAL* (2013); SIMONE VEZ-ZANI, *JURISDICTION IN INTERNATIONAL FISHERIES LAW: EVOLVING TRENDS AND NEW CHALLENGES* 179–96 (2020); Arron N. Honniball, *Engaging Asian States on Combating IUU Fishing: The Curious Case of the State of Nationality in EU Regulation and Practice*, 10 *TRANSNATIONAL ENVIRONMENTAL LAW* 543 (2021).

3. See, e.g., PescaDOLUS, <https://www.pescadolus.org/> (last visited Apr. 11, 2023); INTERPOL, *INTERNATIONAL LAW ENFORCEMENT COOPERATION IN THE FISHERIES SECTOR: A GUIDE FOR LAW ENFORCEMENT PRACTITIONERS* 9–13 (crimes), 16–19 (jurisdictions) (2018); Emma Witbooi et al., *Organized Crime in the Fisheries Sector Threatens a Sustainable Ocean Economy*, 588 *NATURE* 48 (2020).

4. Teresa Fajardo, *To Criminalise or Not to Criminalise IUU Fishing: The EU’s Choice*, *MARINE POLICY* (Oct. 2022), <https://www.sciencedirect.com/journal/marine-policy/vol/144/suppl/C>.

levels—utilizes this jurisdiction to combat natural or legal persons’ involvement in, or support of, IUU fishing. The conclusion summarizes the main trends discerned in this analysis and addresses the advantages and disadvantages of combating IUU fishing through the regulation of nationals.

## II. ILLEGAL, UNREPORTED, AND UNREGULATED (IUU) FISHING

While IUU fishing is a popular term of reference found in various binding and non-binding instruments as well as national laws and policy, it is neither an established legal concept in customary international law nor generally applicable treaty law. Instead, international fisheries law instruments frequently cross-reference the definition of IUU fishing in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU International Plan of Action).<sup>5</sup> The IUU International Plan of Action is a non-binding “comprehensive toolbox, in that it is a full range of tools that are available for use in a number of different situations to combat IUU fishing.”<sup>6</sup> Its detailed definition of IUU fishing is divided into three categories of activity of fishers (illegal fishing, unreported fishing, and unregulated fishing), which—due to space limitations—cannot be discussed here in detail.<sup>7</sup> A broad remit of conduct by fishers may be addressed in applying the IUU International Plan of Action’s definition of IUU fishing and, in practice, the definition is clearly open to differing interpretations and application. This article uses the IUU International Plan of Action’s definition as a reference point for the subsequent analysis and not as an agreed legal concept.

Similarly, this article uses the following definition of the term “supporting IUU fishing”:

any operation in support of, or in preparation for, [IUU] fishing, including the landing, packaging, processing, transshipping or transporting of fish

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5. U.N. Food and Agriculture Organization [FAO], *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, ¶ 3 (2001) [hereinafter IUU International Plan of Action].

6. FAO, *Illegal, Unreported and Unregulated (IUU) Fishing*, <https://www.fao.org/iuu-fishing/international-framework/ipoa-iuu/en/> (last visited Apr. 11, 2023).

7. For detailed discussion, see Jens T. Theilen, *What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing*, 28 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 533 (2013); MERCEDES ROSELLO, IUU FISHING AS A FLAG STATE ACCOUNTABILITY PARADIGM: BETWEEN EFFECTIVENESS AND LEGITIMACY 19–28 (2021).

that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea.<sup>8</sup>

This definition is constructed by combining the definition of “fishing related activities” in the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement)<sup>9</sup> and the IUU International Plan of Action’s definition of IUU fishing. Again, this article’s proposed definition of “supporting IUU fishing” is a reference point for the analysis below and not an agreed legal concept in international fisheries law. Nationals engaged in or supporting IUU fishing should be understood in the context of these definitions for the purposes of this article.

### III. THE STATE OF NATIONALITY IN THE INTERNATIONAL LAW OF JURISDICTION

International fisheries law generally does not directly impose obligations upon fishers or their supporters.<sup>10</sup> When a State wishes to prevent its nationals from being engaged in or supporting IUU fishing, it will do so through the prescription, adjudication, and enforcement of domestic laws. The dominant approach to international law dictates that States must always have a permissive legal basis in international law to exercise jurisdiction.<sup>11</sup> This basis may be found in the permissive grounds of customary international law, a treaty-based provision, or perhaps its *domaine réservé*-based jurisdiction.<sup>12</sup>

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8. Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing art. 1(d), *opened for signature* Nov. 22, 2009, T.I.A.S. 16-605 (entered into force June 5, 2016) [hereinafter Port State Measures Agreement].

9. *See also id.* art. 1(e).

10. There are examples where the validity of this general statement is contested, *see, e.g.*, United Nations Convention on the Law of the Sea art. 62(4), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. *See also infra* notes 70–72 and accompanying text.

11. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2015); Bernard H. Oxman, *Jurisdiction of States*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (last updated Nov. 2007); Ilias Bantekas, *Criminal Jurisdiction of States Under International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE ¶ 11 (last updated Mar. 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1436>.

12. For an overview of State jurisdiction, with port State jurisdiction including *domaine réservé*-based jurisdiction, *see* ARRON HONNIBALL, EXTRATERRITORIAL PORT STATE MEASURES: THE BASIS AND LIMITS OF UNILATERAL PORT STATE JURISDICTION TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2019).

The permissive grounds of customary international law are commonly distinguished into territorial jurisdiction and extraterritorial jurisdiction, the latter of which simply refers to cases where a State relies upon any nexus other than territoriality.<sup>13</sup> Prescription by the State of nationality provides an excellent example of both a wide-reaching and widely accepted claim to exercise extraterritorial jurisdiction. Prescriptive jurisdiction is “the authority of a State to make laws in relation to persons, property, or conduct.”<sup>14</sup>

It is undisputed that a State may regulate its nationals wherever they are found.<sup>15</sup> This variation of nationality jurisdiction is commonly referred to as active personality-based jurisdiction or simply the active personality principle.<sup>16</sup> According to this principle, “[i]nternational law recognizes a state’s jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory.”<sup>17</sup> Nationals include those natural or legal persons<sup>18</sup> enjoying the nationality of the State in question.<sup>19</sup> Domiciles or residents may also be “nationals” for the purposes of exercising active personality jurisdiction.<sup>20</sup> However, nationality is also sometimes used

13. Menno T. Kamminga, *Extraterritoriality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE ¶ 1 (2020) (last updated Sept. 2020), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040>.

14. “Enrica Lexie” Incident (It. v. India), Case No. 2015-28, Award, ¶ 526 (Perm. Ct. Arb. May 21, 2020).

15. On the personal or communal nexus being dominant prior to territoriality, see Cedric Ryngaert & Mark Zoetekouw, *The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era*, in THE NET AND THE NATION STATE: MULTIDISCIPLINARY PERSPECTIVES ON INTERNET GOVERNANCE (Uta Kohl ed., 2017).

16. Bantekas, *supra* note 11, ¶ 13.

17. A.L.I., RESTATEMENT (FOURTH) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 410 (2018) [hereinafter RESTATEMENT].

18. On the “nationality” of legal persons, see Oliver Dörr, *Nationality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE, ¶¶ 24–29 (last updated Aug. 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e852>.

19. See, e.g., Convention on Cooperation in the Northwest Atlantic Fisheries art. 1(m), Oct. 24, 1978, 1135 U.N.T.S. 369 (entered into force Jan. 1, 1979) (a significant amendment entered into force on May 18, 2017) [hereinafter NAFO Convention]; Southern Indian Ocean Fisheries Agreement art. 1(j), July 7, 2006, 2835 U.N.T.S. 409 [hereinafter SIOFA Agreement]; Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean art. 1(k), Nov. 14, 2015, 2899 U.N.T.S. 211 [hereinafter SPRFMO Convention].

20. RESTATEMENT, *supra* note 17, § 410, cmts. (b)–(c). As a right, see Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea art. 1(1), Mar. 2, 1953, 222 U.N.T.S. 77 (entered into force, Oct. 28, 1953) (regulating fishing by “nationals and inhabitants and fishing vessels and boats of the United States of American

to refer to flag State jurisdiction concerning vessels, or State of registration jurisdiction concerning aircraft.<sup>21</sup> To avoid confusion, this article does not include vessels and aircraft when referring to “nationals” or the “State of nationality.” When State practice uses nationality to refer to both cases, this article will explicitly note it during its discussion.

The jurisdictional nexus between a State and its nationals is thus established in the *lex generalis* of customary State jurisdiction. The geographic and thematic scope of this general right to prescriptive jurisdiction is exhaustive. Therefore, the international law of the sea, as the *lex specialis*, simply confirms its existence, most notably by imposing limitations or obligations upon its exercise in specific cases. For example, Article 109(3)(e) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>22</sup> affirms the discretion to prosecute nationals involved in unauthorized high seas broadcasting, including where no other jurisdictional nexus arises.<sup>23</sup> Indeed, treaties predating the first United Nations Conference on the Law of the Sea, such as Article 8 of the 1884 Convention for the Protection of Submarine Telegraph Cables,<sup>24</sup> had long recognized the possibility of active personality-based jurisdiction in a maritime context. Hence, the well-established position of this basis of jurisdiction in customary international law explains the lack of an empowering treaty provision for nationality-based measures in UNCLOS.<sup>25</sup> It would be superfluous. Instead, as will be shown in this article, international fisheries law primarily places limits on the extent of the discretion to govern nationals through a *lex specialis* obligation to exercise active personality-based jurisdiction in combating IUU fishing.

By relying upon the active personality principle, the State of nationality will often be exercising prescriptive jurisdiction concurrently with other

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and of Canada”). As a responsibility, *see* Convention for the Conservation of Southern Bluefin Tuna art. 15, May 10, 1993, 1819 U.N.T.S. 360 (entered into force May 20, 1994) (notification and measures for “operations by nationals, residents, or vessels of any non-Party”).

21. Dörr, *supra* note 18, ¶ 30.

22. UNCLOS, *supra* note 10, art. 109(3)(e).

23. *See, e.g.*, VEZZANI, *supra* note 2, at 181–82.

24. Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884, T.S. 380 (entered into force May 1, 1888).

25. Request for an Advisory Opinion by the Sub-Regional Fisheries Commission [SRFC], Case No. 21, Written Statement of the Caribbean Regional Fisheries Mechanism [CRFM] of Apr. 2, 2015, ITLOS Rep. 2015, ¶ 274.

States exercising jurisdiction—in particular with respect to maritime activities such as fishing.<sup>26</sup> This could include, for example, flag States,<sup>27</sup> coastal States,<sup>28</sup> port States,<sup>29</sup> and market States.<sup>30</sup> This raises the question of the extent to which other bases of prescriptive jurisdiction in the law of the sea might take precedence over and thereby limit active personality-based jurisdiction. Indeed, in certain cases, the law of the sea, as *lex specialis*, may place limitations upon the exercise of the *lex generalis* right to prescriptive jurisdiction over nationals. For example, both the International Tribunal for the Law of the Sea (ITLOS) and an arbitral tribunal have stated that Article 92 of UNCLOS provides for exclusive flag State jurisdiction on the high seas (subject to exceptions expressly provided for in UNCLOS or in other treaties) in terms of both prescriptive and enforcement jurisdiction.<sup>31</sup> Neither of these two tribunals explicitly mentioned nationality-based jurisdiction under the *lex generalis* as a form of prescriptive jurisdiction that is excluded, but likewise appear to have intentionally remained silent on permissibility in the face of nationality-based submissions by parties to the proceedings.<sup>32</sup> However, in light of the broad character of the tribunals’ statements, it is worth clarifying that Article 92 of UNCLOS provides no barrier to exercising active personality-based prescriptive jurisdiction over nationals on foreign vessels.<sup>33</sup> This

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26. VEZZANI, *supra* note 2, at 181.

27. *See, e.g.*, ROSELLO, *supra* note 7.

28. *See, e.g.*, CAMILLE GOODMAN, COASTAL STATE JURISDICTION OVER LIVING RESOURCES IN THE EXCLUSIVE ECONOMIC ZONE (2021).

29. *See, e.g.*, HONNIBALL, *supra* note 12.

30. *See, e.g.*, MARGARET YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW (2011).

31. M/V “Norstar” (Pan. v. It.), Case No. 25, ITLOS Rep. 2018–2019, Judgment ¶¶ 224–25 (Apr. 10, 2019); “*Enrica Lexie*” Incident, *supra* note 14, ¶ 527. For critiques, including from the perspective of nationality, *see* Arron N. Honniball, *Exclusive “Jurisdiction” on the High Seas Revisited: The Diverging Conceptualisation and Application of Article 92 of UNCLOS in the Enrica Lexie Incident Award*, in ASCOMARE YEARBOOK ON THE LAW OF THE SEA 2021: LAW OF THE SEA, INTERPRETATION AND DEFINITIONS 197 (Pierandrea Leucci & Ilaria Vianello eds., 2022).

32. The wording of the two decisions suggests that they refer to prescriptive jurisdiction over a ship rather than those on board. *See* M/V “Norstar”, *supra* note 31, ¶ 225 (“activities conducted by foreign ships” and “activities carried out by foreign ships”); “*Enrica Lexie*” Incident, *supra* note 14, ¶ 527 (“over a ship” and “in respect of such a ship”).

33. VEZZANI, *supra* note 2, at 181; Douglas Guilfoyle, *The High Seas*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 203, 209 (Donald R. Rothwell et al. eds., 2015); Arron N. Honniball, *The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?*, 31 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 499 (2016); Giuliana Lampo, *Jurisdiction Beyond Territorial Sovereignty: Defining the Scope of Exclusive Flag-State Jurisdiction Under*



was witnessed in the pre-UNCLOS *Muscat Dhows* award,<sup>34</sup> and implicit in the “*Enrica Lexie*” *Incident* award, to the extent that the parties to the dispute shall cooperate in the investigation (and prosecution) of nationality-based offenses.<sup>35</sup> That said, the coordination of concurrent titles of jurisdiction among different States poses considerable challenges in the area of international fisheries law.<sup>36</sup>

The same cannot be said, however, of an exercise of active personality-based enforcement jurisdiction. Enforcement jurisdiction in international law refers to “the authority of a State to exercise its power to compel compliance with law.”<sup>37</sup> The law of the sea generally does not grant the State of nationality enforcement rights vis-à-vis foreign vessels—with very limited exceptions such as the extraterritorial right to arrest nationals involved in unauthorized broadcasting on the high seas.<sup>38</sup> Similarly, in exceptional cases, regional international fisheries law recognizes the possibility of granting the State of nationality limited extraterritorial or quasi-territorial functional enforcement jurisdiction, but this is generally not the case.<sup>39</sup> Therefore, enforcement of laws prescribed through active-personality-based jurisdiction is primarily limited to the *lex generalis* of territorial enforcement jurisdiction, or the ad-hoc consent of the flag State and/or the State in whose territory the person is present.<sup>40</sup>

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*Art. 92 UNCLOS*, 82 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 195 (2022).

34. *Muscat Dhows* (Fr./Gr. Brit.), Case No. 1904-01, Award, at 4 (Perm. Ct. Arb. 1905).

35. “*Enrica Lexie*” *Incident*, *supra* note 14, ¶ 209; Codice Penale arts. 110, 575, Regio Decreto 19 Ottobre 1930, n.1398 (It.) (participation in a crime and homicide), <https://www.gazzettaufficiale.it/sommario/codici/codicePenale>; “*Enrica Lexie*” *Incident* (It. v. India), Case No. 2015-28, Order of Oct. 12, 2021, at 2 (order closing the case).

36. *See also* VEZZANI, *supra* note 2 at 196–213.

37. “*Enrica Lexie*” *Incident*, *supra* note 14, ¶ 526.

38. *See* UNCLOS, *supra* note 10, arts. 109(4), 110(1)(c).

39. *See, e.g.*, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 23(5), Sept. 5, 2000, 2275 U.N.T.S. 43 (entered into force June 19, 2004) (“To this end [control of nationals], members of the Commission may enter into agreements with States whose flags such vessels are flying to facilitate such enforcement”); Protocol Amending the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea art. 2(1)(a), Mar. 29, 1979, T.I.A.S. 9855 (entered into force, Oct. 15, 1980) (enforcement “in all Convention waters, against its own nationals and fishing vessels”).

40. RESTATEMENT, *supra* note 17, § 432.

IV. THE STATE OF NATIONALITY IN INTERNATIONAL FISHERIES LAW

Having established that the State of nationality has exhaustive rights of prescriptive jurisdiction and limited rights of enforcement jurisdiction to address IUU fishing, this article now turns to the question of which use, if any, international fisheries law has made of active personality-based jurisdiction. In this respect, the central question is that of “responsibilities” placed upon the State of nationality, which translate into legal obligations to make use of the rights of nationality-based prescriptive and/or enforcement jurisdiction. As the use of active personality-based jurisdiction is clearest when no territorial nexus is available, this article focuses on instruments and provisions of general applicability and those governing fishing activities on the high seas or in foreign exclusive economic zones (EEZs). Global practice in fisheries law includes global binding instruments and global soft-law instruments. The discussion of regional instruments is centered on the practice of regional fisheries management organizations or arrangements. Due to space restrictions, this article does not specifically address bilateral or domestic State practice.<sup>41</sup>

A. *Global Binding Instruments*

This subsection examines the current legal framework provided by UNCLOS and the most significant subsequent fisheries treaties of global application, namely the United Nations 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 (UN Fish Stocks Agreement),<sup>42</sup> the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

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41. See, e.g., VEZZANI, *supra* note 2, at 187–92 (examples of domestic practice). On Spanish practices concerning IUU fishing activities conducted by Spanish nationals and operators, see Gabriela A. Oanta, *The Application of Administrative Sanctions in the Fight Against IUU Fishing: An Assessment of Spanish Practice*, MARINE POLICY (Oct. 2022), <https://www.sciencedirect.com/journal/marine-policy/vol/144/suppl/C>.

42. 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, *opened for signature* Dec. 4, 1995, T.I.A.S. 01-1211, 2167 U.N.T.S. 3 (entered into force Dec. 11, 2001) [hereinafter UN Fish Stocks Agreement].

(Compliance Agreement),<sup>43</sup> and the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement).<sup>44</sup>

## 1. UNCLOS

Obligations in UNCLOS may apply in a particular maritime zone, to a particular function, or be of general application. The following analysis will consecutively address the obligations of the State of nationality in the EEZ (with a focus on Articles 58(3) and 62(4) of UNCLOS) and the high seas (with a focus on Article 117 of UNCLOS). For reasons of space, and because the mentioned provisions from the EEZ and high seas parts of UNCLOS are arguably more relevant and specific, this article will refrain from an in-depth analysis of provisions of general geographical application in Part XII of UNCLOS (specifically Articles 192 and 194(5)), which have also been held to contain relevant obligations of flag States and, implicitly, States of nationality.<sup>45</sup>

### *i. Obligations of the State of Nationality in the EEZ*

Within the EEZ, coastal States exercise sovereign rights over fisheries.<sup>46</sup> These sovereign rights include both prescriptive<sup>47</sup> and enforcement<sup>48</sup> jurisdiction and are thus evidence of a primary responsibility of the coastal State

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43. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, *opened for signature* Nov. 24, 1993, T.I.A.S. 03-424.1, 2221 U.N.T.S. 91 (entered into force Apr. 24, 2003) [hereinafter Compliance Agreement].

44. Port State Measures Agreement, *supra* note 8.

45. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 944–45 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> (“ensuring activities within their jurisdiction and control do not harm the marine environment”); Request for an Advisory Opinion by the Sub-Regional Fisheries Commission, Case No. 21, ITLOS Rep. 2015, ¶ 124 (Apr. 2, 2015) [hereinafter *Sub-Regional Fisheries Commission Advisory Opinion*] (“ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities”).

46. UNCLOS, *supra* note 10, art. 56(1)(a).

47. *Id.* art. 62(4).

48. *Id.* art. 73(1).

to combat IUU fishing in its EEZ.<sup>49</sup> However, this does not, in principle, rule out concurrent prescriptive jurisdiction of flag States or States of nationality.<sup>50</sup> Rather, it has been a matter of contention if and to what extent other States have obligations to take measures to prevent illegal fishing in foreign EEZs by their vessels or nationals. In its *Sub-Regional Fisheries Commission* advisory opinion, ITLOS read specific obligations of flag States to combat IUU fishing into Articles 58(3) and 62(4) of UNCLOS.<sup>51</sup> The arbitral tribunal in the *South China Sea Arbitration* later endorsed the main thrust of this interpretation.<sup>52</sup> While it can be argued that the wording and function of neither of these two provisions indicates the existence of such an obligation,<sup>53</sup> this article—for reasons of space—proceeds on the assumption that at least Article 58(3) of UNCLOS can be interpreted to contain such an obligation.<sup>54</sup>

The question that arises is to what extent do these obligations extend beyond the flag State and also bind the State of nationality? This query is rooted in the fact that UNCLOS uses the term “nationals” without definition in Article 62(4) and other provisions of Part V.<sup>55</sup> Moreover, UNCLOS addresses “States” without further qualification in Article 58(3). The historical origins of the term “nationals” in UNCLOS—particularly where it is employed in Part VII concerning high seas fisheries—point towards a narrow

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49. Valentin J. Schatz, *Combating Illegal Fishing in the Exclusive Economic Zone—Flag State Obligations in the Context of the Primary Responsibility of the Coastal State*, 7 GOETTINGEN JOURNAL OF INTERNATIONAL LAW 383 (2016).

50. *Id.* at 395, 407.

51. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, ¶ 124.

52. *South China Sea Arbitration*, *supra* note 45, ¶¶ 741–44.

53. See, e.g., Valentin J. Schatz, *Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ*, 47 OCEAN DEVELOPMENT & INTERNATIONAL LAW 327, 329–31 (2016); Eur. Parl. and Eur. Comm’n v. Council of the EU, Joined Cases No. C-103/12 and No. C-165/12, Judgment, ¶¶ 62–65, ECLI:EU:C:2014:2400 (Nov. 26, 2014), <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3E1063BA4BB99DA0A77D6B2D15A8FEC2?text=&docid=160110&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2761068>.

54. Schatz, *supra* note 53, at 331 (“it is difficult, but not impossible, to read a moderate supervisory flag state obligation into the wording of Art. 58(3)”; see also Alexander Proelss, *Article 58, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS): A COMMENTARY* ¶ 27 (Alexander Proelss ed., 2017); *South China Sea Arbitration*, *supra* note 45, ¶ 744.

55. UNCLOS, *supra* note 10, arts. 61(5), 62(3), 64(1), 69(4), 70(5), 72(1).

interpretation as including only “vessels” and not natural or juridical persons.<sup>56</sup> However, ITLOS has stated that Articles 58(3) and 62(4) of UNCLOS contained obligations “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.”<sup>57</sup> Therefore, while the relevant question posed to ITLOS concerned flag State obligations, it appears the tribunal did feel the need to partially address possible obligations upon the State of nationality. When defining the flag State’s obligation as one of due diligence, ITLOS also borrowed the language of the IUU International Plan of Action whereby sanctions should be “sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.”<sup>58</sup> Paragraph 21 of the Plan of Action, which inspired the tribunal’s wording, applies to sanctions by both the flag State and State of nationality.<sup>59</sup>

As ITLOS was not requested to provide an opinion on the responsibilities of the State of nationality, it could be expected that it would not explicitly extend its reasoning to the State of nationality. This hesitancy may follow the differences of opinion expressed in the written submission discussing whether the tribunal should elaborate on the obligations of the State of nationality.<sup>60</sup> It is, however, difficult to reach any conclusion other than the expectation that the implied obligation upon the State of nationality quoted above is equally one of conduct (an obligation of due diligence) rather than result.<sup>61</sup> Further support is apparent in several written statements submitted to inform the *Sub-Regional Fisheries Commission* advisory opinion, including by

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56. *See infra* sec. IV(A)(1)(ii).

57. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, ¶ 124.

58. *Id.* ¶ 138; IUU International Plan of Action, *supra* note 5, ¶ 21.

59. *See infra* sec. IV(B)(1).

60. Compare *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Further Amicus Curiae Brief on Behalf of World Wildlife Fund International, with *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Second Written Statement by the European Commission on Behalf of the European Union (beyond the scope of advisory questions posed).

61. For a detailed discussion of the concept of due diligence obligations in the context of flag State obligations vis-à-vis fishing in the EEZ, see Schatz, *supra* note 53, at 335–38. On the application of the concept to nationals under UNCLOS, see, e.g., Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10; UNCLOS, *supra* note 10, arts. 139(1), 153(2)(b).

New Zealand,<sup>62</sup> the UN Secretary-General,<sup>63</sup> the Caribbean Regional Fisheries Mechanism,<sup>64</sup> and the European Union (EU),<sup>65</sup> as well as the amicus brief of the World Wildlife Fund.<sup>66</sup> These submissions all attempt to interpret the broad language of UNCLOS in the light of subsequent practice<sup>67</sup> so as to demonstrate a due diligence obligation upon the State of nationality concerning nationals involved in extraterritorial IUU fishing.

Interestingly, the Philippines has at least interpreted the potential of the *Sub-Regional Fisheries Commission* advisory opinion in a similar manner in its submissions in the *South China Sea Arbitration*.<sup>68</sup> The arbitral tribunal confirmed that Articles 58(3) and 62(4) of UNCLOS impose international legal obligations with respect to the activity of nationals, albeit subsequently focusing on flag State obligations.<sup>69</sup> The arbitral tribunal also somewhat surprisingly interpreted Article 62(4) of UNCLOS as imposing obligations directly “on nationals of other States fishing in the [EEZ] to comply with the laws and regulations of the coastal State.”<sup>70</sup> This explicitly includes private entities, not merely vessels.<sup>71</sup> This latter interpretation of Article 62(4) of

62. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement of New Zealand.

63. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement of the Secretary-General of the United Nations (cross-referencing relevant UN General Assembly resolutions).

64. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Caribbean Regional Fisheries Mechanism Statement, ¶¶ 122, 132, 143, 146, 210.

65. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement by the European Commission on Behalf of the European Union (referring to EU practice governing nationals).

66. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Further Amicus Curiae Brief on Behalf of World Wildlife Fund International, ¶¶ 22–25, 30; *see also Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement of the Republic of Chile (deter reflagging); Written Statement of Thailand (adopting a neutral position).

67. Valentin J. Schatz, *The Contribution of Fisheries Access Agreements to Flag State Responsibility*, 84 MARINE POLICY 313, 313–19 (2017).

68. *South China Sea Arbitration*, *supra* note 45, ¶¶ 112(B)(9), 726.

69. *Id.* ¶¶ 741–43; *but see* ¶¶ 753–57.

70. *Id.* ¶ 739.

71. *Id.* ¶ 740. For a comparable regional instrument imposing obligations on the “operator” of a fishing vessel in the convention area, *see* Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Pacific Ocean, art. 24(3)(b), Annex 3 arts. 1–2, Sept. 4, 2000, 2275 U.N.T.S. 40532 [hereinafter WCPFC Convention]. Only Japan appears to have advanced a comparable interpretation of UNCLOS during the *Sub-Regional Fisheries Commission* advisory opinion proceedings. *See Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement of Japan.

UNCLOS is unpersuasive as the provision is a declaratory statement regarding the binding nature of the coastal State's domestic fisheries law adopted in accordance with UNCLOS, not an obligation on nationals or States.<sup>72</sup>

Overall, in light of the existing jurisprudence, it seems possible to interpret Article 58(3) of UNCLOS, when read in conjunction with Article 62(4) ("nationals"), as a due diligence obligation on "States" having jurisdiction over relevant actors, be it vessels or nationals, to take the necessary measures to ensure that these actors are not engaged in IUU fishing activities.

ii. *Obligations of the State of Nationality in the High Seas*

There are good reasons to believe that the main tenets of the jurisprudence regarding obligations to use nationality-based jurisdiction against IUU fishing in the EEZ are transferable to the regime of high seas fisheries, which operates under a clear extraterritorial (primarily flag State) paradigm.<sup>73</sup> On the high seas, all States have the conditional right for their "nationals" to fish subject to their obligations under UNCLOS and other treaties.<sup>74</sup> Most importantly, Article 117 of UNCLOS obliges all States (as opposed to flag States only<sup>75</sup>) "to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."<sup>76</sup> This obligation to "take" measures includes both the sufficient prescription and enforcement of measures necessary to conserve the living resources of the high seas.<sup>77</sup> Given its wording, this provision undoubtedly lays down an obligation of due diligence similar to that outlined above with respect to the EEZ.

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72. Schatz, *supra* note 53, at 330 (with reference to *Eur. Parl. and Eur. Comm'n v. Council of the EU*, *supra* note 53: "individuals do not in principle enjoy an independent legal position under UNCLOS"); *Sub-Regional Fisheries Commission Advisory Opinion*, *supra* note 45, separate opinion of Paik, J.

73. UNCLOS, *supra* note 10, arts. 87(1)(e), 92(1), 116–20.

74. *Id.* arts. 87(1)(e), 116.

75. Rosemary Rayfuse, *Article 117*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS): A COMMENTARY ¶¶ 13, 22, 34–37 (Alexander Proelss ed., 2017); ROSE & TSAMENYI, *supra* note 2, at 55.

76. UNCLOS, *supra* note 10, art. 117.

77. Rayfuse, *supra* note 75, ¶ 14.

That said, it should be noted that the earlier Convention on High Seas Fishing and Conservation of Living Resources of the High Seas defines nationals as “vessels,”<sup>78</sup> which indicates a similar meaning of the term in its sister treaty, the High Seas Convention.<sup>79</sup> The drafting history of UNCLOS suggests a continuation of this interpretation, with “nationals” exercising the high seas freedom being taken as referring to vessels.<sup>80</sup> The same narrow interpretation of the term “nationals” as “vessels” was traditionally suggested for the duty to take measures governing nationals.<sup>81</sup> However, the removal by UNCLOS of any provision defining “nationals” has left the door open for subsequent practice to further develop the web of States responsible for regulating distant water fisheries.<sup>82</sup> This is perfectly in keeping with UNCLOS as a living instrument.<sup>83</sup>

## 2. UN Fish Stocks Agreement

The UN Fish Stocks Agreement aims to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of UNCLOS, in particular the obligations to cooperate under Articles 63(2) and 64.<sup>84</sup> It

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78. Convention on Fishing and Conservation of the Living Resources of the High Seas art. 14, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966). Nationality-based jurisdiction is nonetheless recognized, Convention on the High Seas art. 11(1), Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

79. Convention on the High Seas, *supra* note 78, art. 2(2); Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 78, art. 1(1).

80. 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 294 (Myron Nordquist et al. eds., 1995); IRINI PAPANICOLOPULU, INTERNATIONAL LAW AND THE PROTECTION OF PEOPLE AT SEA 124–25 (2018).

81. Rayfuse, *supra* note 75, ¶ 34.

82. VEZZANI, *supra* note 2, at 186. The International Union for Conservation of Nature (IUCN) submission to ITLOS focused on questions concerning flag State obligations and thus the drafting history of UNCLOS to demonstrate the duties to regulate “nationals” as at least imposing obligations on the flag State. *See* UNCLOS, *supra* note 10, arts. 62, 64, 116–18). In general, IUCN left open whether “nationals” in UNCLOS might also include “natural and legal persons serving on or owning fishing vessels.” *See Sub-Regional Fisheries Commission Advisory Opinion*, *supra* note 45, Written Statement of the International Union for Conservation of Nature and Natural Resources.

83. *See generally* UNCLOS AS A LIVING TREATY (Jill Barrett & Richard Barnes eds., 2016); ROZEMARIJN J. ROLAND HOLST, CHANGE IN THE LAW OF THE SEA: CONTEXT, MECHANISMS AND PRACTICE (2022).

84. UN Fish Stocks Agreement, *supra* note 42, pmb., art. 2.



does not explicitly address the State of nationality for the purposes of the obligations it places on its States parties.<sup>85</sup> However, Article 7 of the UN Fish Stocks Agreement contains obligations regarding the compatibility of conservation and management measures (CMMs) of coastal States and States “whose nationals fish for such stocks.”<sup>86</sup> While the term “nationals” is undefined, one should note the restrictive interpretative declarations attached to the UN Fish Stocks Agreement by the EU and individually by the EU member States UK, Spain, France, Slovenia, Hungary, and Austria, which “[understand] that the term ‘States whose nationals fish on the high seas’ shall not provide any new grounds for jurisdiction based on the nationality of persons involved in fishing on the high seas rather than on the principle of flag State jurisdiction.”<sup>87</sup>

However, one should note that nationality-based prescriptive jurisdiction—as opposed to enforcement jurisdiction—was, and remains, a well-established jurisdictional nexus applicable also at sea and is, therefore, not “new.” Moreover, more recent interpretations and practice, particularly in the case of IUU fishing, have significantly evolved beyond reliance on flag States for high seas governance. This includes the practice of the EU and its member States who previously proposed these restrictive interpretations.<sup>88</sup> Another example from another region is New Zealand’s statement in the *Sub-Regional Fisheries Commission* advisory opinion, interpreting Article 7 of the UN Fish Stocks Agreement as including the State of nationality.<sup>89</sup> Finally, many delegations at the review and resumed review conferences of the UN

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85. *Id.* art. 10(l). At most, Article 10(l) of the UN Fish Stocks Agreement contains an obligation of States to “ensure the full cooperation of their relevant national agencies and industries” in implementing the recommendations and decisions of the competent regional fisheries management organizations. This industry extends beyond flagged vessels.

86. UN Fish Stocks Agreement, *supra* note 42, art. 7.

87. U.N. Treaty Collection, Status 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, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XI-7&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XI-7&chapter=21&clang=_en) (last visited Apr. 11, 2023).

88. Council Regulation (EC) No. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, arts. 39–40. An uncoordinated post-Brexit UK has both domestically retained IUU Regulation rules and reasserted a restrictive interpretation of the UN Fish Stocks Agreement.

89. *Sub-Regional Fisheries Commission* Advisory Opinion, *supra* note 45, Written Statement of New Zealand, ¶ 34.

Fish Stocks Agreement<sup>90</sup> have called for further action, cooperation, and implementation by States concerning “control over the fishing activities of their nationals and to strengthen domestic and other mechanisms for identifying and deterring nationals and beneficial owners from engaging in [IUU fishing] activities.”<sup>91</sup> This explicitly includes responsibilities for nationals aboard foreign-flagged and stateless vessels.

### 3. Compliance Agreement

The Compliance Agreement aims to further strengthen (primarily) flag State responsibility with respect to high seas fisheries. That said, its preamble reiterates the link between a State’s “right for their nationals to engage in fishing on the high seas” and the “duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”<sup>92</sup> This is explicitly “as reflected” in UNCLOS. The Compliance Agreement should therefore be interpreted in a similar manner, recognizing the duty as applying to, at least, flag States and States of nationality. This broad interpretation is supported by the fact that while “nationals” is again undefined, its use includes contexts that could only refer to persons and thus the State of nationality, such as in the context of reflagging of fishing vessels by nationals.<sup>93</sup> More broadly, other jurisdictions are also encouraged or compelled to undertake measures that would assist the State of nationality in exercising jurisdiction. For example, flag States are obliged to maintain and share records of their

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90. Pursuant to the UN Fish Stocks Agreement, *supra* note 42, art. 36.

91. Rep. of the Resumed Review Conference on 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, ¶¶ 126–28, annex C(5)(a–c), U.N. Doc. A/CONF.210/2016/5 (Aug. 1, 2016); Rep. of the Resumed Review Conference on 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, ¶¶ 42, 90, 93, annex ¶ III(e), U.N. Doc. A/CONF.210/2010/7 (July 27, 2010); Rep. of the Review Conference on 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, ¶ 103, annex ¶¶ A(39), B(43)(j), A/CONF.210/2006/15 (July 5, 2006).

92. Compliance Agreement, *supra* note 43, pmb. l.

93. *Id.* pmb. l. ¶¶ 2, 4. The original draft included a provision to deter reflagging. See Balton, *supra* note 1, at 53.

fishing vessels that include information on the owners and, if possible, operators.<sup>94</sup>

#### 4. Port State Measures Agreement

The Port State Measures Agreement aims “to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures.”<sup>95</sup> It is the first relevant binding instrument at the global level developed after the IUU International Plan of Action. Therefore, the preamble of the Port State Measures Agreement provides the first inclusion of the soft law developments discussed below by explicitly recognizing “that measures to combat [IUU fishing] should build on the primary responsibility of flag States and use all available jurisdiction . . . including . . . measures to ensure that nationals do not support or engage in [IUU fishing].”<sup>96</sup>

The substantive provisions of the Port State Measures Agreement understandably focus on the role of port States and flag States rather than States of nationality. Nonetheless, port States are obliged to collect and disseminate information on the nationality of persons involved in a vessel, thereby encouraging and assisting the exercise of jurisdiction by the State of nationality. For example, before a vessel enters port, the port States shall request information on a foreign vessel’s owner and, if known, its beneficial owner.<sup>97</sup> Then, upon entry of the vessel into port, any port State inspection shall at least include verifying and reporting upon a vessel’s owner and, if possible, the beneficial owner.<sup>98</sup> State parties to the Port State Measures Agreement are then encouraged to share the inspection report with the master’s State of nationality—clearly hoping action will be taken.<sup>99</sup> Given the due diligence obligations under UNCLOS elaborated above, it can be expected that the State of nationality will act to investigate any documented suspicions of IUU fishing and, if confirmed, impose sufficient sanctions to deprive the offenders of any benefits accrued and deter further violations.

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94. Compliance Agreement, *supra* note 43, arts. VI(1)(d), VI(2)(a), VI(9).

95. Port State Measures Agreement, *supra* note 8, art. 2.

96. *Id.* pmbl.

97. *Id.* art. 8(1), annex A.

98. *Id.* arts. 13(1), 14, annex B–C.

99. *Id.* art. 15(a)(ii).

B. *Global Soft Law Instruments*

Non-binding international standards, guidelines, and resolutions (so-called soft law) have played an important role in international fisheries law in the past decades.<sup>100</sup> Among other functions, soft law instruments may provide authoritative interpretations of previous treaties as well as develop generally accepted standards that either build on treaties or may be subsequently incorporated into treaty law.<sup>101</sup> In the present context, the standards and best practices elaborated in soft law instruments may additionally inform the standard of due diligence arguably required from the State of nationality in discharging its obligations under UNCLOS to combat IUU fishing through nationality-based jurisdiction.

1. Code of Conduct for Responsible Fisheries and IUU International Plan of Action

The Code of Conduct for Responsible Fisheries<sup>102</sup> does not mandate the exercise of active personality-based jurisdiction but presupposes the existence of domestic laws governing the master’s and other officers’ operation of a fishing vessel (including “refusal, withdrawal or suspension of authorizations to serve as masters or officers of a fishing vessel”).<sup>103</sup> It is important to note this provision includes the State of nationality because it applies to all vessels regardless of flag State and is a duty of “all” States, not just the flag State.

At the global level, the IUU International Plan of Action, which was adopted by the UN’s Food and Agriculture Organization (FAO) in the framework of the Code of Conduct for Responsible Fisheries, contains the international community’s first and most extensive attempt to flesh out the

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100. See, e.g., William Edeson, *Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches*, in THE STOCKHOLM DECLARATION AND LAW OF THE MARINE ENVIRONMENT 165, 165–182 (Myron H. Nordquist et al. eds., 2003).

101. Alan Boyle, *Further Development of The Law of the Sea Convention: Mechanisms for Change*, 54 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 563, 567–74 (2005); Lene Korseberg, *The Law-Making Effects of the FAO Deep-Sea Fisheries Guidelines*, 67 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 801 (2018). For a general overview, see Daniel Thürer, *Soft Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE ¶¶ 25–34 (last updated Mar. 2009), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1469>.

102. FAO Code of Conduct for Responsible Fisheries, Res. 4/95, (Oct. 31, 1995).

103. *Id.* ¶ 8.1.9.

regulatory standards expected from the State of nationality in combating IUU fishing. It encourages States to use all available jurisdictions to combat IUU fishing, including the State of nationality.<sup>104</sup> The IUU International Plan of Action reaffirms the obligations in UNCLOS concerning nationals as applying to not only the flag State, but all States.<sup>105</sup> More specifically, it compels States “to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing.”<sup>106</sup> Further provisions also address the exercise of control over nationals, or the raising of awareness among nationals, including a broad list of relevant “nationals,” to address both those involved in and supporting IUU fishing.<sup>107</sup>

If the obligations imposed upon the State of nationality under UNCLOS are obligations of due diligence, then the State is also expected to adopt enforcement measures and ensure compliance by its nationals.<sup>108</sup> This conclusion is supported by paragraph 21 of the IUU International Plan of Action, which concerns sanctions for both vessels and nationals: “States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.”<sup>109</sup>

Beyond exercising jurisdiction, the IUU International Plan of Action addresses cooperation with and by the State of nationality, including “to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.”<sup>110</sup> Active personality jurisdiction should be used to assist other States in implementing their obligations, such as to “discourage their nationals from flagging fishing vessels under the jurisdiction of a

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104. IUU International Plan of Action, *supra* note 5, ¶ 9.3; *see* South China Sea Arbitration (Phil. v. China), *supra* note 45, Written Statement of FAO, ¶ 37 (highlighting paragraph 9.3 of the IUU International Plan of Action).

105. *See supra* section IV(A)(1); IUU International Plan of Action, *supra* note 5, ¶ 15.

106. IUU International Plan of Action, *supra* note 5, ¶ 18.

107. *Id.* ¶¶ 73–74 (covering fishers and “importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public”).

108. *Cf. Sub-Regional Fisheries Commission Advisory Opinion*, *supra* note 45, ¶ 134.

109. IUU International Plan of Action, *supra* note 5, ¶ 21; Conference of FAO, Progress Report on Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, FAO Doc. C 2003/21, ¶ 4 (2003) (reiterated).

110. IUU International Plan of Action, *supra* note 5, ¶ 18.

State that does not meet its flag State responsibilities.”<sup>111</sup> Vice versa, other jurisdictional competencies may take complementary measures or retain information of assistance to the State of nationality.<sup>112</sup> This includes conservation and management via regional fisheries management organizations and arrangements, whereby the organizations are encouraged to notify States whose nationals are engaged in IUU fishing under its competence, and if the “problem is not rectified,” to take “appropriate measures.”<sup>113</sup>

## 2. Further Global Soft-Law Instruments and Resolutions

Finally, space constraints and the objectives of this article have resulted in focusing on the key instruments addressing extraterritorial IUU fishing and the role of the State of nationality. It is nonetheless telling that further soft law fisheries instruments emphasize the importance of regulation by the State of nationality. For instance, the Rome Declaration on Illegal, Unreported and Unregulated Fishing declared a renewed effort “to ensure that States, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing.”<sup>114</sup> Equally, the State of nationality and regional fisheries management organizations should adopt measures to contribute to the objectives of the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas.<sup>115</sup>

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111. *Id.* ¶ 19.

112. For example, flag State records sometimes explicitly include the nationality of the owner, operator, beneficial owner/operator, management and/or master; Code of Conduct for Responsible Fisheries, *supra* note 102, ¶ 8.2.1; IUU International Plan of Action, *supra* note 5, ¶¶ 42.2–42.4; FAO, Voluntary Guidelines for Flag State Performance, ¶ 2(e), 14(b), 25(b)–(d) (2015); FAO, The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, ¶ 4 pnt. 3 (Mar. 12, 2005) [hereinafter 2005 Rome Declaration]; now found in the developing Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, “a single access point for relevant and certified information on vessel identity, characteristics, ownership, authorizations to fish or tranship, and much more.” FAO, Rep. of the Third Meeting of the Global Record Informal Open-Ended Technical and Advisory Working Group, Rep. No. 1252 (June 2017); IUU International Plan of Action, *supra* note 5, ¶¶ 58.2 (port States), 24.2 (coastal States).

113. IUU International Plan of Action, *supra* note 5, ¶ 84.

114. 2005 Rome Declaration, *supra* note 112, ¶¶ 3(6) 3(2) (on due diligence in prescription and enforcement).

115. FAO, International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, ¶¶ 12, 21(vii) (Aug. 29, 2008).

The same may be said of relevant UN General Assembly resolutions which, while non-binding, nonetheless carry considerable legal and political weight. The General Assembly is looked upon as the “central intergovernmental organization for global oceans governance,” representing a broad membership and consensus approach to its yearly guidance on ocean law and policy.<sup>116</sup> The annual General Assembly sustainable fisheries resolution is expressly linked to implementing UNCLOS and the UN Fish Stocks Agreement and frequently reiterates the need to prescribe and enforce measures for nationals engaged in or supporting IUU fishing wherever it occurs.<sup>117</sup> The previously frequent General Assembly resolutions on driftnet fishing and other developments also welcomed developments in the responsibilities of the State of nationality to address IUU fishing and called for further action to address those national’s reflagging vessels so as to avoid being governed by high seas CMMs.<sup>118</sup>

*C. Regional Instruments and CMMs of Regional Fisheries Management Organizations and Arrangements*

Regional fisheries management organizations and arrangements represent the “preeminent vehicles for fisheries regulation at the regional level and, arguably, the preeminent institutions of international fisheries law.”<sup>119</sup> The constituent treaty of a regional fisheries management organization will, inter alia, define its spatial and subject matter competence, within which the regional fisheries management organization is competent to adopt binding CMMs for its members. Under the UN Fish Stocks Agreement, the application of these CMMs is a condition of the right to fish for straddling and highly migratory fish stocks on the high seas, even for non-members of a regional fisheries management organization (referred to as cooperating non-

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116. Gabriele Goettsche-Wanli, *The Role of the United Nations, Including Its Secretariat in Global Ocean Governance*, in THE IMLI TREATISE ON GLOBAL OCEAN GOVERNANCE: VOLUME I: UN AND GLOBAL OCEAN GOVERNANCE 3 (David Joseph Attard & Dino Kritsiotis eds., 2018).

117. See, e.g., G.A. Res. 76/71, ¶¶ 83–86, 178 (Dec. 17, 2021). The UN Secretary General submitted a previous General Assembly resolution “urging” the State of nationality to exercise jurisdiction. Written Statement of the Secretary-General of the United Nations, *supra* note 63, ¶ 22.

118. G.A. Res. 57/142, pmb., ¶ 11 (Feb. 26, 2003).

119. Erik J. Molenaar, *Regional Fisheries Management Organizations*, in GLOBAL CHALLENGES AND THE LAW OF THE SEA 82 (Marta Chantal Ribiero et al. eds., 2020).

parties in case of their compliance).<sup>120</sup> From the perspective of the UN Fish Stocks Agreement, there is little room for doubt as to the general competence of regional fisheries management organizations to adopt CMMs imposing obligations to utilize nationality-based jurisdiction on parties and cooperating non-parties.<sup>121</sup> As shown below, many regional fisheries management organizations have done so on the basis of their constitutive instruments. Other interrelated regional or subregional fisheries instruments can provide further persuasive arguments for the need to exercise active personality jurisdiction but cannot be discussed here in detail for reasons of space.<sup>122</sup> The constitutive instruments and practice of regional fisheries management organizations are demonstrative of four key developments, which progressively develop the use of active personality-based jurisdiction from the traditional sovereign discretion to an obligation of due diligence.

#### 1. A Need for Greater Active Personality-Based Jurisdiction in Regional Fisheries Management Organizations

At the global level, regulation by the State of nationality has only relatively recently been recognized as a recommended—and now increasingly obligatory—tool in international fisheries law. If regional practice is going to give further content to the global instruments, the members of a regional fisheries management organization must first recognize (a) that current regulation by the State of nationality is insufficient, and (b) that multilateral cooperation through the regional fisheries management organization would assist in addressing this.

The parties and cooperating non-parties of numerous regional fisheries management organizations do recognize that inadequate active personality-based regulation by parties, cooperating non-parties, and non-cooperating

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120. UN Fish Stocks Agreement, *supra* note 42, art. 8(3)–(4); David A Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEVELOPMENT & INTERNATIONAL LAW 125, 138–40 (1996).

121. *See, e.g.*, UN Fish Stocks Agreement, *supra* note 42, art. 10(a), (h), (l).

122. *See, e.g.*, Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America art. 5(1), Apr. 2, 1987, T.I.A.S. 11100, 2176 U.N.T.S. 173 (entered into force June 15, 1988) (last amended Dec. 3, 2016); 16 U.S.C. § 973 (1988) (United States implementation); Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific arts. 2, 4(1), Nov. 24, 1989, T.I.A.S. 92-228, 1899 U.N.T.S. 3 (entered into force May 17, 1991) (obligation of parties to prohibit vessels and nationals “engaging in driftnet fishing activities within the Convention Area,” enforced through “appropriate measures”).



non-parties is contributing to IUU fishing.<sup>123</sup> At its broadest, the Commission for the Conservation of Antarctic Marine Living Resources has identified that “international corporate structures, insurance providers and other financial arrangements are often employed by IUU operators to limit their liability and avoid legitimate acceptable codes of behaviour.”<sup>124</sup> More specifically, “persons subject to the jurisdiction” of parties and cooperating non-parties have been found to support non-compliant vessels operating under the International Commission for the Conservation of Atlantic Tunas (Atlantic Tuna Commission),<sup>125</sup> the Indian Ocean Tuna Commission,<sup>126</sup> and the Commission for the Conservation of Antarctic Marine Living Resources.<sup>127</sup> Equally, the Northwest Atlantic Fisheries Organization has identified the problem of non-cooperating non-parties’ flagged vessels fishing in its regulatory area that are nonetheless owned by fishing interests in parties and cooperating non-parties.<sup>128</sup> These are all examples of regional fisheries management organizations raising awareness of cases in which prescription and enforcement by the State of nationality would be a suitable, and now an encouraged, response.

Furthermore, numerous regional fisheries management organizations recognize that including cooperation by the State of nationality would assist in addressing the conduct of persons undermining the effectiveness of

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123. In particular, concerning IUU fishing as defined in the IUU International Plan of Action, *supra* note 5, ¶¶ 3.1.2–3.1.3 (parties’ and cooperating non-parties’ vessels), 3.3.1 (non-cooperating non-parties’ vessels).

124. Commission for the Conservation of Antarctic Marine Living Resources [CCAMLR], Scheme to Promote Compliance by Contracting Party Nationals with CCAMLR Conservation Measures, pmb., CCAMLR CM 10-08 (2017).

125. Int’l Commission for the Conservation of Atlantic Tunas [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, pmb. (entered into force June 13, 2007) [hereinafter ICCAT Rec. 06-14].

126. Indian Ocean Tuna Commission [IOTC], Resolution to Promote Compliance by Nationals of Contracting Parties and Cooperating Non-Contracting Parties with IOTC Conservation and Management Measures, pmb., IOTC Res. 07/01 (2007) [hereinafter IOTC Res. 07/01].

127. CCAMLR, Conservation Measure 10-08, *supra* note 124, pmb. (including “engagement on board or in the management of these vessels”); CCAMLR, Res. 32/XXIX Prevention, Deterrence and Elimination of IUU Fishing in the Convention Area, pmb. (2010); CCAMLR, Report of the Fortieth Meeting of the Commission, ¶¶ 4.29, 9.20, CCAMLR-40 (2021).

128. NAFO, Resolution Relating to Vessels of Non-Member Countries Operating in the Regulatory Area, pmb., NAFO Res. 2 (June 7, 1979) [hereinafter NAFO Res. 2].

CMMs. Thus, in general, the toolbox of jurisdictions called upon in the IUU International Plan of Action is reiterated in the constitutive instruments of regional fisheries management organizations, including nationality-based jurisdiction. For example, the Commission of the South Pacific Regional Fisheries Management Organisation is to establish cooperative procedures to address IUU fishing activities in a manner “that owners and operators of vessels engaging in such activities are deprived of the benefits accruing from those activities.”<sup>129</sup> Such provisions in regional fisheries management organization treaties resulted in the Commission for the Conservation of Antarctic Marine Living Resources,<sup>130</sup> Indian Ocean Tuna Commission,<sup>131</sup> Atlantic Tuna Commission,<sup>132</sup> South Pacific Regional Fisheries Management Organisation,<sup>133</sup> and the Southern Indian Ocean Fisheries Agreement<sup>134</sup> calling for active personality-based measures to combat IUU fishing.

Further pressure to use active personality-based measures as part of a State’s toolbox may be added through references to the parties and cooperating non-parties’ general obligations in international law or the regional fisheries management organization’s constituent treaty. For example, this is evi-

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129. SPRFMO Convention, *supra* note 19, art. 27(1)(f).

130. CCAMLR, Conservation Measure 10-08, *supra* note 124, pmbl. (active personality measures “can be an effective way to confront IUU fishing”); CCAMLR, Flags of Non-Compliance, pmbl., Res. CCAMLR R19/XXI (2002) [hereinafter CCAMLR Res. 19/XXI]; CCAMLR, Res. 32/XXIX pmbl., ¶ 1 (2010) (strengthen efforts including Conservation Measure 10-08); CCAMLR, Declaration on the Occasion of the Fortieth Meeting of the Commission for the Conservation of Antarctic Marine Living Resources, ¶ 14 (Oct. 29, 2021).

131. IOTC Res. 07/01, *supra* note 126, pmbl.; IOTC, On Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, pmbl., IOTC Res. 16/11 (May 27, 2016).

132. ICCAT Rec. 06-14, *supra* note 125, pmbl.

133. South Pacific Regional Fisheries Management Organisation [SPRFMO], For the Establishment of a Compliance and Monitoring Scheme in the SPRFMO Convention Area, pmbl., SPRFMO CMM 10-2019 (Apr. 28, 2019) [hereinafter SPRFMO CMM 10-2019]; SPRFMO, Minimum Standards of Inspection in Port, pmbl., SPRFMO CMM 07-2019 (2019).

134. SIOFA, For the Establishment of a SIOFA Compliance Monitoring Scheme, pmbl., SIOFA CMM 2018/11 (2018) [hereinafter SIOFA CMM 2018/11]; SIOFA, Establishing a Port Inspection Scheme (Port Inspection), pmbl., SIOFA CMM 2017/08 (2017).

dent in, among others, the practice of the Western and Central Pacific Fisheries Commission.<sup>135</sup> Alternatively, pressure may apply as a result of a compliance monitoring scheme that reviews whether a State has exercised active personality-based jurisdiction.<sup>136</sup> By reiterating, strengthening, and reviewing the exercise of active personality jurisdiction by parties and cooperating non-parties, the importance of this jurisdiction in combating IUU fishing is hardened.

A more specific case would be the need to deter nationals from reflagging vessels so as to avoid CMMs. This is recognized by numerous regional fisheries management organizations as a regional problem requiring a response by the State of nationality.<sup>137</sup> The Indian Ocean Tuna Commission went so far as to explicitly identify Chinese Taipei (Taiwan) as the State of nationality for the majority of known owners or operators of said vessels.<sup>138</sup> This naming and shaming is one way in which parties and cooperating non-parties may encourage States to take measures that, while not an established legal obligation, are nonetheless called upon at the global level.

## 2. Increased Participation or Cooperation by States of Nationality in Regional Fisheries Management Organizations

Reiterating the threat unregulated nationals pose to the effectiveness of a regional fisheries management organization's CMMs, as well as the potential of active personality-based jurisdiction to address this, is one thing. Holding a State accountable is another. As mentioned, the broadly defined obligations in global instruments are due diligence obligations (i.e., obligations of conduct, not results). Individual instances of involvement in or support of IUU fishing by a State's nationals will not in and of themselves result in a violation

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135. WCPFC, For Compliance Monitoring Scheme, pmb., WCPFC CMM 2018-07 (2018) [hereinafter WCPFC CMM 2018-07]; IOTC Res. 07/01, *supra* note 126, pmb.; ICCAT Rec. 06-14, *supra* note 125, pmb.

136. SIOFA CMM 2018/11, *supra* note 134, ¶ 2; SPRFMO CMM 10-2019, *supra* note 133, ¶ 1; WCPFC CMM 2018-07, *supra* note 135, ¶ 1.

137. ICCAT, Calling for Further Actions Against Illegal, Unregulated and Unreported Fishing Activities by Large-Scale Longline Vessels in the Convention Area and Other Areas, pmb., ICCAT Res. 99-11 (1999) [hereinafter ICCAT Res. 99-11]; GFCM, Recommendation on the Establishment of a List of Vessels Presumed to Have Carried Out IUU Fishing in the GFCM Area, pmb., GFCM/33/2009/8 (2009); CCAMLR Res. 19/XXI, *supra* note 130, pmb.

138. IOTC, Calling for Actions Against Fishing Activities by Large Scale Flag of Convenience Longline Vessels, pmb., IOTC Res. 99/02 (1999) [hereinafter IOTC Res. 99/02].

by the State of its international obligations.<sup>139</sup> At the same time, there is no strict requirement of an established pattern of IUU fishing incidents to prove such a violation,<sup>140</sup> although showing such a pattern—in combination with a lack of response from the State of nationality—would assist in providing evidence of a violation of the applicable due diligence obligations.<sup>141</sup>

Any greater awareness by States concerning the conduct of their nationals may trigger the need to assess whether their current response, if any, to the regulation of nationals is sufficient to meet their due diligence obligations. In this respect, regional practice frequently includes provisions that encourage or require notification of non-cooperating non-parties when conduct under their jurisdiction undermines the objectives of the convention or the CMMs adopted thereunder. The constitutive instruments of the Southern Indian Ocean Fisheries Agreement,<sup>142</sup> Western and Central Pacific Fisheries Commission,<sup>143</sup> Northwest Atlantic Fisheries Organization,<sup>144</sup> and the North Pacific Fisheries Commission<sup>145</sup> demonstrate that this extends beyond vessels flying the non-cooperating non-party’s flag to also include the activities of nationals. In the case of the Commission for the Conservation of Southern Bluefin Tuna<sup>146</sup> and the North Pacific Anadromous Fish Commission,<sup>147</sup> this also includes the activities of residents.

Parties and cooperating non-parties may then encourage the State of nationality to adopt and enforce adequate measures.<sup>148</sup> In certain cases, non-cooperating non-parties are equally urged to discourage their importers,

139. *Cf. Sub-Regional Fisheries Commission Advisory Opinion*, *supra* note 45, ¶¶ 146–48, 150 (with respect to flag States).

140. *Id.* ¶ 150 (with respect to flag States).

141. *Cf. Schatz*, *supra* note 53, at 338 (with respect to flag States).

142. SIOFA Agreement, *supra* note 19, art. 17(3).

143. WCPFC Convention, *supra* note 71, art. 32(2).

144. NAFO Convention, *supra* note 19, art. XVI(2)(c); NAFO, Resolution on Non-NAFO Fishing Activities, pmbl., NAFO Res. (1/90) (Sept. 14, 1990) (focusing on vessels).

145. Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean art. 20(2), Feb. 24, 2012, S. TREATY DOC. No. 113-2 (entered into force July 19, 2015) [hereinafter NPFC Convention].

146. Convention for the Conservation of Southern Bluefin Tuna art. 15(1), Oct. 5, 1993, 1819 U.N.T.S. 360 [hereinafter CSBT Convention].

147. Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean art. IV(1), Feb. 11 1992, T.I.A.S. 11465 (entered into force Feb. 16, 1996) [hereinafter NPAFC Convention].

148. *Id.* art. IV(2).

transporters, manufacturers, businesses, and the general public from engaging or transacting with IUU fishing vessels.<sup>149</sup> Parties and cooperating non-parties may take undefined “action” to deter the fishing activities of non-cooperating non-parties’ nationals and residents.<sup>150</sup> This practice predates any decisions suggesting a legal obligation on the State of nationality to adopt and enforce measures but nonetheless demonstrates a long history of awareness, encouragement, and a move away from absolute discretion.

If the State of nationality has a defined role to combat IUU fishing and is expected to take measures to support a regional fisheries management organization, then it should arguably be allowed to participate. The lightest approach witnessed in numerous instruments is to provide an opportunity for States of nationality to at least attend as observers.<sup>151</sup> Observers may also, as in the case of Taiwan and the North Pacific Anadromous Fish Commission, report on their active personality-based regulation and enforcement measures.<sup>152</sup>

More concrete recognition of the importance of States of nationality in combating IUU fishing would be to allow these States to become a party to the regional fisheries management organization. Cooperation through such an organization in adopting CMMs would evidence and fulfill the more general obligations of UNCLOS that bind States in their capacity as States of nationality. However, the term “States having a real interest in the fisheries concerned” in Article 8(3) of the UN Fish Stocks Agreement, which contains a right of participation in regional fisheries management organizations, is usually interpreted as referring to flag States or coastal States, not States of

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149. IOTC Res. 99/02, *supra* note 138, ¶ 4; ICCAT, Further Actions Against IUU Activities by Large-Scale Longline Vessels in the Convention Area and Other Areas, ¶ 3, ICCAT Res. 99-1 (Dec. 16, 1999).

150. CSBT Convention, *supra* note 146, art. 15(4); NPAFC Convention, *supra* note 147, art. IV(4).

151. CSBT Convention, *supra* note 146, art. 14; CCSBT, Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna, r. 3(1)(a) (as amended Oct. 18, 2018); SIOFA Agreement, *supra* note 19, art. 14; SIOFA, Report of the Fifth Meeting of the Parties, Annex DD Rules of Procedure of Meetings of the Parties, r. 18(1) a–b (June 29, 2018) (both are unspecific on conditions of non-cooperating non-parties observers); SIOFA, Report of the First Meeting of the Parties, App. G (Draft SIOFA Rules of Procedure), r. 19(1)(b) (Oct. 19, 2013) (refers, however, to non-cooperating non-parties “whose vessels or nationals wish to undertake fishing activities in the Agreement Area or have fished in the Agreement Area in the last two years”).

152. *See, e.g.*, NPAFC, Annual Report 2012, app. 5 (2012).

nationality, which is also reflected in regional fisheries management organization practice.<sup>153</sup> Only the Western and Central Pacific Fisheries Commission and North Pacific Fisheries Commission provide that States with “nationals” active or desiring to be active in the convention area may be invited to accede to the relevant constitutive treaty, although this has not yet occurred.<sup>154</sup>

Alternatively, it appears to be more common that States of nationality are included in provisions upon cooperating non-parties. Sadly, in this respect, the practice of inviting cooperating non-parties still appears preconditioned by a link between flagged vessels and the convention area before being a cooperating non-party.<sup>155</sup> If this was to change, cooperating non-parties States of nationality could agree to apply all CMMs,<sup>156</sup> or, as in the Western and Central Pacific Fisheries Commission and South Pacific Regional Fisheries Management Organisation, ensure “to the greatest extent possible, its nationals, comply with the provisions of the Convention and conservation and management measures adopted.”<sup>157</sup> Nonetheless, upon becoming cooperating non-parties, commitments as a State of nationality are, where applicable, reinforced by compliance monitoring schemes, suggesting the compliance of a State’s nationals is also reviewed. A negative review, while not invoking responsibility for a breach of legal responsibility, may nonetheless have negative consequences upon their status as a cooperating non-party if insufficient control is evident.<sup>158</sup>

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153. Erik J. Molenaar, *Participation in Regional Fisheries Management Organizations*, in STRENGTHENING INTERNATIONAL FISHERIES LAW IN AN ERA OF CHANGING OCEANS 103, 113–115 (Richard Caddell & Erik J. Molenaar eds., 2019).

154. WCPFC Convention, *supra* note 71, art. 35(2); NPFC Convention, *supra* note 145, art. 20(3).

155. WCPFC Convention, *supra* note 71, art. 32(4) (“request non-parties to this Convention whose vessels fish in the Convention Area to cooperate”); SPRFMO Convention, *supra* note 19, arts. 8, 32; SPRFMO, Rules for Cooperating Non-Contracting Parties, ¶ 2, SPRFMO Decision 2-2018 (2018) [hereinafter SPRFMO Decision 2-2018] (“non-Member of the Commission, with an interest in the fishery, or whose vessels fish or intend to fish in the Convention Area, may request the Commission for the status of Cooperating non-Contracting Party (CNCP),” but the preamble reaffirms the emphasis on flag States).

156. NPAFC Convention, *supra* note 150, art. 20(3).

157. SPRFMO Decision 2-2018, *supra* note 155, ¶ 3(b); WCPFC, Conservation and Management Measure on Cooperating Non-Members, ¶ 2(b), WCPFC CCM 2009-11 (Dec. 11, 2009) [hereinafter WCPFC CCM 2009-11].

158. SPRFMO Decision 2-2018, *supra* note 155, ¶¶ 13–14; WCPFC CMM 2009-11, *supra* note 157, ¶¶ 14–15.

### 3. Parties and Cooperating Non-Parties' Prescription of Active Personality-Based Measures

Regional practice may create treaty-based obligations, or it may represent further commitments that can be of use in interpreting the global binding instruments discussed above. For example, relevant elements of the IUU International Plan of Action are reiterated in regional resolutions for parties and cooperating non-parties, including to “take every possible action” to urge importers, transporters, manufacturers, businesses, and the general public not to engage or transact with IUU fishing vessels.<sup>159</sup> In many cases, regional fisheries management organizations have adopted lists of IUU fishing vessels, which result in numerous consequences for a listed vessel under the regional fisheries management organization’s legal framework, such as an inability to transship catch or access ports and port services. The subject matter of listing mechanisms is then expanded to also include the fish caught by a listed vessel. This may include active personality-based measures, such as the transshipment of catch by its “transporters.”<sup>160</sup>

Furthermore, the general due diligence obligation of the State of nationality under UNCLOS is supported by numerous regional treaties. The constitutive instruments of the Northwest Atlantic Fisheries Organization,<sup>161</sup> North Pacific Anadromous Fish Commission,<sup>162</sup> North Pacific Fisheries Commission,<sup>163</sup> Southern Indian Ocean Fisheries Agreement,<sup>164</sup> Western and Central Pacific Fisheries Commission,<sup>165</sup> and South Pacific Regional

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159. IOTC Res. 99/02, *supra* note 138, ¶ 3; ICCAT Res. 99-11, *supra* note 137, ¶ 2.

160. For instance, SIOFA, Conservation and Management on the Listing of IUU Vessels (IUU Vessel List), ¶ 19(1), SIOFA CMM 2018/06 (Dec. 14, 2018) [hereinafter SIOFA CMM 2018/06]; SPRFMO, Conservation and Management Measure Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the SPRFMO Convention Area, ¶ 16, SPRFMO CMM 04-2019 (2019) [hereinafter SPRFMO CMM 04-2019]; ICCAT, Recommendation by ICCAT on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities, ¶ 9, ICCAT 18-08 (June 18, 2018); IOTC, On Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence, ¶ 21(g), IOTC Res. 18/03 (Jan. 1, 2018); AIDCP, Resolution to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the Agreement Area, ¶ 9(f), AIDCP Res. A-04-07 (Oct. 20, 2004).

161. NAFO Convention, *supra* note 19, art. X(1)(g) (“take actions”).

162. NPAFC Convention, *supra* note 147, art. V(1).

163. NPFC Convention, *supra* note 145, art. 17(7)(a).

164. SIOFA Agreement, *supra* note 19, art. 10(3).

165. WCPFC Convention, *supra* note 71, art. 23(5).

Fisheries Management Organisation all mandate, using slightly different language, that:

to the greatest extent possible, each member of the Commission shall take measures and cooperate to ensure compliance by its nationals, or fishing vessels owned, operated or controlled by its nationals, with the provisions of this Convention and any conservation and management measures adopted.<sup>166</sup>

Regional fisheries management organizations whose constitutive treaties lack an explicit provision mandating active personality-based measures but whose respective treaty, resolutions, and CMMs, when combined, reach a similar conclusion, provide further support to the general due diligence obligation. Thus, the parties and cooperating non-parties of the Commission for the Conservation of Antarctic Marine Living Resources,<sup>167</sup> the North Atlantic Salmon Conservation Organization,<sup>168</sup> Atlantic Tuna Commission,<sup>169</sup> and Indian Ocean Tuna Commission<sup>170</sup> shall also take “appropriate measures” for nationals engaged in IUU fishing.

Regional fisheries management organizations have given this general obligation more bite to reinforce the control of nationals or address perceived gaps in control by parties and cooperating non-parties.<sup>171</sup> The language employed, namely verifying, investigating, and reporting on measures or actions

166. SPRFMO Convention, *supra* note 19, art. 24(3) (“Obligations of Members of the Commission”).

167. CCAMLR Res. 19/XXI, *supra* note 130, ¶¶ 1–2; CCAMLR CM 10-08, *supra* note 124, ¶ 1.

168. Convention for the Conservation of Salmon in the North Atlantic Ocean art. 2(1), Mar. 2, 1982, 35 U.S.T. 2284, T.I.A.S. 10789, 1338 U.N.T.S. 33 (entered into force Oct. 1, 1983) [hereinafter NASCO Convention] (fishing for salmon on the high seas is prohibited under the NASCO Convention, which should be prescribed and enforced by parties and cooperating non-parties); Protocol Open for Signature by States Not Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean art. 1(a), June 1992, NASCO CNL(92)53; NASCO, *Fishing for Salmon on the High Seas*, Resolution of the Council of NASCO at its Ninth Annual Meeting, ¶ 3, NASCO CNL(92)54 (June 1992) (parties and cooperating non-parties “should take appropriate measures for discouraging its nationals and to prohibit vessels owned by its nationals from engaging in any activity contrary to the provisions of the Convention”).

169. ICCAT Rec. 06-14, *supra* note 125, ¶ 1.

170. IOTC Res. 07/01, *supra* note 126, ¶ 1, pmbl. (“as a first step”).

171. Penelope Ridings et al., *Report of the South Pacific Regional Fisheries Management Organisation Performance Review Panel*, ¶ 224 (2018) (predating the SPRFMO CMM, “One Member



taken against nationals suspected of IUU fishing, suggests responsibilities of enforcement and are therefore discussed below. However, it is important to remember enforcement, including in the non-exhaustive list of cases provided, presuppose an adequate legislative framework. These CMMs therefore equally imply the prescription of measures by parties and cooperating non-parties so as to provide the opportunity to take enforcement measures. In the case of the South Pacific Regional Fisheries Management Organisation, the “shall take all appropriate measures” would be interpreted in a similar manner to UNCLOS to refer to both prescription and enforcement.<sup>172</sup>

In interpreting which measures are necessary for the conservation of living resources, the fundamental questions a State will need to answer are which nationals? And which activities? As seen above, global instruments do not provide a definition of nationals. By contrast, regional instruments contain a broadening definition of relevant nationals. Several regional fisheries management organizations provide a non-exhaustive definition of “natural or legal persons” including “operators, effective beneficiaries, owners, logistics and service providers, including insurance providers and financial service providers.”<sup>173</sup> The wider the definition of nationals, the wider the encouragement or obligation for laws governing conduct.

Regional instruments have also addressed the question of which activities States should or shall address by taking measures. This adds further specificity to discharging the duties of the State of nationality. Thus, apart from IUU fishing in general, regional nationality-based measures may address the reflagging of vessels<sup>174</sup> or implement the General Assembly ban on large-scale pelagic driftnet fishing on the high seas.<sup>175</sup> The exercise of active personality-based jurisdiction is promoted to discourage any link between a State’s nationals and the fishing activities of non-cooperating non-parties’

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identified a number of gaps in the current MCS measures, including: measures for the control of nationals”).

172. SPRFMO CMM 04-2019, *supra* note 160, ¶ 25.

173. CCAMLR CM 10-08, *supra* note 124, ¶ 1(ii); SIOFA CMM 2018/06, *supra* note 160, ¶ 30(b); SPRFMO CMM 04-2019, *supra* note 160, ¶ 26; Richard Caddell et al., *Emerging Regulatory Response to IUU Fishing*, in STRENGTHENING INTERNATIONAL FISHERIES LAW IN AN ERA OF CHANGING OCEANS 113–15 (Richard Caddell & Erik J. Molenaar eds., 2019).

174. NPFC Convention, *supra* note 145, art. 20(5); NPAFC Convention, *supra* note 147, art. IV(3); CCAMLR Res. 19/XXI, *supra* note 130, ¶ 3. On CCAMLR, see Penelope Ridings, *Compliance, Enforcement and the Southern Oceans: The Need for a New Approach*, in SOVEREIGNTY AT SEA: FROM WESTPHALIA TO MADRID (Richard Herr ed., 2000).

175. ICCAT, *Resolution on Large-Scale Pelagic Driftnets*, ¶ 5, ICCAT Res. 96-15 (Feb. 3, 1997) [hereinafter ICCAT Res. 96-15] (“their nationals and their fishing vessels comply”).

vessels.<sup>176</sup> Within the Northwest Atlantic Fisheries Organization, members are called upon to take steps to prevent fishing arrangements between their nationals and non-cooperating non-parties’ flagged vessels.<sup>177</sup> For the Commission for the Conservation of Southern Bluefin Tuna, parties “shall encourage [their] nationals not to associate” with non-cooperating non-parties’ fisheries within the competence of the Commission when this undermines the Commission’s objectives.<sup>178</sup> Atlantic Tuna Commission parties and cooperating non-parties should take similar measures concerning nationals and Atlantic Tuna Commission fisheries.<sup>179</sup> A non-binding resolution of the Commission for the Conservation of Antarctic Marine Living Resources urges nationality-based measures for persons engaged on vessels flying a flag of non-compliance.<sup>180</sup>

Finally, subsequent CMMs by the Commission for the Conservation of Antarctic Marine Living Resources, Southern Indian Ocean Fisheries Agreement, and South Pacific Regional Fisheries Management Organisation now explicitly address nationality-based measures for nationals “responsible for, benefiting from, supporting or engaging in” IUU fishing by parties and cooperating non-parties and non-cooperating non-parties vessels.<sup>181</sup> Unfortunately, in terms of assisting and clarifying the content of any general obligation for the State of nationality, specific CMMs on the control of nationals are not always approved and adopted by the regional fisheries management organization.<sup>182</sup>

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176. This can be supported by incentivizing fishers in the convention area to report on non-cooperating non-parties flagged vessels operating therein. ICCAT, Resolution on Compliance with the ICCAT Conservation and Management Measures, ¶ 2, ICCAT Res. 94-09 (1995) [hereinafter ICAT Res. 94-09].

177. NAFO Res. 2, *supra* note 128, ¶ 1.

178. CSBT Convention, *supra* note 146, art. 15(1).

179. ICCAT Res. 94-09, *supra* note 176, ¶ 8.

180. CCAMLR Res. 19/XXI, *supra* note 130, ¶ 1.

181. CCAMLR CM 10-08, *supra* note 124, ¶ 1(a) (CMMs 10-06 and 10-07 concerning IUU vessel lists for parties, cooperating non-parties, and non-cooperating non-parties’ vessels); SIOFA CMM 2018/06, *supra* note 160, ¶¶ 30(a), 5; SPRFMO CMM 04-2019, *supra* note 160, ¶ 1.

182. Paper Submitted by New Zealand to WPCFC Technical and Compliance Committee, *Control of Nationals*, WCPFC-TCC4-2008/DP-01 (Aug. 26, 2008); Draft Submitted by New Zealand to WPCFC Technical and Compliance Committee, *WCPFC Conservation and Management Measure for the Control of Nationals*, WCPFC-TCC5-2009/DP-10 (Rev. 2) (Oct. 3, 2009); and for some of the interstate discussion, Paper Prepared by New Zealand for WPCFC Technical and Compliance Committee, *Control Of Nationals*, WCPFC-TCC6-2010-DP/01 (Aug. 27, 2010).

#### 4. Parties and Cooperating Non-Parties' Enforcement of Active Personality-Based Measures

The obligation to “take measures” in global instruments was interpreted as including both the need for sufficient prescription and enforcement. If this is applied to the constitutive instruments and CMMs of regional fisheries management organizations that refer to “taking” (and not simply “adopting”) measures, parties and cooperating non-parties are obliged to exercise a minimum degree of enforcement with respect to the law they have prescribed vis-à-vis their nationals.<sup>183</sup>

Indeed, regional fisheries management organizations have provided elaboration upon explicit cases where the prompt investigations of nationals, followed by “appropriate” enforcement measures, is necessary. Parties and cooperating non-parties shall thus verify or investigate allegations or reports of the involvement of their nationals in IUU fishing activities, usually by reference to a non-exhaustive list of such activities.<sup>184</sup> If verified, appropriate “actions,” i.e., enforcement measures, should be taken.<sup>185</sup> These “may” (Southern Indian Ocean Fisheries Agreement and the Commission for the Conservation of Antarctic Marine Living Resources) or “shall” (Western and Central Pacific Fisheries Commission) deprive offenders of any benefits accrued and dissuade further violations.<sup>186</sup> Interestingly, the South Pacific Regional Fisheries Management Organisation reaffirms the prerogative of the

183. SPRFMO Convention, *supra* note 19, art. 24(3); SPRFMO CMM 04-2019, *supra* note 160, ¶ 25; WCPFC Convention, *supra* note 71, art. 23(5); NPFC Convention, *supra* note 145, art. 17(7)(a); SIOFA Agreement, *supra* note 19, art. 10(3); NPAFC Convention, *supra* note 147, art. V(1); NASCO Convention, *supra* note 168, ¶ 3; NAFO Convention, *supra* note 19, art. X(1)(g) (“actions”); IOTC Res. 07/01, *supra* note 126, ¶ 1; ICCAT Rec. 06-14, *supra* note 125, ¶ 1; CCAMLR CM 10-08, *supra* note 124, ¶ 1.

184. IOTC Res. 07/01, *supra* note 126, ¶ 1(i); SIOFA Agreement, *supra* note 19, art. 10(4); SIOFA CMM 2018/06, *supra* note 160, ¶¶ 30(a)–(b); SPRFMO Convention, *supra* note 19, art. 24(3); WCPFC Convention, *supra* note 71, arts. 23(5), 25(7); NAFO Convention, *supra* note 19, art. X(1)(g); ICCAT Rec. 06-14, *supra* note 125, ¶ 1(i); NPFC Convention, *supra* note 145, arts. 8, 17(7)(b); NPAFC Convention, *supra* note 147, art. V(2)(b)–(c).

185. IOTC Res. 07/01, *supra* note 126, ¶ 1(ii); CCAMLR CM 10-08, *supra* note 124, ¶ 1(iii); ICCAT Rec. 06-14, *supra* note 125, ¶ 1(ii); ICCAT Res. 96-15, *supra* note 175, ¶ 5; SIOFA CMM 2018/06, *supra* note 160, ¶ 30(c); WCPFC Convention, *supra* note 71, arts. 25(1), 25(7); NPAFC Convention, *supra* note 147, art. V(2)(b)–(d).

186. SIOFA CMM 2018/06, *supra* note 160, ¶ 30(c); CCAMLR CM 10-08, *supra* note 124, ¶ 1(iii); WCPFC Convention, *supra* note 71, art. 25(7); ICCAT Res. 96-15, *supra* note 175, ¶ 5 (“adequate” sanctions); NPFC Convention, *supra* note 145, art. 17(8); NPAFC Convention, *supra* note 147, art. V(2)(d).

State of nationality to take further enforcement measures when a national is within its enforcement jurisdiction: “Nothing in this paragraph shall preclude the rights of Members and [cooperating non-parties] to apply additional or more stringent measures.”<sup>187</sup>

Additionally, substantive provisions are often accompanied by cooperative procedural obligations. General obligations emphasize, inter alia, information exchange and the possible designation of a contact point for communications.<sup>188</sup> The State of nationality may be expected to provide implementation reports on any investigations or actions taken. Recipients of these reports include the regional fisheries management organization’s secretariat, parties and cooperating non-parties or any requesting or assisting State.<sup>189</sup>

## V. CONCLUSIONS

“One reason why IUU fishing has been such a persistent problem is that many States have not been successful in controlling the fishing activities by their nationals.”<sup>190</sup>

This article has sought to demonstrate the extent to which international law recognizes the jurisdiction and responsibilities of the State of nationality when addressing IUU fishing.<sup>191</sup> Practice at the global, regional, and unilateral level points towards an increasing recognition and depth of the State of nationality’s responsibilities, albeit in a much softer form than the more established responsibilities of flag, coastal, and port States. Since the 1990s, the international community has recognized the necessity of regulating nationals

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187. SPRFMO CMM 04-2019, *supra* note 160, ¶ 25.

188. *See, e.g., id.* ¶ 27; ICCAT, *supra* note 125, ¶ 1(iii); IOTC Res. 07/01, *supra* note 126, ¶ 1(iii); CCAMLR CM 10-08, *supra* note 124, ¶ 2; SIOFA CMM 2018/06, *supra* note 160, ¶ 31.

189. *See, e.g.,* SPRFMO Convention, *supra* note 19, art. 24(3)–(4); SIOFA Agreement, *supra* note 19, art. 10(4); SIOFA CMM 2018/06, *supra* note 160, ¶ 32; WCPFC Convention, *supra* note 71, art. 23(5); IOTC Res. 07/01, *supra* note 126, ¶ 2; ICCAT, *supra* note 125, ¶ 2; NAFO Convention, *supra* note 19, art. X(1)(g); NPFC Convention, *supra* note 145, art. 17(9); CCAMLR CM 10-08, *supra* note 124, ¶ 3.

190. *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO Technical Guidelines for Responsible Fisheries (2002) [hereinafter IUU International Plan of Action Implementation].

191. Further research could address the State of nationality’s role in the law of the sea more generally. *See, e.g.,* Nilüfer Oral, *Jurisdiction and Control Over Activities by Non-State Entities on the High Seas*, in *HIGH SEAS GOVERNANCE* 9, 17–18 (Robert C. Beckman et al. eds., 2018) (concerning marine pollution from submarine pipelines).

to combat IUU fishing. Global treaties do not impose explicit jurisdictional obligations on the State of nationality. Still, the broad wording of relevant provisions of UNCLOS (particularly Articles 58(3) and 117) can arguably be interpreted as a sufficient basis for (due diligence) obligations of States of nationality to take the necessary measures to prevent their nationals from engaging in or supporting IUU fishing. A more concrete affirmation of these obligations in treaty or customary law has yet to occur, but soft law and *obiter dicta* of international courts and tribunals clearly demonstrate the winds are very much in favor of recognition and are only expected to harden further.

Moreover, regional fisheries management organizations have further strengthened and elaborated upon the regulatory expectations of parties and cooperating non-parties with respect to their nationals. This includes both prescription and enforcement jurisdiction, although regional fisheries management organization parties have to date been careful to use conditional language or implementation (e.g., “to the greatest extent possible”) or limiting investigation requirements to reported cases or allegations. Nonetheless, there is a clear trend towards further development of nationality-based measures. The previously “small minority of countries” regulating their nationals involved in IUU fishing, regardless of flag, is a growing club.<sup>192</sup> The practice of the EU is of particular importance,<sup>193</sup> although a recent study commissioned by the European Commission showed “significant weaknesses” in the legislative frameworks and enforcement systems of EU member States.<sup>194</sup> Specifically, the weaknesses are regarding their obligations and sanctioning of nationals for infringements of relevant EU law, as well as “(nearly) non-existent sanctioning of, on the one hand, nationals having engaged in IUU fishing activities outside EU waters, either operating or on board fishing vessels . . . registered in third countries or vessels without nationality and, on the other, nationals supporting IUU fishing activities . . . wherever their location.”<sup>195</sup>

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192. Erceg, *supra* note 2, at 34–35 (referring to previous practice by Spain, Japan, New Zealand, and Australia).

193. Council Regulation (EC) No. 1005/2008, *supra* note 88, arts. 39–40; see Honniball, *supra* note 2; VEZZANI, *supra* note 2, at 194–96.

194. Camille Borrett et al., *Study on the Legislative Frameworks and Enforcement Systems of Member States Regarding Obligations and Sanctions to Nationals for Infringements to the Rules Arising from the IUU Regulation: Final Report* 103 (2022), <https://data.europa.eu/doi/10.2771/353964> (report prepared for the Directorate-General for Maritime Affairs and Fisheries of the European Commission).

195. *Id.*

The State of nationality therefore no longer presents a potential area for the evolution of international fisheries law, but rather an area where significant developments are already ongoing. Its active personality basis of prescriptive jurisdiction is not limited by the territory, maritime zone, or vessel where a national’s conduct occurs. It can thus not only address IUU fishing wherever it may occur but equally the natural and juridical persons, and not merely vessels, involved.<sup>196</sup> This disincentivizes nationals engaging in or supporting IUU fishing, enables the punishment of non-compliance, and “sends a strong signal to other countries.”<sup>197</sup> While enforcement may be limited by a lack of awareness of what a national is doing with respect to or aboard a foreign vessel,<sup>198</sup> and unenforceable until the national returns to the State’s territory (except with respect to juridical persons, assets, licenses, and other issues not dependent on the presence of natural persons),<sup>199</sup> these limitations are also seen in respect of other jurisdictional capacities.<sup>200</sup> Cooperation may partially address these limitations, including greater information sharing or promoting the owners and operators of parties and cooperating non-parties’ flagged vessels within a State’s territory to enable effective enforcement.<sup>201</sup>

Exercising due diligence in the regulation of nationals and the further development of the applicable threshold of due diligence arguably represents the next bastion in international fisheries law’s defenses against IUU fishing. Significant States of nationality should recognize these developments and proactively fortify their domestic legal systems through sufficient prescription and enforcement of provisions governing their nationals, domiciles, and, where applicable, residents.

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196. High Seas Task Force, *supra* note 2, at 34–35.

197. *Id.*

198. IUU International Plan of Action Implementation, *supra* note 190, at 12.

199. High Seas Task Force, *supra* note 2, at 34–35.

200. To avoid challenges to its implementation and/or improve coordination with flag States, some States voluntarily constrain their exercise of concurrent active personality jurisdiction. *See* VEZZANI, *supra* note 2, at 184.

201. *See, e.g.*, IOTC, Resolution Concerning the IOTC Record of Vessels Authorised to Operate in the IOTC Area of Competence, art. 7(f), IOTC Res. 15/04 (2015).