

ARTICLE

EU–Third Country Dialogue on IUU Fishing: The Transformation of Thailand’s Fisheries Laws

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Abstract

This article addresses the impacts of the carding system (green, yellow, red) of the European Union (EU) Regulation on illegal, unreported and unregulated (IUU) fishing on the fisheries laws of third countries. Specifically, it analyzes Thailand’s national legal reforms, which followed interactions between the EU and Thailand during the yellow card period. Building on past research on the EU’s use of market power to exert regulatory influence on third countries, the article explores other factors that might encourage third countries to engage in national regulatory reforms: the EU’s powers of expertise, monitoring, and agenda-setting. Finally, the article also considers the legitimacy of the EU’s regulatory power over third countries.

Keywords: Illegal; unreported and unregulated (IUU) fishing; European Union (EU) IUU Regulation; Trade; Regulatory power; Legitimacy

1. INTRODUCTION

Asian countries have become important locations of fishery production. In 2018, 11 of the top 25 major marine-capture producing countries (the share of which amounts to

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56% of the global production) were Asian.¹ This translates into 79% of the world's population who participate in the fisheries sector live in Asia,² and 75% of the entire global fleet consists of Asian fishing fleets.³ This development has not been entirely without problems.⁴ One concern has been that fishing by Asian countries may have contributed to a large amount of illegal, unreported, and unregulated (IUU) fishing as a result of the outdated and poorly implemented fisheries laws in many Asian countries. In addition, there are concerns about the lack of adequate monitoring systems, trained personnel and similar issues, although these problems are not unique to Asian countries.⁵

In terms of the definition of IUU, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), adopted by the Food and Agriculture Organization of the United Nations (FAO) in 2001, is of particular importance.⁶ While 'the IPOA-IUU is a voluntary, non-binding instrument', 'many of its provisions have been given binding legal effect through their incorporation in national, regional, and international legal instruments'.⁷ For instance, its definition of IUU fishing is incorporated in the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA),⁸ and is widely used in the decisions of regional fisheries management organizations (RFMOs). A detailed discussion of the complexities of the definition of IUU is beyond the scope of this article, although previous studies have generally argued that the concept of IUU is too broad, with no definite scope. It has been pointed out that 'unregulated' fishing is not necessarily 'illegal' fishing.⁹

Against this backdrop the article analyzes how, and to what extent, Asian countries have engaged in combating IUU fishing by revising their fisheries laws. To address this

¹ Food and Agriculture Organization of the United Nations (FAO), *The State of World Fisheries and Aquaculture 2020: Sustainability in Action* (FAO, 2020), p. 13, available at: <http://www.fao.org/3/ca9229en/ca9229en.pdf>.

² *Ibid.*, p. 37.

³ *Ibid.*, p. 43.

⁴ The literature has identified problems of food security and the livelihoods of small-scale artisanal local fishermen in many Asian countries; see, e.g., X. Zhao & P. Jia, 'Towards Sustainable Small-scale Fisheries in China: A Case Study of Hainan' (2020) 121 *Marine Policy*, article 103935; FAO, Committee on Fisheries, 'Small-scale and Artisanal Fisheries Governance', Mar. 2018, p. 5, available at: <http://www.fao.org/3/MX092EN/mx092en.pdf>.

⁵ For an overview of the Asian situation see, e.g., Asia-Pacific Fishery Commission, 'Fishing Capacity Management and IUU Fishing in Asia', 2007, p. 10, available at: <http://www.fao.org/3/ah997e/ah997e00.pdf>; Asia-Pacific Economic Cooperation (APEC), Fisheries Working Group, *Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific* (APEC Secretariat, 2008), Chs 4 and 5, available at: <https://www.apec.org/Publications/2008/11/Assessment-of-Impacts-of-Illegal-Unreported-and-Unregulated-IUU-Fishing-in-the-Asia-Pacific>.

⁶ Available at: <http://www.fao.org/3/a-y1224e.pdf>.

⁷ B. Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar, 2017), p. 209. See also E.R. van der Marel, 'Problems and Progress in Combatting IUU Fishing', in R. Caddell & E.J. Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019), pp. 291–318, at 298–9.

⁸ Rome (Italy), 22 Nov. 2009, in force 5 June 2016, Art. 1(e), available at: <http://www.fao.org/3/a-i5469t.pdf>.

⁹ A. Serdy, 'Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal' (2017) 48 (3–4) *Ocean Development & International Law*, pp. 345–64, at 352–4; Van der Marel, n. 7 above, pp. 292–8.

question, the article focuses on the impacts of the European Union (EU) Regulation of 2008 on IUU fishing through its third-country carding (green, yellow, red) system.¹⁰

The EU IUU Regulation provides a step-by-step procedure for ‘non-cooperating third countries’ which take insufficient action to combat IUU fishing. The first phase is receipt of a ‘yellow card’ – a formal warning, which indicates ‘the *possibility* of being identified as [a] non-cooperating third countr[y]’.¹¹ If the state does not take action to rectify the situation, it receives a ‘red card’ and is identified as a non-cooperating third country.¹² Various measures, which include the imposition of import prohibitions, apply to a non-cooperating third country.¹³ Further, there is a procedure for removal: a country may be upgraded to ‘green-card’ status, which means delisting from yellow- or red-card status.¹⁴

Such measures, based on market power, are not new. Research has focused on ‘trade’ as a possible instrument in advancing regulatory issues in current times where it is difficult to make new agreements among countries.¹⁵ It has been noted that ‘by means of the governance of trade flows, one can also govern social and environmental issues’.¹⁶ The most prominent example of this phenomenon is the EU, which is ‘making compliance with specific standards mandatory for market access’.¹⁷ Environmental examples include timber,¹⁸ biofuels,¹⁹ aviation emissions,²⁰ and IUU fishing.

In 2018, the EU was the largest fish importing market (34% in terms of value), followed by the United States (US) (14%) and Japan (9%),²¹ which suggests that EU market power in this sector is significant. Formally, however, the European Commission explains that a yellow card is not intended to affect seafood trade: ‘the [yellow-card] decision does not entail any measures affecting trade. The yellow card is a warning and offers [third countries] the chance to react and take measures to rectify the situation within a reasonable time’.²²

¹⁰ Regulation (EC) No. 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, amending Regulation (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulation (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L 286/1 (EU IUU Regulation).

¹¹ *Ibid.*, Art. 32(1).

¹² *Ibid.*, Art. 33.

¹³ *Ibid.*, Arts 33, 38.

¹⁴ *Ibid.*, Art. 34.

¹⁵ See also, e.g., United Nations Conference on Trade and Environment (UNCTAD), ‘A European Union Carbon Border Adjustment Mechanism: Implication for Developing Countries’, 2021, available at: https://unctad.org/system/files/official-document/osginf2021d2_en.pdf.

¹⁶ A. Marx et al., ‘Global Governance through Trade: An Introduction’, in J. Wouters et al. (eds), *Global Governance through Trade: EU Policies and Approaches* (Edward Elgar, 2015), pp. 1–15, at 5–6.

¹⁷ *Ibid.*, p. 6.

¹⁸ Regulation (EU) No. 995/2010 laying down the Obligations of Operators Who Place Timber and Timber Products on the Market [2010] OJ L 295/23.

¹⁹ Directive (EU) 2018/2001 on the Promotion of the Use of Energy from Renewable Sources [2018] OJ L 328/82.

²⁰ Directive 2009/29/EC amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading Scheme of the Community [2009] OJ L 140/63.

²¹ FAO, n. 1 above, p. 8.

²² This was announced by the European Commission when it notified Ecuador of a yellow card in 2019: European Commission, ‘Commission Notifies the Republic of Ecuador over the Need to Step Up Action to Fight Illegal Fishing’, Press Release, 30 Oct. 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6036.

In practice, the consequences of a yellow card are quite serious, even without escalation to a red card. Receipt of a yellow card can damage the reputation of the country's seafood products and cause a decline in their exports to the EU market.²³ Past studies have noted that yellow-carding has triggered legal reforms of national fisheries in certain countries.²⁴ Accordingly, it has been argued that the EU acts as an 'enforcer of international obligations' in combating IUU fishing.²⁵ Targeted Asian countries face pressure to reform their fisheries laws in accordance with international obligations as a result of the EU carding system.

By examining Thailand's yellow card, this article aims to identify drivers for national regulatory reforms as a result of external pressures, including the EU carding system. The remainder of the article is organized as follows. Section 2 provides an overview of EU carding procedures for third countries. Section 3 reviews past research on EU use of market power to exert regulatory influence on third countries. Section 4 examines the Thai case in detail, looking specifically at how EU-Thailand interactions led to Thailand's national regulatory changes. Against this backdrop Section 5 assesses the EU's regulatory power over Thailand, especially in the light of legitimacy; Section 6 presents conclusions.

2. LEGAL FRAMEWORK AND PRACTICE OF EU–THIRD COUNTRY DIALOGUE

2.1. *How the EU IUU Regulation Determines Relations with Third Countries*

In accordance with the EU IUU Regulation, the export of fishery products to the EU is managed by a 'catch certification scheme', which requires fishing vessels to be accompanied by documents certifying the legality of their cargo.²⁶ Chapter III of the Regulation provides details of this scheme (which applies to both EU Member States and third countries). The interaction between the EU and exporting third countries begins with a 'flag state notification' from third countries to the European Commission,²⁷ as catch certificates must be validated by the flag state of each fishing vessel.²⁸ This notification must contain two types of information: (i) affirmation that the flag state 'has in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures

²³ V. Mundy, *The Impact of the EU IUU Regulation on Seafood Trade Flows: Identification of Intra-EU Shifts in Import Trends Related to the Catch Certification Scheme and Third Country Carding Process* (Environmental Justice Foundation, Oceana, The Pew Charitable Trusts, WWF, 2018), available at: http://www.iuuwatch.eu/wp-content/uploads/2018/02/TDA_report_IUUwatch_LQ.pdf.

²⁴ A.N. Honniball, 'Engaging Asian States on Combating IUU Fishing: The Curious Case of the State of Nationality in EU Regulation and Practice' (2021) 10(3) *Transnational Environmental Law*, pp. 543–69, at 566; A.N. Honniball, 'What's in a Duty? EU Identification of Non-cooperating Port States and Their Prescriptive Responses' (2020) 35(1) *The International Journal of Marine and Coastal Law*, pp. 19–54, at 47.

²⁵ Cooreman, n. 7 above, p. 216.

²⁶ EU IUU Regulation, n. 10 above, Art. 12.

²⁷ *Ibid.*, Art. 20.

²⁸ *Ibid.*, Art. 12(2).

which must be complied with by its fishing vessels'; and (ii) that the flag state's 'public authorities are empowered to attest the veracity of the information contained in catch certificates and to carry out verifications of such certificates on request from the Member States'.²⁹

Thus, even at this early stage of notification, third countries are required to adopt effective implementation measures (via national regulatory arrangements) to combat IUU fishing. However, there are third countries that do not make appropriate national arrangements for implementation of the catch certification provisions. The Regulation provides how the European Commission may proceed in such cases, stating that the Commission 'shall ... cooperate administratively with third countries' and such cooperation will aim, for instance, to 'provide for the conduct of on-the-spot audits ... to verify the effective implementation of the cooperation arrangement'.³⁰

Accordingly, before imposing a yellow card, the EU interacts with third countries in the context of this 'administrative cooperation'. The Commission often makes a visit to verify information provided under the flag state notification and, based on the visit, sends a report to the third country.³¹ For instance, the Commission interacts with third countries in terms of 'their traceability systems for imports and exports' and 'monitoring of fisheries activities, including vessel monitoring system (VMS) requirements'.³² The third country then responds with additional information and, occasionally, a meeting takes place between the Commission and the third country. After several rounds of this process, and considering 'any other relevant information',³³ the Commission decides whether to issue a yellow card.

The EU IUU Regulation establishes how the European Commission notifies the third country that it has received a yellow card. Notification is by way of a Commission Decision informing the country of the risk of being identified as a non-cooperating third country. The Decision describes how the Commission interacted with the third country's authorities and, more importantly, states the extent to which the third country did not meet relevant criteria³⁴ by explaining that it is failing to discharge the duties incumbent upon it under international law – as flag, port, coastal or market state – to take action in response to IUU fishing.³⁵ More specifically, the criteria include: (i) the gravity of the IUU fishing by the third country; (ii) whether the third country has taken effective domestic enforcement measures; and (iii) whether the country has ratified international fisheries instruments.³⁶ These are the criteria for issuing a yellow card.

²⁹ *Ibid.*, Art. 20(1)(a)–(b).

³⁰ *Ibid.*, Art. 20 (4)(c).

³¹ Van der Marel, n. 7 above, p. 309.

³² European Commission, Report from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No. 1005/2008 establishing a Community System to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated (IUU) Fishing (the IUU Regulation), COM (2020) 772 Final, pp. 9–10.

³³ EU IUU Regulation, n. 10 above, Art. 31(2).

³⁴ *Ibid.*, Art. 32(1)(a).

³⁵ *Ibid.*, Art. 31(3).

³⁶ *Ibid.*, Art. 31(4)–(6).

Beyond this, the EU Regulation requires the Commission to include in the notification ‘a request that the third country concerned take necessary measures for the cessation of the IUU fishing activities in question and the prevention of any such future activities’.³⁷ These requests are referred to as ‘recommendations’ from the Commission to the third country. However, they are not disclosed to the public, and some researchers have criticized this procedure for its lack of transparency: Van der Marel notes that such lack of transparency is problematic because it inhibits the ability of various parties to assess ‘whether third countries have been treated equally’ by the Commission.³⁸ At the same time, a yellow-carded country may prefer the Commission’s recommendations to remain confidential, as disclosure would reveal the country’s non-compliance with its international obligations.

The issuing of a yellow card formally triggers interactions and dialogues between the EU and the third country, and the EU IUU Regulation suggests possible interactions during this period. For example, third countries are given ‘the opportunity to respond to the Commission in writing’ and the EU has ‘the right to ask for ... additional information’.³⁹ This process is reviewed in detail in Section 4 where we address the case of Thailand.

2.2. Issuing a Yellow Card

The European Commission’s IUU website publicizes a list of countries that have received yellow and red cards.⁴⁰ Among the 27 yellow-carded countries, 10 are not permitted to export seafood products to the EU because they have not yet sent their flag state notifications to the EU.⁴¹ Others are barred because they do not meet the EU sanitary standards for seafood products.⁴² Seven yellow-carded countries are in Asia: Cambodia, Korea, the Philippines, Sri Lanka, Taiwan, Thailand, and Vietnam.⁴³

³⁷ *Ibid.*, Art. 32(2).

³⁸ E.R. van der Marel, ‘An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation’, in L. Martin et al. (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Juris, 2017), pp. 237–55, at 255.

³⁹ EU IUU Regulation, n. 10 above, Art.32(1)(b)–(c).

⁴⁰ European Commission, Oceans and Fisheries, Illegal Fishing, ‘Overview of IUU Procedures’, available at: https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/illegal-fishing_en.

⁴¹ See Information from the European Commission, published in accordance with Art. 22(2) of Council Regulation (EC) No 1005/2008, concerning Flag State Notifications (List of States and Their Competent Authorities), according to Article 20 (1), (2), and (3), and Annex III to Council Regulation (EC) No. 1005/2008 [2021] OJ C 93/16. It is important to note that the EU will still issue yellow and red cards to third countries even if those countries do not export seafood to the EU. This raises the question of the effectiveness of EU measures. In this respect we should caution against paying too much attention to EU market power (see Section 3), as the EU does not rely on its market power in all yellow/red decisions.

⁴² Mundy, n. 23 above, pp. 9–10. See also F. Blaha, ‘Impacts of the European Commission Yellow Cards in the Pacific’, *SPC Fisheries Newsletter*, No. 148, Sept.–Dec. 2015), available at: <https://spccfpstore1.blob.core.windows.net/digitalibrary-docs/files/cd/cd4005f0cd07bb57894de6cbe10b2bdf.pdf?sv=2015-12-11&cs->

⁴³ Listed in alphabetical order. Among these seven countries, Vietnam, the Philippines, Korea, Thailand, and Taiwan are ranked in the 2020 FAO table of 25 major marine capture producer countries: FAO, n. 1 above, p. 13.

As noted, when the EU issues a yellow card to a country via a Commission Decision, it explains the extent to which the country is in violation of international instruments relating to IUU fishing activities. Cooreman argues that when ‘demanding real legislative change’ from third countries, ‘the EU only requires the implementation of existing international obligations of the targeted states, and does not force them to implement new and/or EU-imposed (higher) norms (norm creation)’, and that therefore ‘the EU is acting with the objective of international norm enforcement’.⁴⁴

However, the question arises as to whether the EU is a ‘righteous’ enforcer of international obligations. Firstly, state participation in international instruments varies. Accordingly, the Commission’s reasoning varies based on each targeted country’s level of ratification or non-ratification of international instruments. Secondly, contrary to Cooreman’s statement above, the EU has attempted to enforce the commitments of the targeted country under non-binding international instruments – such as the voluntary instrument IPOA-IUU – as well as under binding international instruments, including the UN Convention on the Law of the Sea (UNCLOS).⁴⁵ Thirdly, even when the EU is enforcing obligations under an international agreement of which the targeted country is a party, it is worth considering how these obligations are interpreted by the Commission and whether its legal interpretation is valid.

An interesting test case arose in relation to Cambodia’s yellow card. Cambodia was not a party to any of the major binding international instruments, including UNCLOS, and was a party only to two regional instruments. However, UNCLOS is known to contain many rules of customary international law, which are also binding on non-parties. The EU Commission first acknowledged the UNCLOS provisions on navigation in the high seas (Articles 86 to 115 UNCLOS) as customary international law. By itself, this recognition of the customary nature of UNCLOS provisions is not problematic.⁴⁶ However, the Commission then stated that, according to Article 94 UNCLOS (with regard to the duties of the flag state), ‘a flag State is required to ensure that vessels flying its flag comply with RFMO conservation and management rules’.⁴⁷ Rosello criticized this interpretation by the Commission as overreach, because ‘the provision [Article 94 UNCLOS] does not by itself impose a duty to cooperate specifically by subjecting vessel operations to the fishing constraints imposed by the rules of RFMOs’.⁴⁸

The aim of this article is not to undertake an in-depth analysis of the Commission’s legal reasoning over the issuing of yellow cards. Nevertheless, in the case study we

⁴⁴ Cooreman, n. 7 above, p. 215 (also arguing that the EU measure requiring national regulatory reforms ‘could be accepted only to the extent that what is required is already a binding obligation on the targeted country’: *ibid.*, p. 216).

⁴⁵ Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

⁴⁶ Commission Decision of 15 Nov. 2012 notifying the Third Countries that the Commission Considers as Possible of being Identified as Non-cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing [2012] OJ C 354/1, para. 72.

⁴⁷ *Ibid.*, para. 78.

⁴⁸ M. Rosello, ‘Cooperation and Unregulated Fishing: Interactions between Customary International Law, and the European Union IUU Fishing Regulation’ (2017) 84 *Marine Policy*, pp. 306–12, at 308. See also Van der Marel, n. 38 above, p. 250.

examine the extent to which the government of Thailand understood and accepted the legal rationale presented by the Commission. Before turning to the case study, in the next section we explore the theories and mechanisms through which the EU can exert its regulatory influence over third countries – that is, EU market power (but, as noted previously, the EU has issued yellow cards to third countries that do not export seafood products to the EU).

3. EU MARKET POWER AND BEYOND

Both legal and political science scholarship have analyzed the EU's regulatory influence and impact on other jurisdictions through trade.⁴⁹ Literature on the 'Brussels Effect'⁵⁰ and the 'EU Effect'⁵¹ examines various cases of the EU's regulatory influence through trade, emphasizing the importance of EU market power and the importance of its market size as a destination for exporting countries.⁵² The prospect of market access motivates exporters to adopt EU regulatory standards. Notably, the literature focuses on the impacts of EU environmental and labour standards on firms (exporting companies). The literature typically analyzes regulatory behavioural change at the firm level by considering how firms adapt their production technologies and processes to comply with EU regulatory standards.⁵³ EU regulatory impacts may eventually mobilize firms and other private actors, such as environmental non-governmental organizations (NGOs), to lobby national governments to adopt legislative reforms in line with EU regulatory standards.⁵⁴ However, Bradford has argued that 'we typically see only a "de facto regulatory convergence" whereby much of global business is conducted under unilateral EU rules even when other states continue to maintain their own rules'.⁵⁵ Thus, we do not always witness legal change at the national level in third countries in response to the EU's 'unilateral' measures.

In contrast, the EU IUU Regulation can be categorized as having a different effect. This phenomenon is explained through the concept of 'country-level territorial

⁴⁹ While in this article we focus on the regulatory impacts of the EU, it is worth noting that the US took 'global regulatory leadership' in safety and environmental regulations for some decades. For a shift of global regulatory impacts from the US to the EU, see D. Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press, 2012), Ch. 1.

⁵⁰ A. Bradford, *The Brussels Effect* (Oxford University Press, 2020).

⁵¹ See, e.g., A. Prakash & M. Potoski, 'The EU Effect: Does Trade with the EU Reduce CO2 Emissions in the Developing World?' (2017) 26 *Environmental Politics*, pp. 27–48.

⁵² According to Bradford, while 'in essence, the Brussels Effect emerges from market forces', there are five elements to generate the Brussels Effect: market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility: Bradford, n. 50 above, pp. 2, 25.

⁵³ This is called the 'de facto Brussels Effect': Bradford, n. 50 above, p. 2.

⁵⁴ This is called the 'de jure Brussels Effect', which means that multinational firms lobby their government because they are 'at a disadvantage when competing domestically against companies that do not export to the EU': Bradford, *ibid.* For a similar explanation with a focus on 'interaction between transnational norms and processes and domestic factors' that leads to formal regulatory changes, see J. Lin, 'Emergence of Transnational Environmental Law in the Anthropocene', in L. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene* (Hart, 2017), pp. 329–51, at 348.

⁵⁵ Bradford, n. 50 above, p. 5.

extension' in EU law: 'access to the EU market will be denied for goods originating in countries that are deemed to have inadequate laws in place'.⁵⁶ While the 'Brussels Effect' happens *unintentionally* and does not arise from 'the EU's active efforts to export its regulation',⁵⁷ under the concept of territorial extension a third country's compliance with EU measures is evaluated by the laws that the third country has in place.

In this respect the EU IUU Regulation is one example of country-level territorial extension as the EU has the intention to exert its regulatory influence over the fisheries laws and policies of third countries. The main responsibility for fishing activities exists at the national level – what matters is responsibility for a flag, port, coastal or market state in line with international IUU fishing instruments. This is why the EU IUU Regulation compels other nation-states to cooperate with the EU and take action in response to IUU fishing. In some transactions, such as the export of tuna, it may be possible to prove through a privately managed traceability system that certain products do not originate from IUU fishing.⁵⁸ However, this would not prevent a third country from being yellow-carded if the country does not respond to IUU fishing appropriately as a flag, port, coastal or market state. A primary consequence of the EU carding system, therefore, is legal change at the national level in third countries.

When the EU issues a yellow card to an Asian country under the IUU Regulation, it is a momentous event which may trigger responses that lead to national regulatory changes. Previous studies addressing the EU IUU Regulation have noted how and to what extent the EU carding system has influenced the fisheries laws of third countries. For instance, Honniball argues that 'the strong correlation between EU Yellow Cards, specific EU requests on regulating nationals, and third-country legislative amendments are indicative of the identification procedure playing an influential role'.⁵⁹ On this point this article goes one step further by analyzing key factors that explain third countries' national regulatory reforms. Which factors explain the EU's regulatory influence and impact on third countries? As noted, one important factor is EU market power, but are there other factors that may encourage third countries to engage in national regulatory reforms?

⁵⁶ J. Scott, 'The Global Reach of EU Law: Is Complicity the New Effects', in M. Cremona & J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press, 2019), pp. 21–63, at 26–7.

⁵⁷ Bradford, n. 50 above, p. 1.

⁵⁸ E.g., on 30 Oct. 2019, John West, a subsidiary of Thai Union Group PCL (the largest tuna supplier in Thailand and one of the world's major canned tuna suppliers), made a declaration that the company does not have a 'guilty verdict ... on all counts of doing business directly connected to IUU with which it had been charged', following the investigation by the UK Marine Management Organisation (MMO); see J. Merva, 'John West Foods Cleared of IUU Fishing Charges', *Thai Union*, 31 Oct. 2019, available at: <https://www.thaiunion.com/en/newsroom/press-release/1106/john-west-foods-cleared-of-iuu-fishing-charges>.

⁵⁹ Honniball (2021), n. 24 above, p. 566. Honniball also noted in his previous work that 'the response of third countries to the pressures of the EU listing process demonstrates, by and large, the extraterritorial effects intended and – at least in the statute books – achieved, is striking': Honniball (2020), n. 24 above, p. 47.

Two points are worth noting when considering factors beyond EU market power. Firstly, as explained above, not all yellow- and red-carded third countries export seafood products to the EU.⁶⁰ Moreover, even for those that do export such products to the EU, the power of EU market leverage may not be as strong as other instances of ‘governance through trade’ and the ‘Brussels Effect’. This is because the global demand for seafood products has increased, allowing exporting countries to easily find alternative destinations for export instead of the EU market.⁶¹

Secondly, yellow-carded third countries could have engaged in national law reforms at any time after the adoption of the EU IUU Regulation.⁶² However, these countries took no such legislative action until after they received the yellow card. Research shows that firms are usually very reactive to EU preferences and positions, and often choose adaptive responses such as changing their production technologies or processes in anticipation of new EU policies or legislation.⁶³ This is because firms have a ‘business incentive’ (profit motive) to export to the EU.⁶⁴ However, similar adaptive responses do not necessarily occur at government level. Legal reforms in third countries may not emerge and even if such reforms do happen, it may take time for them to materialize. In this respect the EU must exert other powers beyond its market power to encourage national legal reforms in third countries.

In this light, existing scholarship has argued that the EU has ‘normative power’ beyond its market power in the context of the EU IUU Regulation.⁶⁵ However, the concept of ‘normative power’ is too broad to explain the EU’s regulatory influence over third countries. In this respect we explore detailed factors in Thailand’s case, with a particular focus on legitimacy. The ‘unilateral’ nature of EU trade measures has made them controversial and led some to question their legitimacy.⁶⁶ Unilateral measures raise concerns because they have far-reaching impacts on third countries and fishermen. Many EU law scholars have analyzed legitimacy concerns and discussed whether the EU ‘unilateral’ measures could be justified and, if so, on

⁶⁰ Honniball (2020), *ibid.*, p. 46 (‘No link between a third country and the EU’s market is necessary’).

⁶¹ See FAO, n. 1 above, p. 8 (‘Overall, from 1976 to 2018, the value of global fish exports increased from USD 7.8 billion to peak at USD 164 billion, at an annual growth rate of 8 percent in nominal terms and 4 percent in real terms (adjusted for inflation)’).

⁶² Research shows that for some exporting countries, declines in seafood exports were observed immediately after entry into force of the EU IUU Regulation prior to a yellow card: Mundy, n. 23 above, p. 4.

⁶³ Prakash & Potoski, n. 51 above, p. 30; Bradford, n. 50 above, p. 5.

⁶⁴ Bradford, n. 50 above, p. 2.

⁶⁵ A.M.M. Miller, S.R. Bush & A.P.J. Mol, ‘Power Europe: EU and the Illegal, Unreported and Unregulated Tuna Fisheries Regulation in the West and Central Pacific Ocean’ (2014) 45 *Marine Policy*, pp. 138–45; A. Kadfak & S. Linke, ‘More than Just a Carding System: Labour Implications of the EU’s Illegal, Unreported and Unregulated (IUU) Fishing Policy in Thailand’ (2021) 127 *Marine Policy*, article 104445.

⁶⁶ G. Shaffer & D. Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 31–41, at 37. The issue of legality – in particular, the legality against the law of the World Trade Organization (WTO) – is often raised. As existing studies have already addressed this topic, this article focuses in more depth on other dimensions of legitimacy. For a discussion of the legality against WTO law see, e.g., Cooreman, n. 7 above, pp. 203–15; M.A. Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing* (The E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015), pp. 1–21, available at: <http://e15initiative.org/wp-content/uploads/2015/09/E15-Oceans-and-Fisheries-Young-FINAL.pdf>.

what grounds.⁶⁷ This legitimacy issue is addressed in greater detail in Section 5. We now turn to the case study of Thailand.

4. NATIONAL REGULATORY CHANGES IN THAILAND

Thailand plays a crucial role in the international fisheries supply chain as it has moved towards specialization in producing high-value-added products, especially in the tuna processing industry.⁶⁸ From 2019 to 2020, the EU was ranked as the 4th top destination for Thailand's fishery exports and accounted for approximately 6% of the country's total fishery exports by value.⁶⁹ The top exports to the EU are tuna (canned, loins, and frozen yellowfin tuna), molluscs (both cephalopod and bivalve), prepared surimi (in the form of processed food, crabsticks, fish fingers, fish balls, etc.), and prepared or preserved shrimps and prawns.⁷⁰ Apart from shrimp and prawn products, where most of the raw materials are from aquaculture and are thus outside the scope of the IUU Regulation,⁷¹ the majority of raw materials for Thailand's fishery products are caught in the wild and are imported predominantly from the waters of other countries.⁷²

Thailand's market share of the EU's fishery imports has steadily declined: in 2019, imports of fishery products from Thailand accounted for less than 1% of the EU's entire fishery imports.⁷³ This decline in Thailand's EU fishery market share is the result of a combination of factors; these include Thailand's withdrawal from the EU Generalized

⁶⁷ See, e.g., Bradford, n. 50 above; I. Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Hart, 2019); Cooreman, n. 7 above; J. Scott & L. Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) *European Journal of International Law*, pp. 469–94.

⁶⁸ Thailand is one of the world's major exporters of processed and canned tuna: Thai Union, 'Thai Union Ranked No. 1 Globally in Food Industry, Named as Industry Leader Again in Dow Jones Sustainability Indices', 16 Sept. 2019, available at: <https://www.thaiunion.com/en/newsroom/press-release/1082/thai-union-ranked-no1-globally-in-food-industry-named-as-industry-leader-again-in-dow-jones-sustainability-indices#:~:text=ABOUT%20THAI%20UNION%20GROUP&text=Today%2C%20Thai%20Union%20is%20regarded,pioneering%20sustainable%2C%20innovative%20seafood%20products>.

⁶⁹ Top of the list were the US and Japan, accounting for approximately 21% and 15% of the total exports by value respectively: *สถานการณ์การส่งออกสินค้าประมงและผลิตภัณฑ์อาหารทะเลของไทย ปี 2562* (Department of Trade Negotiation) (in Thai), available at: <https://api.dtn.go.th/files/v3/5e971bcbef414016f5670833/download>.

⁷⁰ Data from Comtrade and Thai Custom Department. Additional analysis can be found in P. Sengtin, *การค้าสินค้าประมงของไทยไตรมาสแรกของ ปี 2560* (Department of Fisheries) (in Thai), available at: <https://www.fisheries.go.th/strategy/UserFiles/files/fish%208-60.pdf>.

⁷¹ Annex I of the EU IUU Regulation lists the products excluded from 'fisheries products'. See also IUU Watch Group, 'The Impact of the EU IUU Regulation on Seafood Trade Flows: Identification of Intra-EU Shifts in Import Trends related to the Catch Certification Scheme and Third Country Carding Process', Feb. 2018, p. 72, available at: http://www.iuuwatch.eu/wp-content/uploads/2018/02/TDA_report_IUUwatch_HQ.pdf.

⁷² For instance, most raw material for canned tuna is caught or exported from countries in the Indian and Pacific Oceans: Interviews with the Thai Department of Fisheries, 6 Aug. 2019, and Thai Union Group PCL, 26 Feb. 2019.

⁷³ Data from Eurostat and Thai Department of Fisheries; see P. Noradee, *การนำเข้าสินค้าประมงของสหภาพยุโรป ปี 2563* (Department of Fisheries) (in Thai), available at: <https://www.fisheries.go.th/strategy-trade-stat/images/PDF/aticle/EU/imEU2563.pdf>.

System of Preferences (GSP), a natural decline caused by an aquaculture disease,⁷⁴ diversification by Thailand to alternative markets and, more recently, the COVID-19 pandemic. However, the major decline that started between 2015 and 2019 was the direct result of the issuing of a yellow card, following which the entire range of Thai fishery exports to the EU market encountered significant and immediate reductions in export volumes.⁷⁵

4.1. *Interactions Prior to Issuing the Yellow Card (during ‘Administrative Cooperation’)*

Prior to issuing a yellow card to Thailand in April 2015, the European Commission Directorate-General for Maritime Affairs and Fisheries (DG MARE) visited Thailand on three occasions to scrutinize its actions to combat IUU fishing. These consisted of visits in 2011, 2012 and October 2014. During and after each visit, the DG MARE and the Thai Department of Fisheries (DoF) engaged in dynamic bilateral dialogues, which included the exchange of comments, suggestions, replies, rebuttals, and reports.

The DG MARE commented, *inter alia*, upon Thailand’s lack of a national VMS to regulate and control Thai vessels in their operations outside Thai waters and the inability of the DoF and other entities to exercise continuous oversight of all activities of foreign vessels operating within Thai waters.⁷⁶ The DG MARE considered these inadequate controls to be most alarming as there had already been a complicated network of national and international fleets supplying Thailand’s growing fisheries processing industry, which produced fishery products for export worldwide. Because of the lack of VMS, Thai authorities and producers could not produce any verifiable records to evidence the legality of the raw materials used to produce fishery products destined for the EU market.

The DG MARE also pointed out that Thailand still had an archaic Fisheries Act dating from 1947,⁷⁷ under which the DoF lacked the ability to impose adequate penalties and controls over fisheries offences.⁷⁸ Further, Thailand did not have a national action plan for a long-term solution to curb IUU fishing. Overall, the DG MARE suggested to

⁷⁴ This is largely as a result of a local aquatic disease, ‘early mortality syndrome’ (EMS), in shrimps, which affected the majority of aquaculture shrimps in Thailand.

⁷⁵ In 2016, after the yellow card was imposed, frozen fish exported to the EU market faced a decline of approximately 75%: IUU Watch Group, n. 71 above, pp. 73–9.

⁷⁶ This reasoning that led to the EU rejecting the original Thai vessel regulatory system as being ineffective has been mentioned in various press conferences and academic seminars in Thailand; see, e.g., N. Saenphit, ‘Summary of the Academic Seminar for the 20th Anniversary of Thai Transport and Maritime Law, ‘ใบเหลือง IUU Fishing ต่อประเทศไทยจบแล้วหรือยัง’ (2019) 14(19) *Transport and Maritime Law Journal*, pp. 110–4, at 113 (in Thai), available at: <https://so04.tci-thaijo.org/index.php/transportandmaritimelawjournal/issue/view/16849/4065>.

⁷⁷ Fisheries Act, B.E. 2490 (1947), *Royal Thai Government Gazette*, 14 Jan. B.E. 2490 (1947).

⁷⁸ Order of the National Council for Peace and Order No. 10/2558 (2015), *Royal Thai Government Gazette*, 29 Apr. B.E. 2558 (2015) (NCPO Public Order 10/2558 (2015)). See also, e.g., C. Chantarawarathit, *แนวทางการป้องกันเรือประมงไทยทำหารประมง ไอยูยูนอกน่านน้ำไทย ภายหลังจากการปลดใบเหลืองจากสหภาพยุโรป*, Ministry of Foreign Affairs (in Thai), available at: <https://image.mfa.go.th/mfa/0/yZ0EO327fd/nbt/nbt11/IS/11038.pdf>.

the Thai government that a strong political commitment to upgrade the entire regulatory system and practices in the fisheries sector would be required.

Following the 2014 visit, the DoF and other relevant government entities in Thailand anticipated that Thailand would be yellow-carded. To address the issues, the Thai government moved quickly to introduce Thailand's new Fisheries Act in 2015,⁷⁹ which replaced the archaic Fisheries Act of 1947. The new Act incorporated responses to most of the EU's comments and included the establishment of a national VMS. The 2015 Act was published in the *Royal Gazette* on 28 April 2015 (a mere one week after the issuing of the yellow card). However, it was too late to enact this new Act, which was launched prematurely and still failed to address many of Thailand's international obligations to combat IUU fishing.

4.2. Receipt of the Yellow Card: 'Commission Decision'

A yellow card was issued to Thailand on 21 April 2015.⁸⁰ The Thai government immediately signalled the need to obtain its revocation. A week after the yellow card was issued, the Prime Minister made a public order to address IUU fishing and issued a policy for Thailand to move towards responsible and sustainable fishing.⁸¹

In the Commission Decision notifying Thailand of its yellow-card status⁸² the DG MARE repeated the reasons for issuing the yellow card, which were based on comments made during its earlier visits to Thailand. In particular, one such reason for yellow-card status was the absence of control or monitoring systems for IUU-related activities. These included an inadequate system to control and monitor stock landings in Thai ports, such as inadequate logbook information (in contravention of Articles 61 to 62 UNCLOS and also Point 24 IPOA-IUU),⁸³ the lack of a VMS (not in accordance with Article 94 UNCLOS and also Point 24 IPOA-IUU),⁸⁴ and unreliable transparency and traceability systems (not in accordance with Points 72 to 74 IPOA-IUU).⁸⁵

Concerns were also expressed over the outdated domestic law intended to control and combat IUU fishing and the ineffective enforcement of existing fisheries legislation (thus, not in accordance with Article 94 UNCLOS and Point 24 IPOA-IUU),⁸⁶ which resulted in inadequate deterrence or penalties for IUU-related offences (thus, not consistent with Article 94 UNCLOS and Point 21 IPOA-IUU).⁸⁷

⁷⁹ Fisheries Act, B.E. 2558 (2015), *Royal Thai Government Gazette*, 28 Apr. B.E. 2558 (2015).

⁸⁰ European Commission, 'EU Acts on Illegal Fishing: Yellow Card Issued to Thailand while South Korea & Philippines are Cleared', Press Release, 21 Apr. 2015, available at: https://ec.europa.eu/commission/press-corner/detail/en/IP_15_4806.

⁸¹ The National Council for Peace and Order (NCPO) initiated the Command Center for Combatting Illegal Fishing under NCPO Public Order 10/2558 (2015), n. 78 above.

⁸² Commission Decision notifying a Third Country of the Possibility of Being Identified as a Non-cooperating Third Country in Fighting Illegal, Unreported and Unregulated Fishing [2015] OJ C 142/06.

⁸³ *Ibid.*, para. 30.

⁸⁴ *Ibid.*, para. 37.

⁸⁵ *Ibid.*, paras 44–47.

⁸⁶ *Ibid.*, paras 56–60.

⁸⁷ *Ibid.*, paras 68–69.

Furthermore, Thailand had ratified only the 1982 UNCLOS and was a party only to one RFMO – the Indian Ocean Tuna Commission (IOTC) – but had not joined any other international instruments. The Commission Decision referred specifically to the United Nations (UN) Fish Stocks Agreement,⁸⁸ which Thailand had failed to ratify (thereby, not acting in accordance with Point 11 IPOA-IUU).⁸⁹ Notably, Thailand subsequently ratified the Fish Stocks Agreement in 2017.⁹⁰

Following imposition of the yellow card, a further round of bilateral dialogue between the EU and the Thai government took place. One such occasion was during the visit of the EU Parliament Committee on Fisheries in November 2016, while the second occasion was made by the DG MARE in April 2018. Important recommendations and suggestions were made during both visits, all of which were highly valued by the Thai authorities. While details of the communications are not published officially for confidentiality reasons, the EU played a crucial role in helping Thailand to introduce changes to its fisheries systems, which we will now examine in detail.

4.3. *Stage following Receipt of the Yellow Card*

Following receipt of the yellow card, the Thai government launched strategies to reform its fisheries laws, which incorporated many of the EU recommendations. As noted, the new Fisheries Act, which replaced the 1947 Act, was published in 2015. The 2015 Act brought about basic regulatory changes to the existing rules, thereby updating definitions, fishing methods, fees, and processes to obtain fishing and port certificates. However, it did not directly address any of the EU recommendations and concerns. Subsequently, the most important legal reform was the Royal Ordinances on Fisheries, which entered into force in November 2015. This instrument, later updated by the 2017 Royal Ordinance, was augmented by an additional 100 ministerial decrees and announcements.

A Royal Ordinance is normally passed by the Cabinet and, during an emergency, it can be issued prior to a parliamentary hearing. In the case of the 2015 Royal Ordinance, drafting began immediately after the Prime Minister's public order declaring the need to combat IUU fishing as part of the Thailand National Agenda; the Royal Ordinance entered into force approximately six months after the Prime Minister's declaration.⁹¹ This accelerated process in enacting the legislation was adopted by the Thai

⁸⁸ UN Agreement for the Implementation of the Provisions of the [UNCLOS] relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), New York, NY (US), 4 Aug. 1995, in force 11 Dec. 2001, available at: http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

⁸⁹ Commission Decision, n. 82 above, para. 85.

⁹⁰ In 2016 Thailand also ratified the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome (Italy), 22 Nov. 2009, not yet in force, available at: http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf. Moreover, in 2017 it became a party to the Southern Indian Ocean Fisheries Agreement (SIOFA), Rome (Italy), 7 July 2006, in force 21 July 2012, available at: https://www.apsoi.org/sites/default/files/documents/SIOFA%20AGREEMENT_EN.pdf.

⁹¹ Royal Ordinance on Fisheries B.E. 2558 (2015), *Royal Thai Government Gazette*, 13 Nov. B.E. 2558 (2015), available at: https://www4.fisheries.go.th/local/file_document/20180402093812_1_file.pdf (Royal Ordinance on Fisheries 2015). This was followed by the Royal Ordinance on Fisheries (No. 2) B.E. 2560 (2017), 25 June 2560 (2017), available at: <https://www.fisheries.go.th/law/images/PR2558/>

government at that time to demonstrate that the EU's concerns regarding IUU fishing problems in Thailand would be addressed promptly. The government considered the issue to be not only economically essential to retain EU market access for Thai fisheries exports, but also politically important to enhance its image at both the domestic and international levels. This is especially significant given that the government at the time had come to power through the 2014 military *coup d'état*.⁹² At the domestic level the military government has been criticized for its frequent use of this fast-tracked legislative process. Questions were raised regarding whether its use by the government is a deliberate ploy to avoid full public scrutiny when addressing sensitive political issues.⁹³ Noting that the IUU problems were quickly addressed after the issuing of the yellow card, it can be questioned whether the issues would have been addressed as quickly had the Thai government been elected.

Detailed observations of this Ordinance clearly reveal the incorporation of Thailand's international obligations as a coastal, port, and flag state under both UNCLOS and the IPOA-IUU, which are summarized in the following seven major changes.

- (1) The first important concept introduced by the 2015 Royal Ordinance is the establishment of a VMS system whereby all Thai-registered commercial fishing vessels with a capacity of 30 gross tonnage or above must install a workable VMS device. In addition, the owners of such vessels must introduce fishing logbooks and regularly report the logbook data to the DoF.⁹⁴ However, VMS devices are not required for artisanal fishing vessels, which are operated mostly by small-scale fishermen, who numerically represent 60% of Thai-registered fishing vessels. To keep the operations of unregistered artisanal fishing vessels separate from those of registered commercial vessels, the Ordinance imposed a requirement that artisanal vessels may not operate more than three nautical miles beyond the coastal area, and commercial fishing vessels must not be engaged in operations within the three-nautical-mile coastal areas.⁹⁵

3-Royal-Ordinance-on-Fisheries-Amendment-No2.pdf (Royal Ordinance on Fisheries 2017) (which elaborates the principles and practices which had already been introduced by the 2015 Ordinance).

⁹² Thairath Online, *ไทยพลิกวิกฤต ปลดล็อกใบเหลืองอียู จัดระเบียบประมงไทยอย่างยั่งยืน*, 30 July 2015 (in Thai), available at: <https://www.thairath.co.th/news/local/514733>.

⁹³ ILaw, *มาตรา 44 ครบ 200 ฉบับ ใช้ทุกประเด็นปัญหาแบบตามใจชอบ*, 27 Nov. 2018 (in Thai), available at: <https://ilaw.or.th/node/5041>.

⁹⁴ As the minimum, the logbook must contain information on 'the date of departure from or arrival to a fishing port, type of fishing gear, area of fishing operation and vessel location, type and quantity of catch or disposal of aquatic animals, landing of catch at fishing port, transshipment of aquatic animals' (Royal Ordinance on Fisheries 2015, n. 91 above, s. 81). This information must be certified as being true and accurate by the master of the vessel (*ibid.*, s. 81) as elaborated by the Notification of the Department of Fisheries concerning Specification of Conditions and Methods of Installing Vessel Monitoring Systems (VMS) of Fishing Transshipment Vessels which Operate Outside Thai Waters B.E. 2560 (2017), *Royal Thai Government Gazette*, 16 June B.E. 2560 (2017) (in Thai), available at: <http://www.ratchakitcha.soc.go.th/DATA/PDF/2560/E/164/17.PDF>.

⁹⁵ Royal Ordinance on Fisheries 2015, n. 91 above, ss. 34, 38. This, in turn, revokes controversies among Thai fishermen, especially the small-scale or local fishermen who are involved in artisanal rather than commercial fishing and thus do not have vessels or tools that are capable of fishing too far from the coastline; see, e.g., A. Treerutkuarkul, 'From IUU Black Spot to Clean Fishing Hub', *Bangkok Post*, 5 Oct. 2019, available at: <https://www.bangkokpost.com/thailand/special-reports/1765529/from-iuu-black>.

- (2) To make the VMS system effective, the Thai authorities established the Fisheries Monitoring Centre (FMC), which is an ‘integrated state of the art IT system to ensure effective remote surveillance’.⁹⁶ The FMC is currently administered by more than 80 full-time officers and 120 staff members.⁹⁷ At the policy level, the Command Centre for Combatting Illegal Fishing (CCCIF) was established in 2015. This Centre is chaired by the DoF and deals directly with the EU. The Centre is responsible for storing all information relevant to IUU fishing activities, training FMC staff, and collecting data relating to the development of sustainable fishing from all relevant agencies, both inside and outside Thailand.⁹⁸ It can also make policy recommendations to the Thai government.
- (3) The port-in-port-out system applies to the 32 busiest ports in Thailand. This system targets the control of all vessels with a capacity of a gross tonnage of 30 or more.⁹⁹ Here, a team of qualified authority staff inspects and checks vessels at the points of arrival and departure. This system was inspired by the Commission’s recommendation to utilize a port as the most effective location to carry out full checks on the condition of vessels, the registration of fishing gear, and the records of both catch and crew. Incorporating the EU recommendations made during a visit by its officials, the documents are now stored in a digital database in an online system to prevent forgery.¹⁰⁰
- (4) An improved system has been introduced to patrol Thai waters and inspect both foreign- and Thai-registered vessels. The patrols check the vessels’ crew and

[spot-to-clean-fishing-hub](https://www.bangkokpost.com/thailand/general/830660/fishermen-say-new-rules-bad-for-business); see also P. Wangkiat, A. Wipatayotin & P. Jikkham, ‘Fishermen Say New Rules Bad for Business’, *Bangkok Post*, 19 Jan. 2016, available at: <https://www.bangkokpost.com/thailand/general/830660/fishermen-say-new-rules-bad-for-business>; The Environment Justice Foundation, *Thailand’s Road to Reform: Securing a Sustainable, Legal and Ethical Fishery* (EJF, 2019), available at: <https://ejfoundation.org/resources/downloads/ThailandRoadToReform.pdf>.

⁹⁶ See, e.g., Department of Fisheries, ‘Thailand’s Success in Combatting IUU Fishing’, 10 July 2020, available at: https://www4.fisheries.go.th/dof_en/view_message/232.

⁹⁷ Department of European Affairs, Ministry of Foreign Affairs, ‘Highlights of Progress: Fisheries Monitoring Center Now Fully Operational’, Apr. 2017, available at: <https://europetouch.mfa.go.th/th/content/90110-highlights-of-progress-fisheries-monitoring-center-now-fully-operational?cate=5d6abf7c15e39c3f30001468> (‘From 16 staff members in 2015, the FMC now has 83 full-time officers running MCS [monitoring, control and surveillance] activities on a 24/7 basis. Additional 123 officers were also recruited in 2016 for various inspection activities both at sea and at port’).

⁹⁸ The CCCIF was responsible for overseeing the monitoring and surveillance abilities of FMC staff and to train them for a minimum period of three months: Ministry of Foreign Affairs, ‘Thailand Strengthens Effectiveness of the Fisheries Monitoring Center’, 25 May 2018, available at: <https://www.mfa.go.th/en/content/5d5bd14615e39c3060023fcd?cate=5d5bcb4e15e39c306000683e>.

⁹⁹ In addition, a special provision for Thai vessels operating on the high seas and the Exclusive Economic Zone (EEZ) of other coastal states was also introduced. The Ordinance now prohibits the operation of Thai vessels outside Thai waters for more than 180 days; see Royal Ordinance on Fisheries 2015, n. 91 above, s. 87. Previously, large Thai commercial fishing vessels would have been able to operate continuously at sea and only return to a Thai port for checks and monitoring by Thai authorities every 2 to 4 years.

¹⁰⁰ Interview with the DoF, 7 June 2019.

- catch, with a focus on Thailand's obligations as a coastal state adequately to prevent IUU fishing activities in its waters.¹⁰¹
- (5) There is a new requirement that on-board observers be present on every Thai-registered vessel operating outside Thailand.¹⁰² The first batch of 42 officials boarded tuna fishing vessels in 2018.¹⁰³
 - (6) There is now an e-traceability system to maintain records of important details regarding fishery products throughout the supply chain – from sea to port, and from port to market. The records include a logbook of catch certificates, and marine-catch purchasing and trans-shipment documents. The system includes links to the data of 1,063 fishing ports worldwide to cross-check the information.¹⁰⁴
 - (7) The 2015 Ordinance made IUU fishing and related offences subject to severe fines.¹⁰⁵ In fact, a specific section of the criminal court has been established to deal with fishery-related offences; it can impose heavy fines for breaches of the Royal Ordinances requirements.¹⁰⁶ For the most serious breaches – which include most of the offences relating to Thailand's duty as a coastal state, port state, and flag state under UNCLOS and the IPOA-IUU – a fine of 20 to 30 million Baht (฿) (€500,000 to 750,000) or up to five times the value of the catch (whichever is higher) can be imposed on the vessel's owners. Between 2015 and July 2018, there were 4,448 such cases which received cumulative fines of over ฿400 million (over €10.5 million).¹⁰⁷

4.4. *Removal of the Yellow Card*

The turning point when the lifting of the yellow card was felt among the Thai authorities occurred in November 2018 when Thai representatives made an official visit to the EU Parliament. They received generally favourable comments on their progress to combat IUU fishing, while most of the negative comments – such as issues of poor labour conditions at sea and sustainable fishing – were considered by the Thai authorities to be the next important step in the country's fisheries reform.¹⁰⁸ In addition, towards

¹⁰¹ Royal Ordinance on Fisheries 2015, n. 91 above, s. 50. In terms of the waters of a coastal state, the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) clarified that coastal states are subject to the obligation to combat IUU fishing within their EEZ: ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, List of Cases: No. 21, 2 Apr. 2015, para. 106.

¹⁰² Royal Ordinance on Fisheries 2015, n. 91 above, s. 50.

¹⁰³ The first batch of 40 officials were employed initially. Currently, approximately 5 rounds of officials have been employed specifically for this observation task: Naewna, *ตัวเข้มผู้สังเกตการณ์บนเรือประมงรุ่น 5*, 23 Dec. 2020 (in Thai), available at: <https://www.naewna.com/local/461804>.

¹⁰⁴ The system has developed since the first 2015 Royal Ordinance came into force; the system is now available with limited access.

¹⁰⁵ Royal Ordinance on Fisheries 2015, n. 91 above, ss. 123, 124, 129–32, 155, 165.

¹⁰⁶ Prachachat, *กฎหมายเผาผลาญออกคำสั่งการพิจารณาพิพากษาคดีความผิดตามพระราชกำหนดประมง พ.ศ. 2558*, Prachachat, 5 Feb. 2018 (in Thai), available at: <https://www.prachachat.net/breaking-news/news-112523>.

¹⁰⁷ Thairath Online, *วิบากกรรมประมงไทย*, 15 Apr. 2019 (in Thai), available at: <https://www.thairath.co.th/business/market/1469211>.

¹⁰⁸ Interview with the DoF, 7 June 2019.

the end of 2018 there were several reports by the media and NGOs praising Thailand's progress and its partnership with the EU to combat IUU fishing.¹⁰⁹

The yellow card issued to Thailand was removed in January 2019. The reason for this is expressed in the Commission's press release:

Thailand has amended its fisheries legal framework in line with international law of the sea instruments. It has reinforced compliance with its obligations as a flag, port, coastal and market State, included clear definitions in its legislation and set up a deterrent regime of sanctions. Moreover, it has reinforced the mechanisms of control of the national fishing fleet and enhanced its monitoring, control and surveillance systems. This includes remote monitoring of fishing activities and a robust scheme of inspections at port. With these measures, Thai authorities now have all the necessary policies in place to prevent, deter and eliminate illegal, unreported and unregulated fishing.¹¹⁰

Interestingly, the Commission's press release also pointed out the following issue in Thailand:

The Commission also recognises the efforts demonstrated by Thailand to tackle human trafficking and to improve labour conditions in the fishing sector ... Thailand has recently announced the ratification of the International Labour Organisation's Convention No. 188 on Work in Fishing (C188), the first country in Asia to do so.¹¹¹

Relatedly, it also stated:

The EU IUU Regulation does not specifically address working conditions on-board fishing vessels, neither human trafficking. Nonetheless, improvements in the fisheries control and enforcement system on IUU fishing may have a positive impact in the control of labour conditions in the fisheries sector.¹¹²

Although the IUU Regulation does not specifically address either labour conditions on board fishing vessels or human trafficking (which the European Commission clearly and openly acknowledged above), concerns over poor labour conditions in the Thai fisheries sector have been raised by the EU. Such concerns were not officially pointed out in the Commission Decision, although they were included in the original comments

¹⁰⁹ See, e.g., International Labour Organization (ILO), *Ship to Shore Rights: Baseline Research Finding on Fishers and Seafood Workers in Thailand* (ILO, 2018), available at: <https://shiptoshorerights.org/wp-content/uploads/baseline-research-findings-english.pdf>. See also Praxis Labs, *Tracking Progress: Assessing Business Responses to Force Labour and Human Trafficking in the Thai Seafood Industry* (Humanity United and The Freedom Fund, 2019), available at: http://www.praxis-labs.com/uploads/2/9/7/0/29709145/09_hu_report_final.pdf.

¹¹⁰ European Commission, Press Release, 'Commission Lifts "Yellow Card" from Thailand for its Actions Against Illegal Fishing', 8 Jan. 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_61.

¹¹¹ Ibid.

¹¹² European Commission, Press Corner, 'Questions and Answers: Illegal, Unreported and Unregulated (IUU) Fishing in General and in Thailand', 8 Jan. 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/memo_19_201.

and recommendations of the DG MARE,¹¹³ and were also expressed through comments made during the visit by the EU Parliament.¹¹⁴

Consequently, Thai labour law was reformed to address problems specific to the fisheries sector.¹¹⁵ As noted, a breach of labour law now involves heavy fines. There is now a special unit within the criminal court for fisheries offences. For every illegal worker found on board a fishing vessel, a heavy fine of €20,000 may be imposed on the vessel's owners.¹¹⁶ The new labour law applicable to the fisheries sector is considered to have significantly reduced, although not entirely eliminated, the number of cases of poor working conditions and human trafficking in the industry. Clearly, such efforts by the Thai government to address labour issues helped in the lifting of the yellow card.

As noted by the Commission, in 2019 Thailand ratified the International Labour Organization (ILO) Convention No. 188 on Work in Fishing to improve the living and working conditions for fishermen and workers on board fishing vessels.¹¹⁷ To implement the Convention, the Labour Protection in Fishing Work Act B.E. 2562 (2019) was enacted in order to secure the rights of workers in fisheries.¹¹⁸ Although this Act includes many issues under the ILO Convention, it does not fully implement all of its detailed obligations. For example, there remain gaps regarding suitable on-board lodgings, appropriate sanitation facilities, and the provision of social security for fisheries workers.¹¹⁹ This is partly as a result of legal overlap between the labour law applicable to fisheries workers, as brought about by the 2019 Act, and the general labour law in Thailand. Further, as most fisheries workers are not Thai nationals, they are not entitled to full social security benefits and cannot fully access the domestic remedies provided under Thai labour law.¹²⁰

¹¹³ For information on the DG MARE visits see, Department of Fisheries, *บทเรียนการแก้ไขปัญหาการทำประมงผิดกฎหมาย*, 2019 (in Thai), available at: https://www4.fisheries.go.th/local/file_document/20190708091833_1_file.pdf. See also Ministry of Foreign Affairs, *คณะธุรกิจและผู้แทนหน่วยงานไทยพบหารือสมาชิกผู้สังเกตการณ์ค้าประมงของยุโรปและภาครัฐอียูเพื่อสร้างความเชื่อมั่นในสินค้าประมงไทย 2014* (in Thai), available at: <https://www.mfa.go.th/th/content/5d5bce5315e39c3060014db1?cate=5d5bc-b4e15e39c306000683b>; Manager Online, *EU ใหลลียงไทยปลอัยประมงเกืออล่างผลาญทะเล เดือนไมปรับปรุงกระทบส่งออก 4 แสนล้านบาท*, *Manager Online*, 22 Dec. 2014 (in Thai), available at: <https://mgronline.com/south/detail/9570000146926>.

¹¹⁴ For information on the EU Parliament visit, see Government Public Relations Department, *การแก้ไขปัญหาประมงผิดกฎหมายของไทยในสายตาดูอียู*, 2017 (in Thai), available at: http://www.asean thai.net/ewt_news.php?nid=6765&filename=in (accessible to view only in Thailand).

¹¹⁵ This includes the Royal Ordinance on Management of Foreign Workers' Employment B.E. 2560 (2017), *Royal Thai Government Gazette*, 28 June B.E. 2560 (2017).

¹¹⁶ Royal Ordinance on Fisheries 2015, n. 91 above, s. 124.

¹¹⁷ Geneva (Switzerland), 14 June 2007, in force 17 Nov. 2017, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

¹¹⁸ Labour Protection in Fishing Work Act, B.E. 2562 (2019), *Royal Thai Government Gazette*, 22 May B.E. 2562 (2019); P. Jankomol, 'The Problem of the Applicability of Work in Fishing Convention, 2007 (C 188) in Human Trafficking in Thailand's Fishing Industry' (LLM thesis, Thammasat University, Bangkok (Thailand) 2020), pp. 92–6.

¹¹⁹ *Ibid.*, pp. 96–101.

¹²⁰ *Ibid.*, pp. 110–1.

5. ASSESSMENT: POWER AND LEGITIMACY

The EU and the targeted countries play a game of negotiation. Yellow-carded countries aim to have this status removed, thereby avoiding a red card. Whether such countries can meet this goal depends on how effectively they can implement EU recommendations despite their existing administrative constraints. Meanwhile, the EU is concerned with whether it can exert enough pressure for legal reforms and implementation during the yellow-card period. For the EU, further downgrading a country to red-card status represents a ‘failure’ in its use of power. The EU stands to gain by generating regulatory change in targeted countries, but (given its dependence on imports for its supply of seafood products) does not benefit from imposing trade bans on these countries.¹²¹

This article confirms what existing studies have found: that the receipt of the yellow card does trigger national legal reforms when a third country still has export interests. Thailand moved rapidly, and to some extent drastically, to reform its national fisheries legal system, as evidenced by the immediate announcement by the Thai Prime Minister of a public order and enacting the 2015 Royal Ordinance after receiving the yellow card. As noted previously, the Royal Ordinance included various ‘practical’ national reforms of Thai fisheries systems.

In this respect the EU exerted its regulatory influence on Thai authorities by using its powers of expertise and monitoring. The EU’s power of expertise was revealed in its recommendations and suggestions for the Thai authorities. In addition, the EU’s power of monitoring over Thai progress was tactical: it not only offered recommendations to guide the direction of national reform, but the DG MARE also made on-the-spot checks at Thai ports to monitor how Thailand was introducing the VMS systems, port-in-port-out controls, and the e-traceability system. In this way the EU exerted effective pressure for implementation during the yellow-card period.

In our view, an additional factor that triggered national legal reform in Thailand relates to the EU strategy of including labour issues in the Thai reforms.¹²² As stated above, the IUU Regulation does not specifically address either labour conditions on board fishing vessels or human trafficking. However, in the case of Thailand’s yellow card, the EU included Thai labour conditions as one recommendation for national legal reform. There were numerous negative reports by western media on the Thai fisheries industry concerning both illegal fishing and poor labour conditions.¹²³ On this point we also denote the EU’s ‘agenda-setting’ power in terms of expanding the scope of the negotiation beyond IUU fishing. By linking IUU fishing with Thailand’s

¹²¹ Nevertheless, we acknowledge that it is important for the EU to impose a red card on third countries when those countries do not properly address IUU fishing by reforming their national fisheries legal system, which ultimately reinforces the EU measures.

¹²² See also Kadfak & Linke, n. 65 above, pp. 4–6.

¹²³ Human Rights Watch, ‘Hidden Chains: Rights Abuses and Forced Labor in Thailand’s Fishing Industry’, 2018, available at: <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>; BBC, ‘Thailand’s Fishing Industry “Puts Children at Risk”’, Report Says’, *BBC News*, 14 Sept. 2015, available at: <https://www.bbc.com/news/world-asia-34242102>; B. Palmstrom, ‘Forced to Fish: Slavery on Thailand’s Trawlers’, *BBC News*, 23 Jan. 2014, available at: <https://www.bbc.com/news/magazine-25814718>.

poor labour conditions and broadening the scope of the issue, the EU was able to exert greater pressure on the Thai government to undertake legal reform.¹²⁴

Thus, we argue that the EU was exerting its power of expertise, monitoring, and agenda setting to facilitate Thailand's progress. Our argument also raises an important question about legitimacy, as noted above: how can we evaluate the EU's powers of expertise, monitoring, and agenda setting in the light of legitimacy? While there are several ways to assess legitimacy, and scholars use different criteria, there is a consensus among scholars about the appropriate criteria for making this assessment.¹²⁵ We start from the following two criteria. The first is 'input legitimacy' (also known as 'procedural legitimacy'), which is concerned with 'the process by which decisions are made, including factors such as transparency, participation, and representation'.¹²⁶ The second is 'output legitimacy' (also known as 'substantive legitimacy'), which relates to 'the results of governance' – that is, whether 'a regime solve[s] problems effectively'.¹²⁷ While these are two different aspects of legitimacy, they are closely linked as 'input' legitimacy will affect 'output' legitimacy. Accordingly, the combination of 'input' and 'output' legitimacy seems to be a common standard frequently used for legitimacy assessments.¹²⁸

One approach to assess 'input' legitimacy is by looking at 'expertise as a basis of legitimacy'.¹²⁹ Expertise can be a source of legitimacy because expert decision making generates better outcomes and solutions.¹³⁰ Based on this view, Hadjiyianni highlights the importance of checking the EU's 'expertise' when it exercises its unilateral power. She associates 'legitimacy' with good governance and accountability, and considers 'expertise' an essential part of good governance and regulation, which can be provided through 'transparency, reason giving, due process, public participation and judicial review'.¹³¹

As noted, the EU's expertise was complemented by its monitoring power; its expertise and knowledge to combat IUU fishing were employed through monitoring at the Thai ports. However, in the light of 'expertise' as legitimacy, there is a question concerning whether the EU's exercise of its power of expertise was accompanied by

¹²⁴ For the detailed process of the cooperation, see Kadfak and Linke, n. 65 above, pp. 5–7.

¹²⁵ See V. Heyvaert, *Transnational Environmental Regulation and Governance: Proposals, Strategies and Principles* (Cambridge University Press, 2018), p. 262.

¹²⁶ D. Bodansky, 'Legitimacy in International Law and International Relations', in J. Dunoff & M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012), pp. 321–41, at 330. Some commentators differentiate between 'input' legitimacy (i.e., participation) and 'throughput' legitimacy (e.g., transparency and interest consultation); see J. van Zeben, 'Facing the Legitimacy Challenge: Law as a Disciplining Force for Transnational Environmental Governance', in V. Heyvaert & L. Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar, 2020), pp. 145–58, at 147–8.

¹²⁷ Bodansky, *ibid.*

¹²⁸ Bodansky, n. 126 above, p. 331; G. Shaffer, 'The Dimensions and Determinants of State Change', in G. Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2013), pp. 23–49, at 34.

¹²⁹ D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *American Journal of International Law*, pp. 596–624, at 619.

¹³⁰ *Ibid.*, p. 620.

¹³¹ Hadjiyianni, n. 67 above, p. 71.

sufficient transparency and the giving of reasons. Except for the notifications issued to third countries, there is no official information regarding discussions with third countries during each visit. Thus, we do not know the extent to which the Commission presented reliable expert knowledge to Thailand. Also, while this article does not engage with the question of whether the EU asked Thailand about more than what is required by international fisheries law, this point may affect the quality of the EU's 'legal' expertise.¹³²

On the other hand, we can acknowledge that Thailand did not argue with the Commission's legal reasoning for the yellow card, which referred mainly to UNCLOS and the IPOA-IUU (note that the EU IUU Regulation provides an opportunity for the third country to respond to the Commission).¹³³ The IPOA-IUU is a non-binding instrument, and it may be debatable whether the EU measure should be based only on binding instruments.¹³⁴ However, Thailand seemed to accept the reasoning for the yellow card based on the IPOA-IUU. Moreover, it can be said that the EU's power of expertise, complemented by its monitoring power, was appreciated by Thailand in that this expertise and monitoring guided Thailand towards a pathway for transforming its national fisheries systems. This appears to have been a positive instance where 'expertise can provide a basis of decision making with respect to issues where there is no significant disagreement over values where people have shared goals and the issue is how to achieve those goals'.¹³⁵ Both the EU and Thailand recognized the importance of combating IUU fishing. The Thai authorities wanted their country to become a forerunner among developing countries, an exemplar of moving towards sustainable fishing, and to continue its long-term partnership with the EU in the fight against IUU fishing. In this respect the EU's powers of expertise and monitoring entailed substantial 'output' legitimacy, which resolved the problem effectively.

Further, how can we evaluate the EU's agenda-setting power, including in respect of labour issues, in the IUU agendas? Considered on the ground of fairness, Bodansky argues that 'all those who will be affected by a decision should be able to participate in the decision-making process'.¹³⁶ However, it has not been possible for third countries and their people to participate in the EU's decision-making process to include labour issues in the IUU agendas; thus, issues regarding legitimacy arise. In this respect 'accountability' is an important element for the legitimacy assessment.¹³⁷ Between the

¹³² Van der Marel, n. 38 above, p. 255 ('Currently, it is somewhat unclear from the Commission's evaluations what level of conduct it requires from a third country, and whether this goes beyond what is required by international law').

¹³³ EU IUU Regulation, n. 10 above, Art. 32(1)(b).

¹³⁴ We argue that it is unnecessary to exclude non-binding instruments from the reasoning behind a yellow card if the non-binding instrument (e.g., the IPOA-IUU) forms a shared understanding that can guide a state's behaviour. Indeed, the IPOA-IUU has been recognized as representing a shared understanding of IUU fishing, as it has been incorporated into national legislation and the decisions of RFMOs.

¹³⁵ Bodansky, n. 129 above, p. 622. See also Shaffer and Bodansky, n. 66 above, p. 41.

¹³⁶ D. Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11(2) *European Journal of International Law*, pp. 339–47, at 341.

¹³⁷ Hadjiyianni, n. 67 above, p. 70.

EU and third countries, the external accountability process¹³⁸ can function through transparency, the giving of reasons, and due process, which relate to ‘input’ legitimacy.¹³⁹ On this point the EU’s exercise of ‘agenda-setting’ power should not be legitimized in the light of the procedural aspect of accountability because it is not based on any express requirement of the EU IUU Regulation.

However, without the EU’s agenda-setting power, Thailand might not have had enough incentives to reform its labour and fisheries laws,¹⁴⁰ while eventually it reformed its labour laws after receiving a yellow card. It is insightful at this point to consider the legitimacy of EU measures in the light of ‘consequences’, which form a part of ‘output’ legitimacy concerns. Scott argues that the EU’s intention to exert its regulatory influence over the laws of third countries might be justified because the EU has a moral responsibility to minimize environmental harm. She explains that ‘the failure of the EU to take available steps to prevent or minimize environmental wrongdoing in third countries’ may constitute ‘complicity’.¹⁴¹ However, the concept of ‘complicity’ does not necessarily justify EU intervention in the laws of third countries without conditions. According to Scott, the EU should be ‘attentive to the negative third country consequences of its measures’ and ‘balance carefully the negative and positive consequences of interventions’.¹⁴²

As for the negative consequences of the EU interventions, it can be pointed out that the rapid law reforms have caused some disruptions in Thailand’s legal system, as there are some overlaps between the general labour law and the newly adopted 2019 Act, which specifically addresses the fisheries sector. Because the 2019 Act was adopted immediately with insufficient preparation, it did not offer comprehensive labour protection for non-Thai labourers, who constitute the majority of workers in the Thai fishing sector. There are other possible negative consequences of the EU measure, such as impacts on small-scale fishermen,¹⁴³ or trade shifting to markets that do not properly address IUU fishing. This is a limitation of our study and further studies could more comprehensively assess the consequences of the EU measures.

Lastly, it can be argued that the EU could have requested Thailand to address the labour issues more thoroughly and effectively. However, the EU seemed to be satisfied

¹³⁸ ‘External accountability’ (*versus* ‘internal accountability’ that the EU owes to its Member States) concerns whether the EU, exerting its regulatory power externally, is accountable enough to ‘people outside ... whose lives are affected’: R. Keohane, ‘Global Governance and Democratic Accountability’, in D. Held & M. Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity, 2003), pp. 130–59, at 141.

¹³⁹ Moreover, such procedural aspects of the accountability process ultimately affect the effectiveness of the EU IUU Regulation, which is concerned primarily with ‘output’ legitimacy: M. Rosello, *IUU Fishing as a Flag State Accountability Paradigm between Effectiveness and Legitimacy* (Brill Nijhoff, 2021), pp. 160–1.

¹⁴⁰ Bradford also argues that EU intervention is justified if foreign regulators do not have ‘the requisite capacity and the right incentive to act’: Bradford, n. 50 above, p. 253.

¹⁴¹ Scott, n. 56 above, pp. 54–5.

¹⁴² *Ibid.*, p. 59.

¹⁴³ See, e.g., R. Zwoelfer, ‘The Economic Impact of IUU-Fishing and Its Countermeasures on Small Scale Fishermen in Thailand: A Case Study of Baan Khan Kradai’ (2020) 416 *IOP Conference Series: Earth and Environment Science*, pp. 1–15, available at: <https://iopscience.iop.org/article/10.1088/1755-1315/416/1/012019/pdf>.

with the partial reforms made by the Thai government. This transpired because the labour issues were not a required element of the EU IUU Regulation. It may be worth considering how this may have worked if the EU had not addressed the labour issues as part of the IUU agendas, but addressed them separately in a process independent from IUU fishing.

6. CONCLUSION

In this article we have examined the impacts of the EU IUU carding system on national legal reforms in third countries through the case study of Thailand. In addition to EU market forces, we found multiple factors that could explain Thailand's national legal reforms: the EU was exerting its powers of expertise, monitoring, and agenda setting to facilitate Thailand's progress. We also assessed the legitimacy of the EU's powers (of expertise, monitoring, and agenda setting) over Thailand. The results were mixed: the EU's powers had both legitimate and illegitimate aspects. It has been said that '[l]egitimacy is a matter not of all or nothing, but of more or less'.¹⁴⁴ For instance, regarding the EU's agenda-setting power (including labour issues within the scope of IUU agendas), the emergence of labour law reforms was a positive consequence. However, there were also negative consequences, such as legal disruptions caused by reforms that were hastily drafted.

We conclude with three notes. Firstly, in this article we do not seek to draw a general observation from the single case of Thailand. In particular, the EU's agenda-setting power regarding labour conditions may not apply to other cases; further comparative studies are required to consider whether the EU is exerting a similar influence over other third countries.

Secondly, while this article focused on national-level legal impacts on third countries that received a yellow card, we presume that the transformation that Thailand undertook to remove the yellow card will have external influences on other fishing countries. Specifically, we anticipate that this will have effects on countries with outdated fisheries laws and monitoring systems. Other fisheries countries can learn from Thailand's transition processes by introducing an e-traceability system or even protecting minimum labour standards based on international conventions, to mitigate the risk of receiving a yellow card.

Finally, while the EU IUU Regulation triggered an overhaul of the entire system of Thai fisheries law, the next step for Thailand is to continue to reform its national fisheries regulatory systems. Thailand is currently targeting two major issues associated with IUU fishing: further improvement of labour conditions in the fishing industry as well as tackling overfishing.¹⁴⁵ In particular, the issue of overfishing and the

¹⁴⁴ Bodansky, n. 129 above, p. 623 (referring to T.M. Frank, *The Power of Legitimacy among Nations* (Oxford University Press, 1990), p. 26.)

¹⁴⁵ Existing scholarship proposes further possible measures to fight IUU fishing, such as prohibiting offenders from obtaining liability insurance; see, e.g., B. Soyer, G. Leloudas & D. Miller, 'Tackling IUU Fishing: Developing a Holistic Legal Response' (2018) 7(1) *Transnational Environmental Law*, pp. 139–63.

consequent decline of fish stocks in Thai waters has partly been addressed by the application of the law that can curb IUU fishing – through registration of fishing licences, fishing gear, and limiting the number of fishing days.¹⁴⁶ It remains to be seen to what extent Thailand can transform its national fisheries systems in the aftermath of its yellow-card period.

¹⁴⁶ This also requires Thailand to initiate a cooperation programme to manage fish stocks in the overlapping EEZ with the neighbouring countries in the near future.