

SLAVERY AT SEA: FORCED LABOR, HUMAN RIGHTS ABUSES, AND THE NEED FOR THE WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION TO ESTABLISH LABOR STANDARDS FOR FISHING CREW

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INTRODUCTION

Isolated at sea, many fishers are trapped and helpless, unable to escape brutal beatings and inhumane twenty-hour workdays.¹ The fates of these fishers, typically migrants looking for economic opportunity,² remain uncertain because the abuse, crimes, and deplorable conditions they allege usually happen out in the open sea, far away from the scrutiny of inspectors who might ensure proper working conditions, safety, and human wellbeing. Some fishers, however, dead from malnutrition, exhaustion, or abuse, are simply thrown into the sea like undesirable bycatch.³

The staggering scale of modern slavery and inhumane treatment has been well documented but not appropriately addressed. In 2016, the International Labour Organization (ILO) estimated that 40.3 million people were exploited in “modern slavery,”⁴ with roughly 24.9 million people victims of “forced labour.”⁵ Of the victims of forced labor, 11

¹ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., CHINA 2020 HUMAN RIGHTS REPORT 74 (2020) (reporting that Indonesian fishers on board a Chinese flagged fishing vessel “claimed they were subjected to physical violence, forced to work 20-hour days, and not paid for their work”); Afdillah, *Why Are Indonesian Fishing Crews Dying?*, GREENPEACE (Sept. 17, 2020), <https://www.greenpeace.org/international/story/45068/indonesian-fishing-crews-dying/> [<https://perma.cc/8HT6-STY3>] (“Another crew member, Sepri, 24, also died and was thrown overboard.”).

² Int'l Labour Org. [ILO], Walk Free Found. & Int'l Org. for Migration [IOM], *Estimates of Modern Slavery: Forced Labour and Forced Marriage*, at 33, 34, ILO Doc. GLO/10/55/USA and GLO/11/11/USA (Sept. 19, 2017); see also Int'l Org. for Migration [IOM], *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, at 41, 43 (2016) [hereinafter *Fisheries Crime in the Indonesian Fishing Industry*].

³ U.S. DEP'T OF LAB., BUREAU OF INT'L LAB. AFFS., LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 34 (2020).

⁴ The term “modern slavery” is not defined in international law. However, it is commonly used to mean slavery, servitude, debt bondage, forced marriage, and other circumstances of forced labor, and human trafficking. Int'l Labour Org. [ILO], Walk Free Found. & Int'l Org. for Migration [IOM], *supra* note 2, at 9; Roger Plant, *Modern Slavery: The Concepts and Their Practical Implications*, INT'L LABOUR ORG. [ILO] (May 2014) (working paper).

⁵ Int'l Labour Org. [ILO], Walk Free Found. & Int'l Org. for Migration [IOM], *supra* note 2, at 9–10. “Forced labour” is defined by ILO Forced Labour Convention, 1930 (No. 29) as “all work or

percent were in the agriculture and fishing sectors,⁶ with as many as 100,000 people enslaved on fishing vessels around the world.⁷

Despite these horrific statistics, the problem is likely to worsen. Human trafficking⁸ and the use of forced labor are entwined with illegal, unreported, and unregulated (IUU) fishing⁹ and the depletion of fish stocks.¹⁰ As fishers continue to deplete fish stocks—more than 34 percent of stocks are now fished at unsustainable levels¹¹—vessels and their crew

service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” ILO Forced Labour Convention, 1930 (No. 29), art. 2, June 28, 1930, 39 U.N.T.S. 55. *See also* U.S. DEP’T OF LAB., *supra* note 3, at 5 (“The latest global estimates highlight that 152 million children remain in child labor and 25 million adults and children toil under conditions of forced labor, including in global supply chains that crisscross our globe.”).

⁶ Int’l Labour Org. [ILO], Walk Free Found. & Int’l Org. for Migration [IOM], *supra* note 2, at 10–11.

⁷ Gavin G. McDonald, Christopher Costello, Jennifer Bone, Reniel Cabral, Balerie Farabee, Timothy Hochberg, David Kroodsma, Tracey Mangin, Kyle Meng & Oliver Zahn, *Satellites Can Reveal Global Extent of Forced Labor in the World’s Fishing Fleet*, 118(3) PNAS 1, 3 (Jan. 19, 2021). *See also* U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 28* (June 2021) (“Forced labor is well documented in the private economy, particularly in agriculture, fishing, manufacturing, construction, and domestic work.”) [hereinafter *TRAFFICKING IN PERSONS REPORT 2021*].

⁸ “Trafficking in persons” is defined as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

⁹ *See* U.N. Food and Agric. Org. [FAO], *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, at 2 (2001) (defining IUU fishing) [hereinafter *IPOA-IUU*].

¹⁰ U.N. Food and Agric. Org. [FAO], *Scoping Study on Decent Work and Employment in Fisheries and Aquaculture: Issues and Actions for Discussion and Programming*, at viii (2016) (“[P]ractices such as illegal, unreported and unregulated (IUU) fishing are closely linked with labour abuse, including exploitation of migrant workers.”). A “fish stock” is “a biological fish stock is a group of fish of the same species that live in the same geographic area and mix enough to breed with each other when mature.” NOAA Fisheries, *Fish Stock Assessment 101*, 2 (2012), https://www.st.nmfs.noaa.gov/Assets/stock/documents/Fish_Stock_Assessment_101.pdf [<https://perma.cc/7NJ9-EVGX>].

¹¹ U.N. Food and Agric. Org. [FAO], *State of the World Fisheries and Aquaculture 2020*, at 47 (2020).

stay at sea for longer periods in order to remain profitable.¹² Some tuna longliners, for example, stay at sea for months or even years when aided by at-sea transshipment¹³—the movement of fish from a fishing vessel, typically, to a refrigerated cargo vessel away from port.¹⁴ Moreover, as near-shore fisheries decline, fishers push farther out to sea.¹⁵ As fishing voyages lengthen, fuel costs unavoidably rise, driving vessel owners and operators to reduce or eliminate other costs, including “vessel maintenance, safety equipment and labor, as well as living and working conditions, leading to undermanning and fatigue that greatly contribute to human error and accidents.”¹⁶ However, labor costs, which account for up to 60 percent of a fishing vessel’s operating costs,¹⁷ are often the first to be cut.¹⁸ As the UN Food and Agriculture Organization (FAO) explains, “[o]perators of IUU vessels . . . tend to deny to crew members fundamental rights concerning the terms and conditions of their labour, including those concerning wages, safety standards and other living and working conditions.”¹⁹ In fact, the UN Office on Drugs and Crime (UNODC) reports that many fishers are traded from vessel to vessel and, because they

¹² Int’l Labour Org. [ILO], *Caught at Sea: Forced Labour and Trafficking in Fisheries*, 5–6 (2013). See also Int’l Labour Org. [ILO], *Work in Fishing Convention and Recommendation, 2007: Action Plan 2011–2016*, at 1 (2011) (“Many fishers are under economic pressure due to overfishing.”).

¹³ For example, Korean longliners fish in the WCPFC Convention Area for eighteen to twenty-four months before returning to Busan, the home port for all Korean longline vessels. Liam Campling, Antony Lewis & Mike McCoy, *The Tuna Longline Industry in the Western and Central Pacific Ocean and its Market Dynamics*, in FORUM FISHERIES AGENCY 156 (2017); U.N. Off. on Drugs and Crime, *Transnational Organized Crime in the Fishing Industry*, 34 (2011) (“With the possibility of at-sea transshipment a vessel may stay at sea for many years at a time without coming to port.”) [hereinafter UNODC].

¹⁴ For more on transshipment, see, e.g., Chris Wold & Alfred “Bubba” Cook, *Shining a Light on High Seas Transshipment: The Need to Strengthen Observer Reporting of Transshipments in the Western and Central Pacific Fisheries Commission*, 26 HASTINGS ENV’T. L. J. 183 (2020).

¹⁵ U.N. Food and Agric. Org. [FAO], *The State of the World Fisheries and Aquaculture 2012*, at 156 (2012) (“Case studies . . . found evidence that if fishery resources are depleted, or competition for limited resources becomes more intense, fishers will take greater risks, such as fishing farther offshore, to seek a living.”).

¹⁶ U.N. Food and Agric. Org. [FAO], *Fishing Operations: Best Practices to Improve Safety at Sea in the Fisheries Sector*, FAO Technical Guidelines for Responsible Fisheries 1, Suppl. 3, at 2 (2015).

¹⁷ U. Tietze, Joel Prado, Jean-Michel Le Ry & R. Lasch, *Techno-economic Performance of Marine Capture Fisheries*, FAO FISHERIES TECHNICAL PAPER 421 (FAO, Rome), 2001, at 19.

¹⁸ ENV’T JUST. FOUND., *BLOOD AND WATER: HUMAN RIGHTS ABUSE IN THE GLOBAL SEAFOOD INDUSTRY* 10 (2019).

¹⁹ U.N. Food and Agric. Org. [FAO], *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO Technical Guidelines on Responsible Fishing No. 9, at 1 (2002) [hereinafter *Implementation of IPOA-IUU*].

cannot escape, are “de facto prisoners.”²⁰ Moreover, IUU fishing begets additional IUU fishing,²¹ which leads to losses of social and economic opportunities, negative effects on food security and environmental protection, and serious impairment of efforts to rebuild depleted stocks.²² As such, providing proper work conditions for crew is critical to effective fisheries management.

Many fishing operators and recruitment agencies lure migrant workers into forced fisheries labor by charging recruitment fees, providing false promises concerning wages or working conditions, or misrepresenting the nature of the job itself.²³ Once “on the job,” employers, vessel captains, and recruitment agencies frequently confiscate passports and other travel documents, require payment for food, withhold wages, and otherwise expose migrant laborers to “the typical range of abuses,”²⁴ including threats against family, confinement, denial of food and sleep, threats of legal action, and sexual violence.²⁵

To address these issues within the Western and Central Pacific Fisheries Commission (WCPFC),²⁶ Indonesia proposed a Conservation and Management Measure (CMM) on Labour Standards for Crew on Fishing Vessels at the WCPFC’s 2020 annual meeting.²⁷ Although most WCPFC members supported Indonesia’s proposal,²⁸ China opposed it, arguing that the ILO and International Maritime Organization, not the WCPFC, were the appropriate forums for adopting binding labor standards for crew.²⁹ China further argued that its fisheries delegation did not have

²⁰ UNODC, *supra* note 13, at 34.

²¹ *Implementation of IPOA- IUU*, *supra* note 19, at 1 (noting that IUU fishing “undermines the morale of legitimate fishers and, perhaps more importantly, encourages them to disregard the rules as well. Thus, IUU fishing tends to promote additional IUU fishing, creating a downward cycle of management failure.”).

²² IPOA-IUU, *supra* note 9, at 1.

²³ Int’l Labour Org. [ILO], Walk Free Found. & Int’l Org. for Migration [IOM], *supra* note 2, at 31.

²⁴ *Id.* at 34.

²⁵ *Id.* at 35.

²⁶ The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Pacific Ocean (WCPF Convention) established the Western and Central Pacific Fisheries Commission (WCPFC). Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 9, Sept. 5, 2000, 2275 U.N.T.S. 40532 (entered into force June 19, 2004) [hereinafter WCPF Convention].

²⁷ Indonesia, *Proposed CMM on the Labour Standards for Crew on Fishing Vessels*, Western and Central Pacific Fisheries Commission, WCPFC17-2020-DP09 (2020).

²⁸ WCPFC, *Summary Report of the Seventeenth Regular Session of the Commission*, 19–20, 62–63 (2021) [hereinafter *WCPFC17 Summary Report*].

²⁹ *Id.* at 61. Without explanation, China agreed that the WCPFC could adopt non-binding decisions on labor standards. *Id.*

jurisdiction over labor matters.³⁰ Given the consensus-based voting culture of the WCPFC,³¹ China was able to block the adoption of Indonesia's proposal.³²

China's objections, however, are without merit. The WCPFC has the authority to adopt binding CMMs addressing labor standards for fishing crew and related issues concerning human rights. In fact, fishing subject to human rights abuses constitutes IUU fishing,³³ and IUU fishing is squarely within the competence of the WCPFC and other regional fisheries management organizations (RFMOs). As the FAO explains, "RFMOs have a central role to play in preventing, deterring and eliminating IUU fishing."³⁴ Moreover, while a substantial body of law, including the Work in Fishing Convention,³⁵ exists within the ILO to address the rights of fishers on fishing vessels, nothing prevents the WCPFC from adopting other rules. To the contrary, ensuring the safety of crew is a core obligation of flag states under the UN Convention on the Law of the Sea (UNCLOS)³⁶ and has been made a core part of fisheries management since at least 1995 through FAO's Code of Conduct for Responsible Fisheries.³⁷ As such, and due to the low participation rate in the ILO's Work in Fishing Convention and other relevant ILO and IMO agreements concerning labor conditions,³⁸ particularly among WCPFC members, the WCPFC should adopt labor standards for crew. In that way, the standards could be subject to the WCPFC's Compliance Monitoring Scheme³⁹ and reviewed by the WCPFC's Technical and Compliance

³⁰ *Id.* at 62.

³¹ The WCPF Convention includes rules for voting. WCPF Convention, *supra* note 26, art. 20. However, the WCPFC has never taken a decision by vote.

³² However, the WCPFC did agree to "intersessional work to be led by Co-Leads Indonesia and an FFA Member through various means to promote discussion among members and enable the sharing of information, with initial discussion points to be developed in consultation with the Commission Chair and the Secretariat." *WCPFC17 Summary Report*, *supra* note 28, at 67.

³³ IPOA-IUU, *supra* note 9, at 2 (defining "illegal fishing" to mean activities "in violation of national laws or international obligations, including those undertaken by cooperating states to a relevant regional fisheries management organization").

³⁴ *Implementation of IPOA-IUU*, *supra* note 19, at 55.

³⁵ *See generally* Work in Fishing Convention, 2007 (No. 188), June 14, 2007 (entered into force Nov. 16, 2017).

³⁶ The United Nations Convention on the Law of the Sea, art. 94, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

³⁷ U.N. Food and Agric. Org. [FAO], *Code of Conduct for Responsible Fisheries*, FAO Resolution 4/95 at 16 (1995).

³⁸ *See infra* Part IV.A.

³⁹ *See* W. & Cent. Pac. Fisheries Comm'n [WCPFC], *Conservation and Management Measure for Compliance Monitoring Scheme*, Conservation and Management Measure 2019-06 (Dec. 2019)

Committee.⁴⁰ They could also be harmonized with the labor conditions required by the Forum Fisheries Agency (FFA) as a requirement for fishing in the jurisdictional waters of the seventeen FFA members;⁴¹ those waters compose a large portion of the WCPFC Convention Area,⁴² and a majority of WCPFC tuna is caught there.⁴³

This Article reviews relevant international law to show that the WCPFC has the authority to adopt binding labor standards for crew. Part I begins by exploring the scale of forced labor in fishing. Part II describes the history of regulating labor conditions in international law. Part II.A assesses the long history of addressing labor conditions, explicitly and implicitly, as part of fisheries agreements, including UNCLOS, the UN Fish Stocks Agreement, the FAO Compliance Agreement, the FAO Code of Conduct, the WCPF Convention, and other fisheries agreements. Part II.B then analyzes the ILO's Work in Fishing Convention and concludes that, despite its comprehensiveness, it does not preclude action by states through other regimes and organizations. In fact, FAO, ILO, and IMO are collaborating on a range of activities relating to labor conditions.⁴⁴ Part III challenges the argument that labor standards for crew should not be adopted by RFMOs because national delegations to RFMO meetings do not have authority to address labor issues; international law requires that all parties to a treaty implement their treaty obligations in good faith. Part

<https://www.wcpfc.int/doc/cmm-2019-06> [<https://perma.cc/E738-K8UB>] [hereinafter WCPFC CMM 2019-06]. Not every obligation imposed by the WCPF convention and CMMs is subject to compliance review; the members decide which obligations to review. *Id.* ¶ 6.

⁴⁰ WCPF Convention, *supra* note 26, art. 14 (establishing the functions of the TCC). See *infra* Part IV.B for a discussion of the TCC.

⁴¹ See *infra* Part IV.C. The members of the Foreign Fisheries Agency are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu. *FFA Members*, PAC. ISLANDS F. FISHERIES AGENCY, <https://www.ffa.int/members> [<https://perma.cc/27N9-DG3Z>].

⁴² WCPF Convention, *supra* note 26, art. 3(1) (defining the Convention Area). The map of the Convention Area includes all or almost all of the jurisdictional waters of the seventeen FFA members listed in note 41. See W. & Cent. Pac. Fisheries Comm'n [WCPFC], Convention Area Map, <https://www.wcpfc.int/doc/convention-area-map> [<https://perma.cc/PZ6W-SW6N>].

⁴³ STEVEN R. HARE, PETER G. WILLIAMS, CLAUDIO CASTILLO JORDAN, PAUL A. HAMER, WILLIAM J. HAMPTON, ROBERT D. SCOTT & GRAHAM M. PILLING, THE WESTERN AND CENTRAL PACIFIC TUNA FISHERY: 2020 OVERVIEW AND STATUS OF STOCK 36–45 (2021) (containing charts that place the vast majority of the catch of yellowfin, bigeye, and skipjack tuna, as well as albacore, within the exclusive economic zones of Pacific Islands States, all of whom are FFA members).

⁴⁴ See U.N. Food & Agric. Org. [FAO], Rep. of the Comm. on Fisheries on Safety at Sea and Decent Work in Fisheries and Aquaculture ¶ 24, COFI/2020/Inf.14.1 (2021) (describing some of the collaboration between the three organizations including those relating to combatting forced labor in the fishing sector) [hereinafter COFI].

IV describes policy reasons for the WCPFC to adopt labor standards for crew, including review by the WCPFC's TCC. Part V concludes that the WCPFC has authority to adopt binding labor standards for crew and that sound policy reasons support the need for the WCPFC to do so.

I. THE STAGGERING SCALE OF THE PROBLEM

The global catch of fisheries resources is massive and continues to grow. Total production of fisheries resources rose from 145.9 million tonnes in 2009 to 178.5 million tonnes in 2018,⁴⁵ with a total first-sale value of \$401 billion.⁴⁶ Global exports of fish products have also continued to grow at roughly 8 percent per year, reaching a value of \$164 billion in 2018.⁴⁷ In the Western and Central Pacific Ocean, home to perhaps the most valuable fisheries in the world, fishers earned more than \$5 billion, and the total catch retailed for more than \$22.68 billion in 2014.⁴⁸ Fishing and aquaculture are also critical sources of food and livelihoods: 10 percent to 12 percent of the global population relies on fisheries resources for their livelihoods,⁴⁹ and 3.3 billion people depend on fish products for nearly 20 percent of their intake of animal proteins.⁵⁰ Global fisheries are clearly “among the most critical industries for food security, poverty relief and human prosperity worldwide.”⁵¹

Yet, many of those who provide the human population with this critical resource remain unprotected, even though the ILO considers fishing “hazardous”⁵² and “[i]n many countries fishing is the most

⁴⁵ See U.N. Food & Agric. Org. [FAO], *The State of World Fisheries and Aquaculture 2016*, at 4 tbl.1 (2016), <https://www.fao.org/3/i5555e/i5555e.pdf> [<https://perma.cc/TQ2F-JBFT>]; U.N. Food & Agric. Org. [FAO], *supra* note 11, at 3 tbl.1.

⁴⁶ U.N. Food & Agric. Org. [FAO], *supra* note 11, at 2.

⁴⁷ See *id.* at 8.

⁴⁸ See generally PEW CHARITABLE TRUST., NETTING BILLIONS: A VALUATION OF TUNA IN THE WESTERN AND CENTRAL PACIFIC OCEAN (2016).

⁴⁹ U.N. Food & Agric. Org. [FAO], *The State of World Fisheries and Aquaculture 2014*, at 31–32 (2014), <https://www.fao.org/3/i3720e/i3720e.pdf> [<https://perma.cc/5VVR-249Z>].

⁵⁰ U.N. Food & Agric. Org. [FAO], *supra* note 11, at 5.

⁵¹ N. Atl. Fisheries Intel. Grp. [NAFIG] & Int'l Crim. Police Org. [INTERPOL], *Chasing Red Herrings: Flags of Convenience, Secrecy and the Impact on Fisheries Crime Law Enforcement*, at 14 (2017), https://www.interpol.int/en/content/download/5146/file/Chasing_Red_Herrings_Report.pdf [<https://perma.cc/9M7H-GASX>].

⁵² Work in Fishing Convention, *supra* note 35, pmbl. ¶ 8 (“Recognizing that the international Labour Organization considers fishing as a hazardous occupation when compared to other occupations. . .”).

hazardous occupation.”⁵³ Indeed, the FAO rated commercial fishing the world’s second-deadliest profession in 2019,⁵⁴ and the occupation with the “highest incidence of occupational injuries and fatalities”⁵⁵ with approximately 32,000 fishers dying each year, a number that the FAO’s Committee on Fisheries (COFI) concedes is likely an underestimate.⁵⁶ Commercial fishing is so hazardous and deadly because it involves “long work shifts, physically demanding tasks, poor availability and use of protective equipment, [and] inexperienced crew.”⁵⁷ Injuries are caused by extreme weather, poor sea conditions, working at night, noise, exposure to chemicals, sleep deprivation, stress-induced physical and psychological injuries, sexual assault and harassment, malfunctioning equipment, malnourishment, and seasickness, among other things.⁵⁸ Injuries at sea are exacerbated because workers aboard fishing vessels are often far from professional medical care, and caretaking duties often fall on others on board.⁵⁹

Perhaps due to hazardous working conditions, fishing operations often have difficulties finding crew. International capture fisheries and aquaculture operations annually employ more than fifty-eight million people, with more than fifteen million working full-time on fishing

⁵³ Int’l Lab. Off., *The Work in Fishing Convention, 2007 (No. 188) Guidelines for Port State Control Officers*, at V (2011), https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/normativeinstrument/wcms_177245.pdf [https://perma.cc/ZWJ8-QTNA] [hereinafter *ILO Port State Guidelines*].

⁵⁴ U.N. Food & Agric. Org. [FAO], *Need for New Vision for Fisheries Amidst Growing Concerns Over State of Oceans: FAO’s International Symposium on Fisheries Sustainability Kicks Off Today* (Nov. 18, 2019), <https://www.fao.org/newsroom/detail/Need-for-new-vision-for-fisheries-amidst-growing-concerns-over-state-of-oceans/en> [https://perma.cc/GG8Z-H76V].

⁵⁵ Int’l Lab. Off., *Road Map Towards the Ratification of ILO Convention No. 188 to Protect Indonesian Fishers* (Mar. 10, 2021), https://www.ilo.org/jakarta/info/public/pr/WCMS_776485/lang—en/index.htm [https://perma.cc/4KCR-TVXG].

⁵⁶ U.N. Food & Agric. Org., *supra* note 44, ¶ 3.

⁵⁷ Rapepong Suphanchaimat, Nareerut Pudpong & Viroj Tangcharoensathien, *Extreme Exploitation in Southeast Asia Waters: Challenges in Progressing Towards Universal Health Coverage for Migrant Workers*, PLOS MED., Nov. 22, 2017, at 1, 2, <https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1002441&type=printable> [https://perma.cc/4LGM-M6EM].

⁵⁸ See, e.g., *Fisheries Crime in the Indonesian Fishing Industry*, *supra* note 2, at 36 (Fishers “faced with no pay, or a token pay, excessive working hours often exceeding 20 hours a day, and unsanitary and unhealthy conditions. This represented the ‘best case’ scenario. For most it meant human trafficking for labour exploitation, forced labour, physical, sexual, and psychological abuse, with no prospect of escape.”).

⁵⁹ *ILO Port State Guidelines*, *supra* note 53, at V.

vessels.⁶⁰ Yet, worldwide, in the United Kingdom,⁶¹ Thailand,⁶² and elsewhere,⁶³ fleets face chronic shortages of crew.

As a result of these shortages, fleets often turn to migrant workers to fill positions.⁶⁴ For example, although China, Japan, Korea, and Chinese Taipei (Taiwan) flag the vast majority of longline vessels operating in the Western and Central Pacific Ocean, the nationality of the crews on these vessels is primarily Indonesian, Filipino, and Vietnamese.⁶⁵

Migrant workers, however, are frequently recruited with deceptive practices, physically and sexually abused, and subject to different labor laws than those applied to citizens of the flag state.⁶⁶ Recruiters lure migrant workers into forced labor with false promises concerning wages, working conditions, or the nature of the job itself.⁶⁷ Once “on the job,” employers or recruitment agencies frequently confiscate migrant’s passports and other travel documents, withhold their

⁶⁰ Fisheries, INT’L LAB. ORG. [ILO], <https://www.ilo.org/global/industries-and-sectors/shipping-ports-fisheries-inland-waterways/fisheries/lang—en/index.htm> [<https://perma.cc/4UA9-7H42>].

⁶¹ Services, SCOT. WHITEFISH PRODUCERS ASS’N, <https://swfpa.com/services/> [<https://perma.cc/B7JH-LQRR>] (“Partly due to a recent downturn in fleet profitability, many boats experience a chronic shortage of trained crew.”); *Foreign Crewing Hopes: Breakthrough in Sight on Foreign Crew Permits*, FISHING NEWS (Oct. 5, 2020), <https://fishingnews.co.uk/news/foreign-crewing-hopes/> [<https://perma.cc/CS4X-4EPX>].

⁶² Shannon Service & Becky Palmstrom, *Confined to a Thai Fishing Boat, For Three Years*, NAT’L PUB. RADIO (June 19, 2012), <https://www.npr.org/2012/06/19/155045295/confined-to-a-thai-fishing-boat-for-three-years> [<https://perma.cc/3XDZ-YU8T>] (“Thailand’s giant fishing fleet is chronically short of up to 60,000 fishermen per year. . . .”); Int’l Lab. Org. [ILO], *Employment Practices and Working Conditions in Thailand’s Fishing Sector*, at ix (2014), https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_220596.pdf [<https://perma.cc/78SW-ZLBD>] (noting shortages of fishers in 2008 of 10,000 rising in 2012 to 50,000 fishers, mainly migrant workers from Cambodia and Myanmar).

⁶³ See, e.g., Bonnie Flaws, *Salaries Can Be High, with Lots of Time Off—So Why Can’t Fishing Boats Hire Kiwis?*, STUFF (Oct. 23, 2020), <https://www.stuff.co.nz/business/farming/agribusiness/123159959/salaries-can-be-high-with-lots-of-time-off—so-why-cant-fishing-boats-hire-kiwis> [<https://perma.cc/M3DT-NZ3Z>] (noting shortages in New Zealand’s deep sea fishery).

⁶⁴ Penchan Charoensuthipan, *Boats Need Over 40,000 Migrant Crew: Ministry Looks Abroad to Fix Labour Shortage*, BANGKOK POST (Aug. 3, 2018) <https://www.bangkokpost.com/business/1514666/boats-need-over-40-000-migrant-crew> [<https://perma.cc/4L36-EFBU>] (stating that the “workers from Laos, Myanmar, Cambodia and Vietnam would be targeted” to fill crew needs in Thailand).

⁶⁵ Campling et al., *supra* note 13, at 147, 159, 175–76. Korean vessel owners may also be turning to Nepalis for crew. Telephone Interview with Mike McCoy, Consultant, Gillett, Preston & Assocs. Inc., (Mar. 2018).

⁶⁶ See LINKLATERS LLP, THOMSON REUTERS FOUND. & VISAYAN F., *FISHING FOR FAIRNESS: A LANDSCAPE ANALYSIS OF RIGHTS OF FISHING INDUSTRY WORKERS AND ILO CONVENTION 188* (2016), <https://www.trust.org/documents/trustlaw/reports/visayan-fishing-for-fairness-en.pdf> [<https://perma.cc/8K4K-LXQH>] (describing the application of different labor laws in the Philippines and Chinese Taipei).

⁶⁷ Int’l Labour Org. [ILO], Walk Free Found. & Int’l Org. for Migration [IOM], *supra* note 2, at 31.

wages, and otherwise expose migrant laborers to “the typical range of abuses,”⁶⁸ including threats against family, confinement, denial of food and sleep, threats of legal action, and sexual violence.⁶⁹ In addition, forced laborers often find themselves in debt bondage, working to pay off a debt arising from “wage advances or loans to cover recruitment or transport costs or from daily living or emergency expenses, such as medical costs.”⁷⁰

Human trafficking, the use of slave labor, and violations of human rights of crew are widely acknowledged to occur in the Western and Central Pacific Ocean. For example, in 2015, the Indonesian International Office of Migration rescued more than 1,340 fishers from Myanmar, Cambodia, Thailand, and Laos on remote Indonesian islands where they had been forced to work more than twenty hours per day.⁷¹ Some of these men had been at sea for years, with one victim “separated from his family, without any contact, for 22 years.”⁷² The International Organization for Migration estimates that up to four thousand migrant fishers from countries including Cambodia, Laos, Myanmar, and Thailand may be stranded or held in remote parts of the Indonesian archipelago.⁷³ The U.S. Department of Labor has also concluded that the fisheries sectors in Indonesia use child labor and forced labor.⁷⁴

In addition, both the U.S. Department of Labor and the Department of State concluded that the fisheries sectors in China and Chinese Taipei use forced labor⁷⁵ and that the Philippines’ fisheries sector uses child labor.⁷⁶ The Department of Labor reported in 2020, relying on media, governmental, and non-governmental sources, that Indonesian and Filipino migrant workers on Chinese fishing vessels “are sometimes

⁶⁸ *Id.* at 34.

⁶⁹ *Id.* at 35.

⁷⁰ Greenpeace, *Seabound: The Journey to Modern Slavery on the High Seas*, at 10 (Dec. 2019), <https://www.greenpeace.org/static/planet4-southeastasia-stateless/2019/12/c4f6f6b4-greenpeace-seabound-b.pdf> [<https://perma.cc/U5TU-WJ76>].

⁷¹ *Fisheries Crime in the Indonesian Fishing Industry*, *supra* note 2, at 35, 93; Int’l Lab. Org. [ILO], *Working Paper: Indonesia’s Fisheries Human Rights Certification System: Assessment, Commentary and Recommendations*, at 6 (2019), https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—ilo-jakarta/documents/publication/wcms_713924.pdf [<https://perma.cc/S33X-6GGZ>].

⁷² William Lacy Swing, *Crisis Situations are Laboratories for Human Traffickers*, INT’L ORG. FOR MIGRATION [IOM] (July 30, 2015), <https://www.iom.int/oped/crisis-situations-are-laboratories-human-traffickers> [<https://perma.cc/DWG5-WNRU>].

⁷³ Int’l Lab. Org. [ILO], *supra* note 71, at 6 (referencing estimates from the International Organization for Migration).

⁷⁴ U.S. DEP’T OF LAB., *supra* note 3, at 22.

⁷⁵ *Id.* at 21, 24.

⁷⁶ *Id.* at 23.

recruited by agencies that deceive workers with false information regarding their wages and the terms of the contracts, and require the workers to pay recruitment fees and sign debt contracts.”⁷⁷ It also recorded “numerous incidents of forced labor” on Chinese fishing vessels: workers have their identity documents confiscated, work eighteen to twenty-two hours a day, “face hunger and dehydration, live in degrading and unhygienic conditions, are subjected to physical violence and verbal abuse, are prevented from leaving the vessel or ending their contracts, and frequently are not paid their promised wages.”⁷⁸ In 2021, the U.S. Department of State reported that, across the entire Chinese distant water fishing fleet, nothing had changed.⁷⁹ In fact, in May 2021, U.S. Customs and Border Protection banned imports of tuna, swordfish, and other seafood from a Chinese fishing company, Dalian Ocean Fishing Co., Ltd., because information reasonably indicated that the company uses forced labor in its fishing operations.⁸⁰ Meanwhile, Indonesia is investigating forced labor, slavery, and torture of more than 150 Indonesian fishers and the death of two others.⁸¹ Indonesia’s Ministry of Foreign Affairs repatriated 589 Indonesian fishers from ninety-eight Chinese-flagged vessels in 2020.⁸²

⁷⁷ *Id.* at 33.

⁷⁸ *Id.* The U.S. Department of State reported that:

Chinese-flagged fishing vessels subjected workers from other countries to forced labor. On August 26, an Indonesian social media outlet posted a video of three Indonesian fisherman pleading for rescue from a PRC-flagged fishing vessel. The fishermen claimed they were subjected to physical violence, forced to work 20-hour days, and not paid for their work.

U.S. DEP’T OF STATE, *supra* note 1, at 74.

⁷⁹ The Department of State reported the following with regard to the Chinese distant water fishing fleet (DWF):

Many men from countries in Africa, Asia—especially Indonesia and the Philippines—and other regions employed on many of the 2,900 Chinese-flagged DWF fishing vessels operating worldwide experience contract discrepancies, excessive working hours, degrading living conditions, severe verbal and physical abuse, denial of access to health care, restricted communication, document retention, arbitrary garnishing or nonpayment of wages, and other forced labor indicators, often while being forced to remain at sea for months or years at a time.

TRAFFICKING IN PERSONS REPORT 2021, *supra* note 7, at 180.

⁸⁰ CBP issues Withhold Release Order on Chinese Fishing Fleet, U.S. CUSTOMS AND BORDER PROTECTION (May 28, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-chinese-fishing-fleet> [<https://perma.cc/YQ69-93E7>].

⁸¹ TRAFFICKING IN PERSONS REPORT 2021, *supra* note 7, at 289.

⁸² *Id.* at 291.

Similar incidents have been recorded aboard vessels flagged by Chinese Taipei, which flags approximately 36 percent of the global tuna longline fleet.⁸³ This fleet employs approximately thirty-five thousand migrant workers, mostly from Indonesia and the Philippines.⁸⁴ These migrant workers also face the “typical” range of abuses: “confiscation of documents, long days with little rest, physical and verbal abuse, and lack of payment.”⁸⁵ The U.S. Department of State has further noted that “[m]igrant fishermen reported senior crewmembers employ coercive tactics such as threats of physical violence, beatings, withholding of food and water, retention of identity documents, wage deductions, and noncontractual compulsory sharing of vessel operational costs to retain their labor.”⁸⁶ It noted that “[t]hese abuses were particularly prevalent in Chinese Taipei’s large distant-waters fishing fleet, which operated without adequate oversight.”⁸⁷

Despite the international requirement that flag states take effective jurisdiction and control over the vessels they flag,⁸⁸ Chinese Taipei only applies its labor laws to fishers working on vessels operating within its territorial waters.⁸⁹ Thus, fishers on vessels flagged by Chinese Taipei operating in the high seas or exclusive economic zones of other states are “not afforded the same labor rights, wages, insurance, and pensions as those recruited to work within [Chinese Taipei’s] territorial waters.”⁹⁰ Whereas fishers working in the territorial waters of Chinese Taipei earn a mandatory minimum monthly wage of roughly \$850,⁹¹ those working in other waters make a minimum of just \$450 but typically receive far less than that amount.⁹²

⁸³ U.S. DEP’T OF LAB., *supra* note 3, at 33.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ U.S. DEP’T OF STATE, TAIWAN 2020 HUMAN RIGHTS REPORT 23 (2020).

⁸⁷ *Id.* See also TRAFFICKING IN PERSONS REPORT 2021, *supra* note 7, at 150 (“Senior crew aboard vessels in the Thai and Taiwanese fishing fleets subject some Burmese men to forced labor through debt-based coercion, passport confiscation, contract switching, wage garnishing and withholding, threats of physical or financial harm, or fraudulent recruitment; they also subject some to physical abuse and force them to remain aboard vessels in international waters for years at a time without coming ashore.”).

⁸⁸ UNCLOS, *supra* note 36, at art. 94.

⁸⁹ U.S. DEP’T OF STATE, *supra* note 86, at 27.

⁹⁰ *Id.*

⁹¹ Dep’t of Standards and Equal Emp. (Taiwan), *Minimum Wage to be Adjusted to NT\$23,800 per Month and NT\$158 per hour Starting January 1, 2020*, MINISTRY OF LAB. (Mar. 25, 2020), <https://english.mol.gov.tw/21139/21156/21630/> [<https://perma.cc/4ESJ-4Y5U>].

⁹² U.S. DEP’T OF STATE, *supra* note 86, at 27.

Given the scale of the Chinese Taipei fleet and the number of reports indicating abuse on those vessels, in 2018 and 2019 the Environmental Justice Foundation interviewed seventy-one Indonesian fishermen who had worked on sixty-two Chinese Taipei-flagged vessels.⁹³ Of those interviewed, 24 percent suffered violent physical abuse; 92 percent had their wages withheld; and 82 percent worked “excessive overtime,” with many working up to twenty hours per day with very little rest.⁹⁴

These are not isolated cases. Dating back to 2012, 203 Indonesian fishers working for the Chinese Taipei Kwo Jeng Trading Co. Ltd. were rescued in the waters of Trinidad and Tobago because they “suffered physical and psychological abuse” and “were subjected to excessive working hours, denied proper food and medical assistance request, and had restricted freedom of movement.”⁹⁵ South Africa detained the Chinese Taipei-flagged Fuh Sheng 11 for violating the Work in Fishing Convention; South African officials found a “lack of documentation, poor accommodation, insufficient food for fishers, and poor safety and health conditions on board,” as well as crew without work agreements.⁹⁶

On deep-sea vessels flagged by the Republic of Korea, migrants compose 73.3 percent of workers.⁹⁷ As with the fleets of China and Chinese Taipei, some of these migrant workers were recruited with deceptive practices and had their passports confiscated and wages withheld.⁹⁸ Also, similarly, they face long workdays of more than eighteen hours per day—even when sick—endure physical and verbal abuse by the Korean captains and other crew, and are forced to work.⁹⁹ In 2011, for example, the Indonesian government assisted twenty-seven Indonesian fishers on the Korean-flagged Melilla 203, which fished in New Zealand’s

⁹³ EJF Staff, *Widespread Abuse and Illegal Fishing As Taiwan’s Fleet Remains out of Control*, ENV’T JUST. FOUND. (July 22, 2020), <https://ejfoundation.org/news-media/widespread-abuse-and-illegal-fishing-as-taiwans-fishing-fleet-remains-out-of-control-1> [<https://perma.cc/36VS-SRCP>].

⁹⁴ *Id.*

⁹⁵ *Fisheries Crime in the Indonesian Fishing Industry*, *supra* note 2, at 56.

⁹⁶ ILO News, *First Fishing Vessel Detained under ILO Fishing Convention*, ILO (July 17, 2018), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_634680/lang=en/index.htm [<https://perma.cc/5W26-X2J9>]; Nick Aspinwall, *The High Seas Danger to Workers in Taiwan’s Fishing Fleet*, THE INTERPRETER (May 2, 2019), <https://www.lowyinstitute.org/the-interpreter/high-seas-danger-workers-taiwan-s-fishing-fleet> [<https://perma.cc/9MA7-ADE5>] (reporting on the *Fuh Sheng 11* and other problems associated with the fishing fleet of Chinese Taipei).

⁹⁷ U.S. DEP’T OF STATE, REPUBLIC OF KOREA 2020 HUMAN RIGHTS REPORT 33 (2020).

⁹⁸ *Id.* at 31. See also TRAFFICKING IN PERSONS REPORT 2021, *supra* note 7, at 337.

⁹⁹ See generally REPUBLIC OF KOREA 2020 HUMAN RIGHTS REPORT, *supra* note 97.

waters; the crew worked “excessive hours” and “were treated as slave labour,” with some also sexually and physically abused.¹⁰⁰

Despite these abuses, the Korean government has not taken meaningful steps to stop them. It did not identify any cases of forced labor on fishing vessels in 2020, did not implement an adequate inspections regime, and interviewed fishers in locations where they could not speak freely.¹⁰¹ Moreover, Korean law continues to exempt migrant workers from labor rules that apply to Koreans. For example, it exempts migrant workers from legal working and rest hours, overtime pay, and paid holidays, and another law fails to set a minimum wage for migrant fishers.¹⁰² In addition, Korean law does “not prohibit exploitative wage deductions or prohibit worker-charged recruitment fees, which enable[s] traffickers to use debt-based coercion to exploit migrant fishermen.”¹⁰³ With perhaps 4,000 migrant workers on Korean-flagged fishing vessels, and with many Korean-flagged vessels frequently using at-sea transshipment to stay at sea for a year or more—while also providing fishers with inadequate food and water and unsanitary work and living conditions¹⁰⁴—the problems are significant. In fact, the problems with the Korean fleet, as well as the other Asian fleets,¹⁰⁵ are so significant that Indonesia has prohibited Indonesian fishers from working on fishing vessels operated by Chinese companies or flagged by China, the Republic of Korea, or Chinese Taipei when those vessels operate outside of their exclusive economic zones.¹⁰⁶

These problems are not unique to Asian fleets. In Australian ports, physical abuse is used on some fishing vessels to force men to work.¹⁰⁷

¹⁰⁰ *Fisheries Crime in the Indonesian Fishing Industry*, *supra* note 2, at 56. Prior to this incident, other Korean vessels were accused of providing “abhorrent” conditions on their vessels fishing in New Zealand waters. These incidents led New Zealand to, among other things, require all vessels fishing in New Zealand’s waters to be flagged by New Zealand. Ian Urbina, *Ship of Horrors: Life and Death on the Lawless High Seas*, *THE GUARDIAN* (Sept. 12, 2019), <https://www.theguardian.com/world/2019/sep/12/ship-of-horrors-deep-sea-fishing-oyang-70-new-zealand> [https://perma.cc/W8CE-SS2D].

¹⁰¹ *TRAFFICKING IN PERSONS REPORT 2021*, *supra* note 7, at 334–35.

¹⁰² *See id.* at 336.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 337–38.

¹⁰⁵ *See id.* at 293–94 (detailing the full range of abuses inflicted by some Chinese-, Korean-, and Taiwanese-flagged vessels).

¹⁰⁶ *See id.* at 292. Exclusive economic zones are those areas up to 200 nautical miles from a state’s coastline in which the coastal state has sovereign rights for “exploring and exploiting, conserving and managing the natural resources, whether living or non-living.” UNCLOS, *supra* note 36, art. 56.

¹⁰⁷ *TRAFFICKING IN PERSONS REPORT 2021*, *supra* note 7, at 97.

Fijian flagged vessels exploit migrant labor.¹⁰⁸ In the United States, US law exempts vessel owners catching highly migratory fish like tuna from federal rules concerning crewing of fishing vessels.¹⁰⁹ In fact, immigration law provides that migrant workers on such vessels “shall be detained on board the vessel” on arrival in the United States,¹¹⁰ although they may walk on the pier.¹¹¹ U.S. Customs and Border Protection even requires captains

¹⁰⁸ *Id.* at 236–37.

¹⁰⁹ Immigration law, at 46 U.S.C. § 8103(i)(1), provides that:

[E]ach unlicensed seamen on a fishing, fish processing, or fish tender vessel that is engaged in the fisheries in the navigable waters of the United States or the exclusive economic zone must be—(A) a citizen of the United States; (B) an alien lawfully admitted to the United States for permanent residence; (C) any other alien allowed to be employed under the Immigration and Nationality Act [or (D) an alien working on vessels stationed in the Northern Mariana Islands].

Subsection (i)(2) requires that “[n]ot more than 25 percent of the unlicensed seamen on a vessel subject to paragraph (1) of this subsection may be aliens referred to in clause (C) of that paragraph.” *Id.* § 8103(i)(2). However, subsection (i)(3) exempts “fishing vessel[s] fishing exclusively for highly migratory species,” as that term is defined in the Magnuson-Stevens Fishery Conservation and Management Act (MSA). *Id.* § 8103(i)(3). The MSA defines “highly migratory species” to mean “tuna species, marlin (*Tetrapturus* spp. and *Makaira* spp.), oceanic sharks, sailfishes (*Istiophorus* spp.), and swordfish (*Xiphias gladius*).” 16 U.S.C. § 1802(21). In addition, the Secretary of the department in which the Coast Guard operates may waive a citizen requirement under 46 U.S.C. § 8103 governing vessel and seamen citizenship requirements for several reasons, including “if the Secretary determines, after an investigation, that qualified seamen who are citizens of the United States are not available.” 46 U.S.C. § 8103 (b)(3)(C).

¹¹⁰ They “shall be detained on board the vessel” unless Customs and Border Protection (CBP), in its discretion, authorizes a fisherman to land temporarily. 8 C.F.R. § 252.1(a). When these migrant fishers arrive at a US port, CBP issues them a “conditional landing permit,” known as Form I-95, which is stamped “permission to land temporarily at all U.S. ports is refused.” *Id.* § 252.1(g). Reports conflict as to how often CBP authorizes migrant fishers to leave the pier area. In an email, CBP reported that “CBP does receive and approve paroles for the detained fishermen on a regular basis. These fishermen are regularly paroled to seek medical attention, visits to their consulate/passport renewals, transfer vessels, or any who seek to depart the U.S. and repatriated back to their home country.” E-mail from Scott Heatherly, Watch Commander, CBP, to Chris Wold, Professor of L., Lewis & Clark L. Sch. (Jan. 12, 2022) (on file with author). However, Georgetown’s Human Rights Institute, which conducted on-site interviews with migrant fishers, reported that “CBP systematically denies the fishermen’s requests for conditional landing authorization—which would allow them to go ashore during the brief periods their vessels are in port.” HUM. RTS. INST., *THE PRICE OF PARADISE: VULNERABILITIES TO FORCED LABOR IN THE HAWAIIAN LONGLINE FISHING INDUSTRY* 9 (2019).

¹¹¹ Despite the use of the phrase “detain on board the vessel,” crew are allowed to leave their vessels but must remain in the port area of Honolulu Harbor. E-mail from William Wynhoff, Deputy Att’y Gen., State of Hawaii, to Chris Wold, Professor of L., Lewis & Clark L. Sch. (Dec. 1, 2021) (on file with author); E-mail from Eric Kingma, Exec. Dir., Hawaii Longline Ass’n, to Chris Wold, Professor of L., Lewis & Clark L. Sch. (Nov. 30, 2021) (on file with author); Martha Mendoza & Margie Mason, *Hawaiian Seafood Caught by Foreign Crews Confined on Boats*, ASSOCIATED PRESS (Sept. 8, 2016), <https://apnews.com/article/39ae05f117c64a929f0f8fab091c4ee1> [<https://perma.cc/M36W-4RBH>].

to hold the passports of these migrant fishers.¹¹² As a consequence, the United States does not grant visas to the roughly 700 migrant workers who catch \$110 million worth of seafood annually on Hawaiian longline vessels.¹¹³ As such, they lack the labor rights most Americans take for granted. According to an investigative report, they are paid as little as seventy cents per hour while “living in squalor on some boats, forced to use buckets instead of toilets, suffering running sores from bed bugs and sometimes lacking sufficient food.”¹¹⁴ An investigation also found evidence of human trafficking.¹¹⁵

In 2017, members of the Hawaiian Congressional delegation introduced bills in the House¹¹⁶ and Senate¹¹⁷ to authorize the temporary entry into the United States of foreign crew employed on Hawaiian longline vessels to ensure that they receive reasonable wages and working conditions. However, neither bill received a vote.¹¹⁸

Perhaps most disconcerting is that the problem globally and in the WCPO may be more severe than these documented cases suggest. According to one study that evaluated information concerning vessel behavior,

Taiwanese longliners, Chinese squid jiggers, and Chinese, Japanese, and South Korean longliners are consistently the five fisheries with the largest number of unique high-risk vessels. This pattern is consistent

¹¹² U.S. CUSTOMS AND BORDER PATROL, VESSEL INSPECTION GUIDE 16 (2012) (“The master is responsible for the safekeeping of travel documentation of all nonimmigrant crew.”). *See also* Mendoza & Mason, *supra* note 111 (“U.S. Customs and Border Protection requires captains to hold the men’s passports.”). In an email seeking clarification as to whether the advice is the *Vessel Inspection Guide* is current, CBP responded, contradictorily: “The CBP Vessel Inspection Guide is the current guidance. CBP does not mandate that captains hold the passports nor does CBP tolerate any exploitation of this practice.” E-mail from Scott Heatherly, Watch Commander, CBP, to Chris Wold, Professor of L., Lewis & Clark L. Sch. (Jan. 12, 2022) (on file with author).

¹¹³ The Hawaiian longline fishery is not expressly named in the relevant legislation, but the law applies to the fishing vessels in this fleet, which target tuna, swordfish, and other highly migratory species. HUM. RTS. INST., *supra* note 110, at 8; *see generally* About, HAWAII LONGLINE ASS’N. (2020), <https://www.hawaiilongline.org/about> [<https://perma.cc/QH92-3N7G>].

¹¹⁴ Mendoza & Mason, *supra* note 111. In light of these allegations, the Hawaii Longline Association conducted its own assessment of the crew and working conditions and found “[n]o evidence of sub-standard working conditions (*sic*), human trafficking or forced labor.” *Labor Standards*, HAWAII LONGLINE ASS’N. (2020), <https://www.hawaiilongline.org/projects> [<https://perma.cc/7AGE-4HT5>].

¹¹⁵ Mendoza & Mason, *supra* note 111.

¹¹⁶ Sustainable Fishing Workforce Protection Act, H.R. 4224, 115th Cong. (2017).

¹¹⁷ Sustainable Fishing Workforce Protection Act, S. 2071, 115th Cong. (2017).

¹¹⁸ H.R. 4224, 115th Cong. (2017). S. 2071, 115th Cong. (2017).

with reports on the abuses seen within distant water fleets that receive little legal oversight and often use marginalized migrant workers.¹¹⁹

Clearly, far more needs to be done.

II. THE INTERNATIONAL REGULATION OF LABOR CONDITIONS ON FISHING VESSELS

The widespread exposure to and reporting of degrading work conditions, fraudulent labor practices, and human rights abuses on fishing vessels has led the international community to take steps to improve the treatment of fishers. The ILO adopted a series of conventions in the 1950s and 1960s to address minimum age, accommodations, and other issues.¹²⁰ When the ILO deemed those conventions inadequate, it adopted a new agreement and recommendation in 2007. Meanwhile, the 1982 UN Convention on the Law of the Sea (UNCLOS) requires every state to “take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to . . . the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.”¹²¹ Abuses to crew have even reached international trade negotiations concerning fisheries subsidies and efforts to curb IUU fishing.¹²² RFMOs, too, have sought to address these abuses. The WCPFC Convention, for example, directs the WCPFC members to “adopt minimum standards for the responsible conduct of fishing operations.”¹²³ Several RFMOs have also adopted binding labor standards for onboard observers,¹²⁴ although not for crews.

As this Part demonstrates, no single treaty regime has exclusive authority to regulate standards for fishing crews. To date, fisheries regimes, the ILO, and the IMO have all adopted rules relating to labor

¹¹⁹ Gavin G. McDonald et al., *supra* note 7, 3–4.

¹²⁰ See discussion *infra* Part II.B.

¹²¹ UNCLOS, *supra* note 36, art. 94(3)(b) (emphasis added).

¹²² Submission of the United States, The Use of Forced Labor on Fishing Vessels, TN/RL/GEN/205 (May, 27, 2021) (proposing an amendment to the chair’s consolidated text on fisheries subsidies, which seeks to prohibit subsidies to IUU vessels, regarding overfished stocks, and contributing to overcapacity or overfishing). However, when the WTO adopted the Agreement on Fisheries Subsidies in June 2022, it did so without reference to labor conditions. Agreement on Fisheries Subsidies, WT/MIN(22)/W/22 (June 17, 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True> [<https://perma.cc/VA9A-VA87>].

¹²³ WCPFC Convention, *supra* note 26, art. 10(1)(h).

¹²⁴ See, e.g., ICCAT, *Recommendation by ICCAT on Protecting the Health and Safety of Observers in ICCAT’s Regional Observer Programs*, 19–10 (2020). WCPFC, *Protection of Regional Observer Programme Observers, Conservation and Management*, 2017–03 (2017).

conditions for crew. Moreover, RFMOs clearly have the authority to adopt binding conservation and management measures to address labor conditions for crew as evidenced by the inclusion of labor conditions for crews as a component of a flag state's duties in UNCLOS and the elaboration of flag state duties in subsequent fisheries agreements, including the UN Fish Stocks Agreement.

A. THE REGULATION OF LABOR CONDITIONS ON FISHING VESSELS
AS FISHERIES LAW

I. UNCLOS

Fishing and navigation have long been subject to the freedom of the seas doctrine—a principle articulated by the Dutch scholar Hugo Grotius in 1609 in his book, *Mare Liberum*.¹²⁵ In that book, Grotius argued that peaceful navigation and fishing on the high seas was a basic right of nations since natural law forbade ownership of the commons: “The sea is common to all because it is so limitless that it cannot become a possession of one, and because it was adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.”¹²⁶

His view of the limitless oceans perhaps made sense in the early seventeenth century, when very few vessels plied the high seas and very few people wanted or needed ocean resources. While coastal states had the right to regulate coastal waters within a narrow three-mile belt of sea surrounding the state's coastline known as the territorial sea, the remainder of the seas was proclaimed to be free to all and belonging to none.¹²⁷ Vessels could navigate the oceans without interference from other vessels or states, and fish were allocated based on the rule of capture.¹²⁸

This law quickly evolved after World War II with growing conflicts over maritime jurisdiction, increasing concerns over control and unsustainable use of fish and other natural resources, and mounting evidence of harmful pollution of the marine environment.¹²⁹ To that end, UNCLOS acknowledges that “the problems of ocean space are closely

¹²⁵ See generally HUGO GROTIUS, *MARE LIBERUM* (1609).

¹²⁶ *Id.* at 28.

¹²⁷ See, e.g., Tommy T.B. Koh, *The Origins of the 1982 Convention on the Law of the Sea*, 29 MALAYA L. REV. 1, 3–4 (1987) (explaining the evolution of the territorial sea).

¹²⁸ See, e.g., *id.* at 2 (explaining Grotius's concept of the freedom of the seas).

¹²⁹ See, e.g., U.N. Div. for Ocean Affs. & L. the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998).

interrelated and need to be considered as a whole.”¹³⁰ As a consequence, it establishes rules that “take[] into account the interests and needs of [hu]mankind as a whole”¹³¹ in order to contribute to “principles of justice and equal rights [and] promote the economic and social advancement of all peoples of the world.”¹³²

To effectuate those goals, UNCLOS imposes an array of new obligations on coastal states, flag states, and other states regarding ocean governance. While UNCLOS addresses fisheries management,¹³³ it also establishes rules relating to navigation,¹³⁴ laying submarine cables,¹³⁵ conducting research,¹³⁶ minimizing and preventing pollution prevention,¹³⁷ accessing mineral resources,¹³⁸ settling disputes,¹³⁹ and other issues.¹⁴⁰

As a consequence of the comprehensive nature of these obligations, UNCLOS relies heavily on the duty to cooperate to fulfill them. With regard to marine pollution, UNCLOS imposes on all states the duty to “cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment.”¹⁴¹ Even when acting within its sovereign rights in its exclusive economic zone, a coastal state must “exercis[e] its rights and perform[] its duties” while giving “due regard to the rights and duties of other States.”¹⁴² Moreover, coastal and other states must cooperate, including through appropriate regional organizations, for the conservation and management of straddling stocks—those species that move between the exclusive economic zones of

¹³⁰ UNCLOS, *supra* note 36, pmbl. ¶ 3.

¹³¹ *Id.* pmbl. ¶ 5.

¹³² *Id.* pmbl. ¶ 7.

¹³³ *Id.* arts. 55–75 (rights and duties, including those relating to fisheries management, in exclusive economic zones), 86–120 (rights and duties, including those relating to fisheries management, in the high seas).

¹³⁴ *Id.* arts. 17–26 (innocent passage), 37–44 (transit passage through straits), 52 (passage through archipelagic states), 58 (in exclusive economic zones), 86 (freedom of navigation on the high seas).

¹³⁵ *Id.* arts. 87(a), 112–115 (on the high seas).

¹³⁶ *Id.* arts. 76–85 (on the continental shelf), 133–191 (in the Area).

¹³⁷ *Id.* arts. 192–233.

¹³⁸ *Id.* arts. 76–85 (on the continental shelf), 133–191 (in the Area).

¹³⁹ *Id.* arts. 279–320, Annexes VI–VIII.

¹⁴⁰ *See, e.g., id.* arts. 101 (piracy), 266–278 (transfer of marine technology).

¹⁴¹ *Id.* art. 197.

¹⁴² *Id.* art. 56(2).

two or more states or between an exclusive economic zone and the high seas.¹⁴³ Similarly, they must cooperate “directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization” of highly migratory species listed in Annex I of UNCLOS.¹⁴⁴ Annex I includes many tuna and tuna-like species,¹⁴⁵ including those managed by the WCPFC and other tuna-RFMOs. They must also cooperate to conserve and manage anadromous (e.g., salmon)¹⁴⁶ and catadromous species (e.g., eels),¹⁴⁷ as well as to protect the marine environment.¹⁴⁸ Consistent with the duty to cooperate for specific species, UNCLOS also demands that states cooperate to conserve and manage all living resources of the high seas.¹⁴⁹

By framing its obligations within the context of the duty to cooperate, UNCLOS greatly constrains the freedom of the seas and calls on states to take collective action. The International Court of Justice and international tribunals have consistently concluded that the essential purpose of the duty to cooperate is to protect the rights of states that might be affected by another state’s activities.¹⁵⁰ Given the importance of protecting the rights of other states, the International Court of Justice and international tribunals have interpreted the duty to cooperate in the context of ocean governance generally and UNCLOS specifically as including the

¹⁴³ *Id.* art. 63.

¹⁴⁴ *Id.* art. 64(1).

¹⁴⁵ *Id.* Annex I (listing, among others, the following species: albacore tuna (*Thunnus alalunga*), bluefin tuna (*Thunnus thynnus*), bigeye tuna: (*Thunnus obesus*), skipjack tuna (*Katsuwonus pelamis*), yellowfin tuna (*Thunnus albacares*), southern bluefin tuna (*Thunnus maccoyii*), and many oceanic sharks, including basking shark (*Cetorhinus maximus*), thresher sharks (Family Alopiidae), whale shark (*Rhincodon typus*), oceanic whitetip and blue shark and others in Family Carcharhinidae, and Hammerhead sharks (Family Sphyrnidae)).

¹⁴⁶ *Id.* art. 66.

¹⁴⁷ *Id.* art. 67.

¹⁴⁸ *Id.* art. 197 (“States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”).

¹⁴⁹ *Id.* art. 118.

¹⁵⁰ In the *Fisheries Jurisdiction Cases*, for example, which involved disputes over fisheries access, the ICJ concluded that the disputing States “ha[d] an obligation to take full account of each other’s rights and of any fishery conservation measures the necessity of which is shown to exist in those waters.” *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 72 (July 25). *Fisheries Jurisdiction (Ger. v. Ice.)*, Judgment, 1974 I.C.J. 175, ¶ 64 (July 25).

duty to negotiate, consult, share information, monitor impacts of activities, and conduct environmental impact assessments.¹⁵¹

UNCLOS creates additional constraints on the freedom of the seas by imposing responsibilities on states to regulate the vessels they flag. While a state has the right to flag vessels where there is a “genuine link” between that State and the vessel,¹⁵² the flag state has an obligation to “effectively exercise its jurisdiction and control” over the vessels it flags.¹⁵³ UNCLOS specifies that the exercise of “jurisdiction and control” applies to “administrative, technical and social matters.”¹⁵⁴ More specifically, a state must maintain a register of the names and particulars of the vessels it flags¹⁵⁵ and “assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.”¹⁵⁶

The drafters of UNCLOS continued to elaborate on the duties imposed on a flag state to effectuate the duty to exercise effectively its jurisdiction and control over the vessels it flags. It specifies that “[e]very State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to . . . the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.”¹⁵⁷ The 1958 Convention on the High Seas imposes a nearly identical obligation.¹⁵⁸

In other words, flag states have had, as a matter of maritime law, a duty to protect fishing crew by establishing labor conditions for them for decades. Nowhere does UNCLOS cede responsibility to the ILO or IMO.

¹⁵¹ As one international scholar succinctly states, the duty to cooperate “has . . . been translated into more specific commitments,” including environmental impact assessment, information exchange, consultation, and notification. PHILIPPE SANDS, JACQUELINE PEEL, ADRIANA FABRA & RUTH MACKENZIE, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW*, 215–16 (4th ed. 2018). For more on the duty to cooperate, including interpretations of it provided by the International Court of Justice and arbitral tribunals, see Chris Wold, *Japan’s Resumption of Commercial Whaling and Its Duty to Cooperate with the International Whaling Commission*, 35 J. ENV’T. L. & LITIG. 87 (2020).

¹⁵² UNCLOS, *supra* note 36, art. 91(1).

¹⁵³ *Id.* art. 94(1).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* art. 94(2)(a).

¹⁵⁶ *Id.* art. 94(2)(b).

¹⁵⁷ *Id.* art. 94(3) (emphasis added).

¹⁵⁸ Convention on the High Seas, art. 10(1)(b), Apr. 29, 1958, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) (“Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard, inter alia, to . . . (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments.”).

Rather, the duty to cooperate, which applies to all aspects of UNCLOS,¹⁵⁹ including those relating to the conservation and management of fisheries resources, indicates that RFMOs are an appropriate forum for addressing labor conditions for crew when labor conditions affect the management of straddling and highly migratory fish stocks, among others. As combatting IUU fishing is a central component of the responsibility to conserve and manage fisheries resources, and because IUU fishing is abetted by the use of forced labor and poor labor conditions, UNCLOS not only authorizes RFMOs to address labor conditions but could also be interpreted as requiring that RFMOs do so.

2. *The Role of FAO in Addressing Labor Conditions on Fishing Vessels*

Although these provisions of UNCLOS do not expressly make the establishment of labor standards for crew an element of fisheries law, the FAO has done so as an aspect of controlling IUU fishing and elaborating on the steps a flag state must take to exercise effectively its jurisdiction and control over vessels. The FAO has a mandate to collect, analyze, interpret, and disseminate information relating to food and agriculture, including fisheries.¹⁶⁰ Pursuant to that mandate, the FAO played an active and key role in developing fisheries management concepts, including those relating to IUU fishing and labor conditions on fishing vessels. That work began in earnest in the early 1990s with the negotiation and adoption of the FAO Compliance Agreement and the FAO Code of Conduct for Responsible Fisheries, with work continuing in both the FAO and the FAO's Committee on Fisheries (COFI).

¹⁵⁹ The first paragraph of the preamble to UNCLOS states that the parties to the convention are “[p]rompted by the desire to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea.” UNCLOS, *supra* note 36, pmbl., para. 1. *See also id.* arts. 56(2), 58(3) (directing coastal states to have “due regard” to the rights of other states when exercising their own rights and duties within their exclusive economic zone); *id.* at art. 87 (directing all states to have “due regard” to the rights of other states when exercising their own rights and duties on the high seas).

¹⁶⁰ Its mandate reads in full as follows: “The Organization shall collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture.” Constitution of the Food and Agriculture Organization of the United Nations, art. I, Oct. 16, 1945, 225 U.S.T. 1945. Furthermore, “In this Constitution, the term “agriculture” and its derivatives include fisheries, marine products, forestry and primary forestry products.” *Id.* art. XVI.

a. The FAO Compliance Agreement

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement)¹⁶¹ imposes obligations on states designed to strengthen their control over the vessels they flag through cooperation and other means.¹⁶² The FAO Compliance Agreement is an outcome of the Declaration of Cancun, which calls for states to “enhance international cooperation to prevent illicit fishing that constitutes an obstacle to achieving responsible fishing objectives.”¹⁶³

To accomplish its goals to strengthen flag state control over its vessels, deter IUU fishing, and promote international cooperation, the FAO Compliance Agreement requires a party to take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in “any activity that undermines the effectiveness of international conservation and management measures.”¹⁶⁴ Thus, a flag state must do more than ensure that its vessels comply with CMMs; it must ensure that those vessels conduct fishing operations in ways that do not undermine the effectiveness of those CMMs. In light of the goals of the Agreement, this provision appears aimed at those states that do not exercise effectively their jurisdiction and control over the vessels they flag—that is, states that issue flags of convenience.¹⁶⁵ In addition, it appears aimed at states that fail to participate in relevant RFMOs. A state and its vessels cannot be in non-compliance with CMMs of an RFMO to which it is not a member; when such vessels catch fish regulated by an

¹⁶¹ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 2221 U.N.T.S. 91 [hereinafter FAO Compliance Agreement].

¹⁶² *Id.* pmb., ¶ 2, 7, 10. *See generally id.* (“[The FAO Compliance Agreement] aims to enhance the role of flag States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures.”).

¹⁶³ U.N. Food & Agric. Org. [FAO], *Declaration of the International Conference on Responsible Fishing (Declaration of Cancun)*, ¶ 18 (1992).

¹⁶⁴ FAO Compliance Agreement, *supra* note 161, art. III(1)(a) (emphasis added).

¹⁶⁵ U.N. Food & Agric. Org. [FAO], *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities: Information and Options*, FAO FISHERIES CIRCULAR NO. 980, 11 (2002) (“The primary objective of the FAO Compliance Agreement is to deal with the problem of fishing vessels re-flagging into flags of convenience to avoid compliance with agreed conservation and management measures.”). International agreements have not defined “flag of convenience” but it generally refers to a state that grants the use of its flag without requiring a connection between the vessel and that state—an “open registry”—and which does not exercise effectively its jurisdiction and control over the vessels it flags. *See id.* at 2 n. 11.

RFMO, they engage in “unregulated fishing”¹⁶⁶ and undermine the CMMs of RFMOs.

Significantly, the FAO Compliance Agreement places the duty to prevent IUU fishing and enforcement of flag state responsibilities within the context of the duty to cooperate.¹⁶⁷ The Agreement’s preamble recognizes that “under international law as reflected in [UNCLOS], all states have 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.”¹⁶⁸ The Agreement embodies the duty to cooperate by requiring parties to cooperate to implement the Agreement¹⁶⁹ and, as appropriate, “enter into cooperative agreements or arrangements of mutual assistance on a global, regional, subregional or bilateral basis so as to promote the achievement of the objectives of this Agreement.”¹⁷⁰ In other words, RFMOs like the WCPFC can provide the means through which to implement these obligations.

While the FAO Compliance Agreement does not explicitly address labor conditions, it does so implicitly. When vessels provide unsafe working conditions, use forced labor, or violate human rights, those vessels undermine the effectiveness of CMMs, which are designed to ensure the long-term conservation and sustainable use of stocks.¹⁷¹ FAO has already linked the use of forced labor to IUU fishing, explaining that “[o]perators of IUU vessels . . . tend to deny to crew members fundamental rights concerning the terms and conditions of their labour, including those concerning wages, safety standards and other living and working

¹⁶⁶ IPOA-IUU defines “unregulated fishing” to mean fishing activities:

[I]n the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization.

IPOA-IUU, *supra* note 9, ¶ 3.3.1.

¹⁶⁷ FAO Compliance Agreement, *supra* note 161, pmbl., ¶ 2, 7, & 10.

¹⁶⁸ *Id.* pmbl., ¶ 2.

¹⁶⁹ *Id.* art. V(1).

¹⁷⁰ *Id.* art. V(3).

¹⁷¹ See, e.g., WCPFC Convention, *supra* note 26, art. 2; Convention for Strengthening the Inter-American Tropical Tuna Convention, art. II, June 27, 2003, S. Treaty Doc. No. 2, 109th Cong., 1st Sess. (2005). Other regional fisheries agreements use different language to convey the same idea. See Convention for the Conservation of Antarctic Marine Living Resources, art. II, May 20, 1980, T.I.A.S. 10240 (“rational use”); Convention for the Conservation of Southern Bluefin Tuna, art. 2, May 10, 1993, 1819 U.N.T.S. 360 (“conservation and optimum utilization”); Agreement for the Establishment of the Indian Ocean Tuna Commission, Nov. 25, 1993, 1927 U.N.T.S. 329, (“conservation and optimum utilization”).

conditions.”¹⁷² When the denial of those fundamental rights violates international human rights law, then such vessels engage in “illegal fishing,” as defined by the IPOA-IUU;¹⁷³ much of human rights law, including the freedom from slavery, freedom of movement, and security of person, are considered customary international law and, thus, binding on all states.¹⁷⁴ As such, the FAO Compliance Agreement has made labor conditions for crew an aspect of fisheries law and the duty to prevent IUU fishing.

b. FAO Code of Conduct for Responsible Fisheries

The FAO continued its efforts to prevent IUU fishing and promote responsible fishing practices with the non-binding FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct),¹⁷⁵ which makes clear that addressing labor standards and human rights are fisheries matters. The Code of Conduct establishes “principles and international standards of behavior for responsible practices” for fisheries conservation and management.¹⁷⁶ To that end, Article 6.12 directs states to “ensure responsible fishing,”¹⁷⁷ and Article 6.17 emphasizes that “States should ensure that fisheries activities and equipment allow for safe, healthy and fair working and living conditions and meet internationally agreed standards adopted by relevant international organizations.”¹⁷⁸

¹⁷² *Implementation of IPOA-IUU*, *supra* note 19, at 1.

¹⁷³ “Illegal fishing” includes activities conducted in violation of international obligations. IPOA-IUU, *supra* note 9, ¶ 3.1.3 The full definition of “illegal fishing” refers to activities:

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

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

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

IPOA-IUU, *supra* note 9, ¶ 3.1.

¹⁷⁴ See, e.g., JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 642–44 (8th ed., 2012) (“It is now generally accepted that the fundamental principles of human rights form part of customary international law, although not everyone would agree on the identity or content of the fundamental principles.”).

¹⁷⁵ FAO Code of Conduct for Responsible Fisheries, *supra* note 37.

¹⁷⁶ *Id.* at 1.

¹⁷⁷ *Id.* § 6.12.

¹⁷⁸ *Id.* § 6.17 (emphasis added).

Article 7 further directs states and RFMOs to adopt CMMs that take into account “the interests of fishers.”¹⁷⁹ Concerning “fishing operations,” Article 8.1.5 “expands on the principle of safety,”¹⁸⁰ asking states “to ensure that health and safety standards are adopted for everyone employed in fishing operations” and that “[s]uch standards should be not less than the minimum requirements of relevant international agreements on conditions of work and service.”¹⁸¹ While implicitly recognizing standards set by the ILO, the Code of Conduct recognizes those standards as minimum requirements, thereby indicating that states may adopt higher standards. Article 8.4.1 requests that “States should ensure that fishing is conducted with due regard to the safety of human life.”¹⁸² The FAO has specifically interpreted Article 8 to mean that responsible fishing operations need to be conducted so as to “support human well-being while protecting their environments.”¹⁸³

Moreover, the FAO Code of Conduct, while addressing its provisions to states, also tasks them with implementing the Code’s provisions through RFMOs. Article 6.10 provides that, through RFMOs, “States should ensure compliance with and enforcement of conservation and management measures and establish effective mechanisms, as appropriate, to monitor and control the activities of fishing vessels and fishing support vessels.”¹⁸⁴ The Code also asks states, within the framework of RFMOs, to “cooperate to establish systems for monitoring, control, surveillance and enforcement of applicable measures with respect to fishing operations and related activities in waters outside their national jurisdiction.”¹⁸⁵

In other words, the FAO Code of Conduct establishes labor standards as relevant to fisheries management and that RFMOs are

¹⁷⁹ *Id.* § 7.2.1, 7.2.2 (emphasis added).

¹⁸⁰ COFI, *supra* note 44, ¶ 2.

¹⁸¹ FAO Code of Conduct for Responsible Fisheries, *supra* note 37, § 8.1.5.

¹⁸² *Id.* § 8.4.1.

¹⁸³ The full statement of FAO is as follows:

Article 8 of the Code develops provisions regarding responsible fishing operations which need to be conducted and controlled to ensure long-term sustainability of living marine resources so that these can make a substantial contribution to food and nutrition security, strengthen employment opportunities and support human well-being while protecting their environments.

U.N. Food & Agric. Org. [FAO], *Implementation of the Code of Conduct for Responsible Fisheries: Trends over the Last 25 Years*, 12 (2021).

¹⁸⁴ FAO Code of Conduct for Responsible Fisheries, *supra* note 37, § 6.

¹⁸⁵ *Id.* § 8.1.4.

relevant actors for adopting, monitoring, and enforcing such standards. FAO technical guidance for the Code of Conduct supports this view. For example, FAO has explained that states should encourage responsible fishing by ensuring that “the interests of those engaged in fishing are recognized and sufficiently secure to provide for their long term contribution to the health of fisheries resources and inter-generational equity,” that “incomes are sufficient to allow conservation and management measures to be imposed without causing undue financial hardship on fishers and fishing vessel owners,” and that “matters concerning the safety and health of those engaged in the fishing industry are given due consideration by taking into account the provisions of the relevant ILO conventions, as well as the recommendations of its Committee on Conditions of Work and Service in the Fishing Industry.”¹⁸⁶

In addition, FAO technical guidance for the Code of Conduct provides that fisheries protection officers on the high seas should have authority to “require the master to appear and give any explanation concerning the vessel and the crew or any person on board the fishing vessel.”¹⁸⁷ If crew appear malnourished, beaten, or abused, for example, this FAO guidance indicates that fisheries protection officers are well within their rights to ask questions regarding the crew, and the master is required to provide answers. If the failure to respond violates or the evidence otherwise indicates a violation of national legislation or international law applicable to the high seas, the inspecting state may take the suspected offender, the vessel, and the crew to a port or harbor for prosecution.¹⁸⁸

c. Post-Code of Conduct Work in the FAO and COFI

FAO and its Committee on Fisheries (COFI) have continued to elaborate on the need to protect fishers from fraudulent recruiting practices, degrading work conditions, and human rights abuses. For example, FAO, RFMOs, and others have frequently placed fisheries management in the context of sustainable development¹⁸⁹ or, in the words

¹⁸⁶ U.N. Food & Agric. Org. [FAO], *FAO Technical Guidelines for Responsible Fisheries: Indicators for Sustainable Development of Marine Capture Fisheries, NO. 1.*, ¶ 5 (1996).

¹⁸⁷ U.N. Food & Agric. Org. [FAO], *Fishing Operations: Best Practices to Improve Safety at Sea in the Fisheries Sector*, *supra* note 16, ¶ 61(g).

¹⁸⁸ *Id.* ¶ 61(j).

¹⁸⁹ U.N. Food & Agric. Org. [FAO], *FAO Technical Guidelines for Responsible Fisheries: Indicators for Sustainable Development of Marine Capture Fisheries, NO. 8* (1999) (“fishing is important to sustainable development”) [hereinafter *Indicators of Sustainable Development*].

of many agreements, long-term conservation and sustainable use.¹⁹⁰ Sustainable development and sustainable use include environmental, economic, and social factors,¹⁹¹ with the goal of improving or sustaining quality of life and human well-being, not simply economic growth.¹⁹² Sustainable development in the context of fisheries means “[c]atering for the well-being of a fishery workforce within a wider community and broader economic context,”¹⁹³ including through the protection of fishers’ human rights.¹⁹⁴ In other words, FAO has, again, described labor conditions as a fisheries issue.

Most recently, in February 2021, COFI specifically linked sustainable fisheries to labor conditions on vessels in its Declaration on Sustainable Fisheries and Aquaculture.¹⁹⁵ In that declaration, Ministers and others representing their governments at the COFI meeting declared that they

*Promote the attainment of safe, healthy and fair working conditions for all in the sector, support efforts to prevent and halt forced labour, facilitate access to social protection programmes for fishers and aquaculture producers and their communities, support measures to improve safety at sea, and work towards enhancing the standards of living for all in the sector, in cooperation with other relevant international organizations, including the International Labour Organization and the International Maritime Organization.*¹⁹⁶

¹⁹⁰ See, e.g., WCPF Convention, *supra* note 26, art. 2 (“The objective of this Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement.”).

¹⁹¹ WORLD COMM’N ON SUSTAINABLE DEV., OUR COMMON FUTURE 43–46 (1987); *Indicators of Sustainable Development*, *supra* note 189, at 18; G.A. Res. 66/288, ¶ 87 (Sept. 11, 2012) (reaffirming the need to strengthen international environmental governance “in order to promote a balanced integration of the economic, social and environmental dimensions of sustainable development”); ROBERT COSTANZA, JOHN CUMBERLAND, HERMAN DALY, ROBERT GOODLAND, RICHARD NORGAARD, AN INTRODUCTION TO ECOLOGICAL ECONOMICS 88–92 (2d ed. 2015) (describing sustainability in the context of ecological economics as including three factors: sustainable scale, fair distribution of resources, and efficient allocation of resources).

¹⁹² *Indicators of Sustainable Development*, *supra* note 189, at 9 (“Development in this sense relates to the quality of life and should not be confused with economic growth.”).

¹⁹³ *Id.* at 11.

¹⁹⁴ See *Sustainable Fisheries and Responsible Aquaculture: A Guide for USAID Staff and Partners*, U.S. AGENCY FOR INT’L DEV., 32 (2013) (“Economic development is only sustainable if it includes respect for worker rights and human rights. Too often in fisheries, these rights are violated—especially in regards to child labor and working conditions on boats or in processing plants.”).

¹⁹⁵ See generally U.N. Food & Agric. Org. [FAO], *2021 COFI Declaration for Sustainable Fisheries and Aquaculture* (Dec. 4, 2021).

¹⁹⁶ *Id.* ¶ 18.

COFI and FAO have also placed labor conditions squarely within the fisheries management context. In the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries, FAO and COFI ask states to “address occupational health issues and unfair working conditions of all small-scale fishers and fish workers by ensuring that the necessary legislation is in place and is implemented in accordance with national legislation and international human rights standards and international instruments to which a State is a contracting party.”¹⁹⁷ These Guidelines also ask states to “eradicate forced labour, prevent debt-bondage of women, men and children, and adopt effective measures to protect fishers and fish workers, including migrants, with a view to the complete elimination of forced labour in fisheries, including small-scale fisheries.”¹⁹⁸ Clearly, adopting and implementing labor standards for better working and living conditions for crew is a fisheries issue.

In fact, COFI now has a stream of work called “Safety at Sea and Decent Work in Fisheries and Aquaculture.”¹⁹⁹ As part of this program, FAO has been conducting capacity building workshops on safety at sea²⁰⁰ and seminars specifically related to labor issues that “identified regional priorities and potential improvements in the sector.”²⁰¹ It is even exploring the use of insurance services “to reduce the vulnerability of fishers and their families to shocks caused by work-related accidents.”²⁰²

After highlighting the vulnerability of fishers to unfair labor practices and indecent work conditions, FAO concludes that states should develop guidelines for good labor practices in the fisheries sector that cover fundamental labor rights, wages, working hours and occupational health and safety standards.²⁰³ It further recommends that states develop and use certification standards that include decent work criteria.²⁰⁴ Lastly, it recommends that states strengthen the capacity of fisheries agencies “to

¹⁹⁷ U.N. Food & Agric. Org. [FAO], *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*, ¶ 6.12 (2015). As described in the forward, these *Guidelines* are the result of a process that ran through COFI. *Id.* at V.

¹⁹⁸ *Id.* ¶ 6.13.

¹⁹⁹ U.N. Food & Agric. Org. [FAO], *See Safety at Sea and Decent Work in Fisheries and Aquaculture*, ¶ 1 (2021).

²⁰⁰ *Id.* ¶¶ 4–9.

²⁰¹ *Id.* ¶¶ 11–15.

²⁰² *Id.* ¶ 31. See also U.N. Food & Agric. Org., *Best Practices to Improve Safety at Sea in the Fisheries Sector*, *supra* note 16, at 155–65.

²⁰³ See U.N. Food & Agric. Org., *Scoping Study on Decent Work and Employment in Fisheries and Aquaculture: Issues and Actions for Discussion and Programming*, *supra* note 10, at 38–39, 46.

²⁰⁴ *Id.*

deal with labour issues and for effective coordination and cooperation between labour, marine transport, and fisheries and aquaculture management authorities.”²⁰⁵ As an aspect of this last recommendation, FAO also explains that states should improve monitoring and enforcement of labor legislation in offshore and remote fisheries.²⁰⁶ Clearly, FAO believes that labor is a fisheries issue and that the concept of “fishing” is broader than just the gear.²⁰⁷

This work by COFI and FAO supports the larger global sustainable development agenda. The international community adopted the *2030 Agenda for Sustainable Development* in which they called for an end to IUU fishing²⁰⁸ and subsidies that contribute to IUU fishing.²⁰⁹ States also committed to “take immediate and effective measures to eradicate forced labour [and] end modern slavery.”²¹⁰ States also committed to “[p]rotect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.”²¹¹ As long as states, acting alone or through RFMOs like the WCPFC, fail to take action to improve labor conditions on vessels, they fail to uphold their international commitments under the *2030 Agenda for Sustainable Development* and, thus, contribute to IUU fishing.

The *2030 Agenda for Sustainable Development* supports an earlier 2012 UN General Assembly resolution, *The Future We Want*, which affirms that policies in the context of sustainable development and poverty eradication should enhance the welfare of fishers and “improve the livelihoods and empowerment of the poor and vulnerable groups, in particular in developing countries.”²¹² Moreover, the General Assembly

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ In one document supporting the Code of Conduct, the FAO noted the following:

Fisheries management involves not only direct regulations but also management of access rights, influencing of fishers’ attitudes toward the resources, and other broader issues. The scope of fisheries management has widened in recent years to consider aspects beyond the extent of a fishery resource, implying an ecosystem approach. However, in managing fisheries, due consideration should be given to the risk factor to fishers from the point of view of safety at sea, when making management decisions.

U.N. Food & Agric. Org., *Best Practices to Improve Safety at Sea in the Fisheries Sector*, *supra* note 16, at 119.

²⁰⁸ G.A. Res. 70/1, ¶ 14.4 (Oct. 21, 2015).

²⁰⁹ *Id.* ¶ 14.6.

²¹⁰ *Id.* ¶ 8.7.

²¹¹ *Id.* ¶ 8.8.

²¹² G.A. Res. 66/288, *supra* note 191, ¶ 58(k).

acknowledged that IUU fishing “deprive[s] many countries of a crucial natural resource and remain[s] a persistent threat to their sustainable development.”²¹³ Importantly, in neither of these resolutions did the General Assembly direct any specific entity to take these actions; it directed all states to do so. Consistent with the duty to cooperate as described in UNCLOS, states could improve labor conditions for crew on fishing vessels, prevent IUU fishing, and implement the goals of the *2030 Agenda for Sustainable Development* and *The Future We Want* through collective action taken within the WCPFC and other RFMOs.

3. *UN Fish Stocks Agreement*

The UN Fish Stocks Agreement²¹⁴ furthers the conception of labor conditions for crew as an aspect of fisheries management. While the UN Fish Stocks Agreement is limited in scope to straddling and highly migratory fish stocks,²¹⁵ parties to it commit themselves to “responsible fisheries,”²¹⁶ the phrase used by the FAO Code of Conduct to include labor conditions as part of fisheries management.²¹⁷ To accomplish that goal and effectuate their duty to cooperate,²¹⁸ parties must, among many other things, take measures to prevent or eliminate overfishing and excess fishing capacity and ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources.²¹⁹ To fulfill their duty to cooperate specifically through RFMOs,²²⁰ states must “adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations.”²²¹ Like the Code of Conduct,²²² the UN Fish Stocks Agreement acknowledges that the minimum standards of other organizations do not exclude the possibility

²¹³ *Id.* ¶ 170.

²¹⁴ 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 art. 21, § 8, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter UNFSA].

²¹⁵ *Id.* art. 3, ¶ 1.

²¹⁶ *Id.*

²¹⁷ FAO Code of Conduct for Responsible Fisheries, *supra* note 37, art. 6, ¶ 6.17.

²¹⁸ UNFSA, *supra* note 214, art. 5, § (h).

²¹⁹ *Id.* art. 5, § (h).

²²⁰ *Id.* art. 10, § (c).

²²¹ *Id.*

²²² FAO Code of Conduct for Responsible Fisheries, *supra* note 37, art. 5 § (h).

of an RFMO adopting higher standards.²²³ As such, the UN Fish Stocks Agreement implicitly if not explicitly contemplates the adoption of labor standards by RFMOs.

Moreover, the UN Fish Stocks Agreement also requires a party to flag vessels only if it is able to exercise effectively its responsibilities in respect of such vessels.²²⁴ Like the FAO Compliance Agreement, the UN Fish Stocks Agreement directs flag states to ensure the vessels they flag do not undermine the effectiveness of CMMs.²²⁵ If they cannot effectively exercise jurisdiction and control over their vessels, then they should not flag such vessels.²²⁶ If they are able to effectively exercise jurisdiction and control over their vessels, then they must investigate alleged violations of CMMs,²²⁷ enforce such measures wherever such violations occur,²²⁸ and impose sanctions adequate in severity to ensure compliance and deter future violations.²²⁹

The UN Fish Stocks Agreement further authorizes port states to take measures “to promote the effectiveness of” CMMs adopted by RFMOs.²³⁰ Port states are also authorized to inspect “documents,”²³¹ which could include crew lists and work agreements, if such documents were required by an RFMO, and prohibit landings and transshipments of catch taken in a manner that undermines the effectiveness of CMMs.²³² The UN Fish Stocks Agreement thus contemplates an RFMO adopting labor standards and enforcing such standards.

4. *Port State Measures Agreement*

The Port State Measures Agreement (PSMA)²³³ also includes labor conditions as an aspect of international fisheries law. The PSMA has

²²³ UNFSA, *supra* note 214, art. 10 § (c).

²²⁴ *Id.* art. 18, § 2.

²²⁵ *Id.* art. 18, § 1.

²²⁶ U.N. Food & Agric. Org., Rep. of the Expert Consultation on Flag State Performance, 29, Fisheries and Aquaculture Report No. 918 (June 2009).

²²⁷ UNFSA, *supra* note 214, art. 19, § 1(b).

²²⁸ *Id.* art. 19, § 1(a).

²²⁹ *Id.* art. 19, § 2.

²³⁰ *Id.* art. 23, § 1.

²³¹ *Id.* art. 23, § 2–3.

²³² *Id.*

²³³ Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing pmbl., Nov. 22, 2009, 55 I.L.M. 1157 [hereinafter PSMA].

an objective to “prevent, deter and eliminate IUU fishing.”²³⁴ Like other fisheries instruments assessed as part of this report, it does not expressly authorize inspections and detentions of vessels for labor conditions but it does authorize inspections to determine whether a vessel has engaged in IUU fishing or fishing related activities in support of such fishing.²³⁵ The PSMA defines IUU fishing consistently with IPOA-IUU.²³⁶ As such, it includes violations of international law, including human rights law, as a reason to deny port entry,²³⁷ inspect the vessel,²³⁸ and allow services essential to the safety or health of the crew.²³⁹ The PSMA further defines “fishing related activities” to mean “any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port.”²⁴⁰ Critically, the phrase “fishing related activities” expressly relates to “the provisioning of personnel.”²⁴¹

Substantively, a PSMA party may not allow the entry and use of its ports to vessels if the port state has sufficient proof that the vessel seeking entry has engaged in IUU fishing or fishing related activities in support of IUU fishing, unless it wants to inspect and take other appropriate actions with respect to such vessels.²⁴² If a vessel has entered one of its ports, a party shall deny that vessel port services if it has “reasonable grounds” to believe that the vessel has engaged in IUU fishing or fishing related activities in support of such fishing.²⁴³ However, a party shall not deny a vessel the use of port services “essential to the safety or health of the crew.”²⁴⁴

Thus, consistent with other fisheries related agreements, the PSMA includes labor issues as a fisheries management issue. Like the Code of Conduct, the PSMA expressly addresses labor conditions and other issues affecting the health and safety of the crew. That is, labor issues, including the establishment of labor conditions for crew, are not an

²³⁴ *Id.* art. 2.

²³⁵ *Id.* art. 9, § 5.

²³⁶ *Id.* art. 1, § (e).

²³⁷ *Id.* art. 9, § 4.

²³⁸ *Id.* art. 9, § 5.

²³⁹ *Id.* art. 11, § 2.

²⁴⁰ *Id.* art. 1, § d.

²⁴¹ *Id.*

²⁴² *Id.* art. 9, §§ 3–6.

²⁴³ *Id.* art. 11, § 1(e).

²⁴⁴ *Id.* art. 11, § 2(a).

issue left solely to ILO. They are matters that can also be addressed by RFMOs and fisheries-related agreements.

5. WCPF Convention

Consistent with the other instruments reviewed in this Article, the WCPF Convention does not prevent the WCPFC from adopting labor standards. Instead, Article 10 expressly authorizes the WCPFC to do so. That provision authorizes the Commission to “adopt minimum standards for the responsible conduct of fishing operations.”²⁴⁵ By referring to “the responsible conduct of fishing operations,” Article 10 refers back to the FAO Code of Conduct, which specifically refers to adoption of minimum standards for living conditions.²⁴⁶

More generally, as with the UN Fish Stocks Agreement,²⁴⁷ the FAO Code of Conduct,²⁴⁸ and other fisheries agreements,²⁴⁹ the WCPF Convention authorizes the WCPFC to establish cooperative mechanisms for effective monitoring, control, surveillance and enforcement,²⁵⁰ where control has been defined as “the regulatory conditions under which the exploitation of the resource may be conducted.”²⁵¹ The treatment of crew certainly falls within the phrase “conditions under which exploitation may be conducted.”

The WCPFC has, in fact, adopted a non-binding resolution concerning labor standards for crew.²⁵² This resolution begins by acknowledging that Articles 6 and 8 of the FAO Code of Conduct set out international standards, including labor standards, for the responsible conduct of fishing operations to ensure fair work and living conditions.²⁵³ In its operative paragraphs, it encourages members to adopt measures into their national legislation to establish minimum standards regulating crew labor conditions.²⁵⁴ That legislation should include provisions to ensure “fair working conditions,” including through fair terms of employment

²⁴⁵ WCPF Convention, *supra* note 26, art. 10, § 1(h).

²⁴⁶ FAO Code of Conduct for Responsible Fisheries, *supra* note 37, art. 6, ¶ 6.17.

²⁴⁷ UNFSA, *supra* note 214, art. 5 § 1(l).

²⁴⁸ FAO Code of Conduct for Responsible Fisheries, *supra* note 37, art. 7, ¶ 7.7.3, art. 8 ¶ 8.1.4.

²⁴⁹ IPOA-IUU, *supra* note 9, § IV ¶¶ 24, 28.7, 51.1.

²⁵⁰ WCPF Convention, *supra* note 26, art. 10(1)(i).

²⁵¹ U.N. Food & Agric. Org., *An Introduction to Monitoring, Control and Surveillance Systems for Capture Fisheries*, § 3.1 (1999).

²⁵² WCPFC Res. 2018/01 (Dec. 14, 2018).

²⁵³ *Id.* pmbl., para. 1.

²⁵⁴ *Id.* ¶ 1.

embodied in a written contract, decent living and working conditions on the vessel, and “decent and regular remuneration,” among other things.²⁵⁵ Consistent with the obligations of flag states, the resolution also encourages flag states to “strengthen effective jurisdiction and control” over the vessels they flag and to “exercise due diligence to improve and enforce requirements regarding labour conditions on board fishing vessels.”²⁵⁶

The European Union and Japan expressed concerns about the authority of the WCPFC to adopt the resolution.²⁵⁷ China expressly stated that these issues should be addressed elsewhere but supported the resolution because it was not binding.²⁵⁸ However, the WCPFC’s mandate as embodied in the WCPF Convention does not change depending on whether a measure is a non-binding resolution or a binding CMM. By adopting the resolution, the WCPFC has implicitly, and for some members, explicitly,²⁵⁹ agreed that the WCPFC has authority to address labor conditions on fishing vessels. If the WCPFC has the authority to take action pursuant to a non-binding resolution, it also has the authority to take action pursuant to a binding CMM.

In addition, the WCPFC has also acknowledged its authority to regulate for the safety of crews in other ways. For example, when sharks are taken as bycatch, vessels should release them alive “using techniques that result in minimal harm, taking into account the safety of the crew.”²⁶⁰ When taking steps to “ensure the safe release” of cetaceans caught as bycatch, “the safety of the crew shall be paramount.”²⁶¹

²⁵⁵ *Id.* ¶ 2.

²⁵⁶ *Id.* ¶ 4.

²⁵⁷ WCPFC, *Summary Report of the Fifteenth Regulation Session of the Commission*, ¶ 114 (May 4, 2019) (“The EU stated it fully supported the principles put forward, that these were present in its own laws, and that its vessels fully respected them, but expressed doubts about the legal basis of the WCPFC to adopt a Resolution on labour standards under Article 10(h) of the Convention.”) [hereinafter *WCPFC15 Summary Report*]. Article 10(h) of the WCPF Convention provides that the WCPFC may “adopt generally recommended international minimum standards for the responsible conduct of fishing operations.” WCPF Convention, *supra* note 26, art. 10(h).

²⁵⁸ *WCPFC15 Summary Report*, *supra* note 257, ¶ 114.

²⁵⁹ Later, when Indonesia proposed a binding CMM, New Zealand stated, “Under the Convention, the WCPFC has a mandate to adopt minimum standards for responsible conduct of fishing operations. In New Zealand’s view, eliminating the most egregious abuses of human rights against fishing vessel crews is clearly within the purview of establishing standards for the responsible conduct of fishing operations.” *WCPFC17 Summary Report*, *supra* note 28, ¶ 296.

²⁶⁰ WCPFC, *Conservation and Management Measure for Sharks*, ¶ 17, 2019/04 (Dec. 11, 2019).

²⁶¹ WCPFC, *Conservation and Management Measure for Protection of Cetaceans from Purse Seine Fishing Operations*, ¶¶ 3–4, 2011/03 (Mar. 20, 2012).

Moreover, the WCPFC already regulates labor conditions for some workers on fishing vessels: onboard observers. For example, the WCPFC prohibits the assault or intimidation of onboard observers.²⁶² It also requires the vessel operator to provide the observer with officer level accommodation, food, and medical and sanitary facilities,²⁶³ and take other measures to ensure the safety of observers.²⁶⁴

The WCPFC also requires each member to “take all reasonable actions” to care for a sick or injured observer and provide medical care for observers.²⁶⁵ WCPFC members must immediately facilitate safe disembarkation of an observer who needs additional medical care²⁶⁶ if there are “reasonable grounds” to believe the observer has been threatened, harassed, or assaulted such that the observer’s health or safety is endangered.²⁶⁷ The WCPFC also specifically applies the provisions relating to high seas boarding and inspection to the search and rescue of an onboard observer.²⁶⁸

Other RFMOs, including the International Commission for the Conservation of Atlantic Tuna (ICCAT),²⁶⁹ the Indian Ocean Tuna Commission (IOTC),²⁷⁰ and the Inter-American Tropical Tuna

²⁶² WCPFC, *Conservation and Management Measure for the Regional Observer Programme*, annex A, ¶ 1(i), 2018/05 (Dec. 14, 2018) [hereinafter WCPFC CMM 2018-05]; see also WCPFC, *Conservation and Management Measure for the Protection of WCPFC Regional Observer Programme Observers*, ¶¶ 7–8 2017/03 (Dec. 7, 2017) (requiring the flag state to take specified action if “there are reasonable grounds to believe a WCPFC ROP observer has been assaulted, intimidated, threatened, or harassed such that their health or safety is endangered”) [hereinafter WCPFC CMM 2017-03].

²⁶³ WCPFC CMM 2018-05, *supra* note 262, annex A, ¶ 1(g).

²⁶⁴ *Id.* ¶ 1 (providing full, unrestricted access for carrying duties).

²⁶⁵ WCPFC CMM 2017-03, *supra* note 262, ¶ 5(c).

²⁶⁶ See *id.* ¶ 5(d).

²⁶⁷ *Id.* ¶ 7.

²⁶⁸ *Id.* ¶ 12.

²⁶⁹ E.g., ICCAT, *Recommendation by ICCAT on Protecting the Health and Safety of Observers in ICCAT’s Regional Observer Programs*, annex 1 at ¶¶ 6-7, 19/10 (2020); ICCAT, *Recommendation by ICCAT to Replace Recommendation 16-01 by ICCAT on a Multi-Annual Conservation and Management Programme for Tropical Tunas*, ¶ 54, 19/02 (2020); ICCAT, *Recommendation by ICCAT Amending Recommendation 18-02 Establishing a Multi-Annual Management Plan for Bluefin Tuna in the Eastern Atlantic and the Mediterranean*, annex 6, ¶ 11, 19/04 (2020); ICCAT, *Recommendation by ICCAT on Transshipment*, app. 2, ¶ 10 (2017).

²⁷⁰ See, e.g., IOTC Res. 19/06, *On Establishing a Programme for Transshipment by Large-scale Fishing Vessels*, annex IV, ¶ 9(c) (2019) (“Observers shall be provided accommodation, including lodging, food and adequate sanitary facilities, equal to those of officers.”); IOTC Res. 16/04, *On the Implementation of a Pilot Project in View of Promoting the Regional Observer Scheme of IOTC*, annex I, ¶¶ 3–4 (Sept. 27, 2016); IOTC Res. 11/04, *On a Regional Observer Scheme*, ¶ 5 (2011).

Commission (IATTC)²⁷¹ and its companion agreement, the Agreement on the International Dolphin Conservation Program (AIDCP),²⁷² include similar provisions on labor conditions for observers and for the provision of adequate food, lodging, and sanitary facilities. ICCAT,²⁷³ IOTC,²⁷⁴ IATTC,²⁷⁵ and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT)²⁷⁶ also regulate crew safety in the context of releasing bycatch safely.²⁷⁷ None of these RFMOs, however, appear to have any binding or non-binding CMMs relating directly to labor standards for crew.

As such, the WCPFC and other RFMOs have already adopted binding CMMs relating to labor standards. Not only does the WCPFC authorize the WCPFC to adopt labor standards, but the WCPFC already has shown that it believes such standards are within its mandate. Moreover, there is no distinction between adopting labor standards for

²⁷¹ IATTC Res. C/19/08, *Resolution on Scientific Observers for Longline Vessels*, ¶ 5 (July 26, 2019); IATTC Res. C/18/07, *Resolution on Improving Observer Safety at Sea: Emergency Action Plan* (2018).

²⁷² AIDCP Res. A/18/03, *On Improving Safety at Sea: Emergency Action Plan*, ¶¶ 5, 7 (2018) (including the same provisions as in the IATTC).

²⁷³ See, e.g., ICCAT, *Recommendation by ICCAT to Establish Rebuilding Programs for Blue Marlin and White Marlin/Roundscale Spearfish*, ¶ 5, 19/05 (“[S]hall encourage the implementation of the minimum standards for safe handling and live release procedures, as specified in Annex 1 while giving due consideration to the safety of the crew.”).

²⁷⁴ See, e.g., IOTC Res. 13/04, *On the Conservation of Cetaceans*, ¶ 3 (IOTC members “shall require that, in the event that a cetacean is unintentionally encircled in a purse seine net, the master of the vessels shall . . . take all reasonable steps to ensure the safe release of the cetacean, while taking into consideration the safety of the crew”).

²⁷⁵ See, e.g., IATTC Res. C/16/05, *Resolution on the Management of Sharks*, ¶ 3 (2016) (“Any shark (whether alive or dead) caught in the Convention Area that is not retained must be promptly released unharmed, to the extent practicable, as soon as it is seen in the net or on the deck, without compromising the safety of any persons.”).

²⁷⁶ The CCSBT makes binding on its members certain CMMs of other RFMOs, including those relating to bycatch of sharks and cetaceans. CCSBT, *Resolution to Align CCSBT’s Ecologically Related Species measures with those of other tuna RFMOs*, ¶ 2 & annex I (2020); See also *Bycatch Mitigation*, CCSBT, <https://www.ccsbt.org/en/content/bycatch-mitigation> [<https://perma.cc/ATY5-ZXKH>] (listing the CMMs of other RFMOs that are binding on CCSBT members).

²⁷⁷ See, e.g., *Rebuilding Programs for Blue Marlin and White Marlin/Roundscale Spearfish*, *supra* at note 273, ¶ 5 (2020); IATTC Res. C/16/05 *supra* at note 273, ¶ 3 (2016); IATTC Res. C/15/04, *Resolution on the Conservation of Mobulid Rays Caught in Association with Fisheries in the IATTC Convention Area*, ¶ 3 (2015) (requiring that vessels “promptly release unharmed” any Mobulid species caught and release them “in a manner that will result in the least possible harm to the Mobulid rays captured without compromising the safety of any persons”); IOTC Res. 19/03, *On the Conservation of Mobulid Rays Caught in Association with Fisheries in the IOTC Area of Competence*, ¶ 5 (2019) (requiring vessels to “promptly release alive and unharmed” any Mobulid rays caught “in a manner that will result in the least possible harm to the individuals captured . . . while taking into consideration the safety of the crew”).

observers and crew. Just as food, accommodation, and decent working conditions are not directly related to an observer's scientific and compliance role, so too food, accommodation, and decent working conditions are not directly related to catching fish. However, healthy and safe observers and crew are relevant to fisheries management as the job of catching and monitoring catches cannot be accomplished without them.

B. THE REGULATIONS OF LABOR CONDITIONS ON FISHING VESSELS UNDER THE ILO

The ILO's constitutional mandate is to pursue social justice and address conditions of labor which involve "such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled."²⁷⁸ To that end, the ILO has been addressing issues concerning forced labor as early as 1930, when it adopted a convention to prohibit the use of forced labor.²⁷⁹

Even earlier, however, the ILO recommended limits on the hours worked by fishers.²⁸⁰ Beginning in 1959, the ILO adopted several conventions and additional recommendations specifically related to fishing and fishers. These conventions addressed minimum age,²⁸¹ medical examinations,²⁸² contracts,²⁸³ accommodations,²⁸⁴ and competency certification,²⁸⁵ while a non-binding recommendation addressed training.²⁸⁶ However, the ILO determined that these conventions and recommendations required updating to "reflect changes in the sector which have occurred over the last 40 years; achieve more widespread ratification;

²⁷⁸ Constitution of the International Labour Organization, pmbl., June 28, 1919, 15 U.N.T.S. 35 [hereinafter ILO Constitution].

²⁷⁹ ILO, *Forced Labour Convention, 1930 (No. 29)*, June 28, 1930 (entered into force May 1, 1932), as amended by the *Protocol of 2014 to the Forced Labour Convention, 1930*, June 11, 2014, (entered into force Nov. 9, 2016).

²⁸⁰ ILO, *Hours of Work (Fishing) Recommendation, 1920 (No. 7)* (withdrawn 2018).

²⁸¹ ILO, *Minimum Age (Fishermen) Convention, 1959 (No. 112)*, June 19, 1959 (entered into force Nov. 7, 1961).

²⁸² ILO, *Medical Examination (Fishermen) Convention, 1959 (No. 112)*, June 19, 1959 (entered into force Nov. 7, 1961).

²⁸³ ILO, *Fishermen's Articles of Agreement Convention, 1959 (No. 114)*, June 19, 1959 (entered into force Nov. 7, 1961).

²⁸⁴ ILO, *Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)*, June 21, 1966 (entered into force Nov. 6, 1968).

²⁸⁵ ILO, *Fishermen's Competency Certificates Convention, 1966 (No. 125)*, June 21, 1966 (entered into force July 15, 1969).

²⁸⁶ ILO, *Vocational Training (Fishermen) Recommendation, 1966 (No. 126)*, June 21, 1966.

and reach, where possible, a greater portion of the world's fishermen, particularly those on smaller vessels."²⁸⁷ Consequently, the ILO undertook negotiations to revise and update these standards as they apply to fishers, culminating in the Work in Fishing Convention,²⁸⁸ and a separate recommendation supplementing the Convention.²⁸⁹ A separate International Maritime Organization treaty addresses labor standards for seafarers,²⁹⁰ but specifically excludes fishers.²⁹¹

1. *The Scope of the Work in Fishing Convention*

Drawing from those five earlier conventions and two recommendations, the Work in Fishing Convention establishes a broad objective "to ensure that fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security."²⁹² To that end, it applies to all fishers and all fishing vessels engaged in commercial fishing,²⁹³ with more prescriptive standards applying to vessels greater than twenty-four meters in length.²⁹⁴

In addition, the Work in Fishing Convention entitles all fishers to written terms and conditions of employment (a Fisherman's Work Agreement),²⁹⁵ minimum hours of rest (not less than ten hours in any twenty-four-hours period),²⁹⁶ payment (monthly or regularly),²⁹⁷ decent accommodation and food,²⁹⁸ medical care,²⁹⁹ health and safety on board

²⁸⁷ ILO, *Conditions of Work in the Fishing Sector: A Comprehensive Standard (a Convention Supplemented by a Recommendation) on Work in the Fishing Sector*, 17 (2003).

²⁸⁸ ILO, *Work in Fishing Convention*, *supra* note 35.

²⁸⁹ ILO, *Work in Fishing Recommendation, 2007 (No. 199)*, (June 14, 2007).

²⁹⁰ ILO, *Maritime Labour Convention, 2006, as amended*, Feb. 23, 2006, (entered into force Aug. 20, 2013).

²⁹¹ *Id.* art. 2, § 4.

²⁹² ILO, *Working in Fishing Convention*, *supra* note 35, pmb1., ¶ 14.

²⁹³ *Id.* art. 2, § 1.

²⁹⁴ *Id.* arts. 10, § 3; 12; 14, § 1(a); 30; 31, § 1; 41; Annex III.

²⁹⁵ *Id.* art. 16.

²⁹⁶ *Id.* art. 14, § 1.

²⁹⁷ *Id.* arts. 23–24.

²⁹⁸ *Id.* arts. 25–28.

²⁹⁹ *Id.* arts. 29–30.

the vessel,³⁰⁰ social security,³⁰¹ regulated working time,³⁰² repatriation,³⁰³ and fee-free recruitment and placement services.³⁰⁴ With respect to accommodation, parties must adopt legislation that gives “full effect” to the requirements included in Annex III, which provides additional requirements concerning accommodation, living conditions, and other matters affecting the quality of the onboard experience.³⁰⁵

2. *Major Gaps in the Work in Fishing Convention*

Although broad in scope, the Work in Fishing Convention has numerous exceptions that diminish its scope. For example, if the Convention “raises special problems,” a party to the Convention may exclude “limited categories of fishers or fishing vessels.”³⁰⁶ If a party cannot implement all the provisions due to “special problems of a substantial nature,” it may delay implementation of numerous provisions, including those protecting fishers from work-related illness, injury, or death.³⁰⁷ The Convention, however, does not define “special problems,” giving parties discretion to define that phrase themselves.

Beyond these exceptions, national authorities have vast discretion as to how they implement the Convention and define key terms. For example, each party has discretion to adopt laws and regulations to ensure the vessels it flags are “sufficiently and safely manned” and that fishers are given “regular periods of rest of sufficient length.”³⁰⁸ Although the Convention prohibits those under the age of eighteen from fishing at night, parties may define “night” consistently with national law.³⁰⁹ Even the provision on compliance requires a party to establish a system for ensuring compliance with the Convention, “as appropriate,” allowing a party to exclude inspections and monitoring from the compliance regime.³¹⁰

³⁰⁰ *Id.* arts. 31–33, 38–39.

³⁰¹ *Id.* arts. 34–37.

³⁰² *Id.* arts. 13–14.

³⁰³ *Id.* art. 21.

³⁰⁴ *Id.* art. 22.

³⁰⁵ *Id.* art. 28.

³⁰⁶ *Id.* art. 3, § 1.

³⁰⁷ *Id.* art. 4, § 1. This exception, however, is not available to vessels that are 24 meters in length or more. *Id.* art. 4, § 2.

³⁰⁸ *Id.* art. 13.

³⁰⁹ *Id.* art. 9, § 6.

³¹⁰ *Id.* art. 40. The provision reads in full: “Each Member shall effectively exercise its jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the

Moreover, the provisions on port state authority are inadequate and fall well short of what is included in the Port States Measures Agreement.³¹¹ The Work in Fishing Convention provides that a port state party may prepare a report if it has received a complaint of evidence that a fishing vessel is not in conformance with the Convention and may take measures to “rectify any conditions on board which are clearly hazardous to safety or health.”³¹² By using the discretionary “may,” the Convention retreats from its objective to protect fishers from abuse. In addition, the “clearly hazardous” threshold allows abuses and working conditions that clearly deviate from the objectives of the Convention to go unreported. For example, a vessel’s provision of accommodation, food, water, and sanitary facilities may violate the Convention’s requirements but not be “clearly hazardous.”

3. *The Work in Fishing Convention Does Not Preclude Regulation by Fisheries Organizations*

Even though the Work in Fishing Convention is broad and comprehensive, nothing in it precludes other regimes, including RFMOs, from addressing labor conditions on fishing vessels. In fact, questions arose during the negotiation of the Work in Fishing Convention as to whether a coastal state, within its jurisdictional waters, could enforce provisions stricter than those included in the Convention. The ILO’s Legal Advisor responded that “there were no provisions in the proposed Convention that could have the effect of limiting what a Member may do in regulating the activities of foreign vessels” and that no ILO Convention ever prevented Members from adopting higher standards.³¹³ Members may choose to adopt those higher standards unilaterally or multilaterally, including through RFMOs.

The provisions of the Work in Fishing Convention itself support this view. First, nothing in the Convention indicates that the ILO is the

requirements of this Convention including, as appropriate, inspections, reporting, monitoring, complaint procedures, appropriate penalties and corrective measures, in accordance with national laws or regulations.” *Id.*

³¹¹ See *supra* Part II.A.4. (requiring a port state to deny port services to vessels believed to have engaged in IUU fishing or fishing related activities).

³¹² ILO, Work in Fishing Convention, *supra* note 35, art. 42, § 2.

³¹³ ILO, *Provisional Record of the Ninety-sixth Session: Report of the Committee on the Fishing Sector*, ¶ 258 (2007). The Legal Advisor added, however, the full extent of port state authority over foreign vessels was subject to debate and that specific treaty provisions, regardless of origin, could clarify the matter. *Id.* ¶ 258.

only body with authority to establish standards for labor on fishing vessels. Second, nothing in the Convention indicates that it establishes maximum standards for labor on fishing vessels or that it seeks to establish the only labor standards applicable to fishing vessels and fishers.

To the contrary, Article 37 specifically provides that, with respect to social security, parties are free to adopt, through bilateral and multilateral agreements, “other rules.”³¹⁴ The use of the phrase “other rules” indicates that any other rules, even if completely different from those established by the Convention, are permissible. By implication, the absence of similar provisions with respect to the many other standards of the Convention indicates that parties to the Convention may adopt other standards, provided that they are compatible with those of the Convention. This is not surprising, as international agreements set minimum standards, not maximum standards. When international agreements establish maximum standards, they do so expressly, as UNCLOS has done with respect to vessel design and construction standards.³¹⁵

Moreover, providing decent work has become a “universal objective” and has been included in major human rights declarations, including Article 23 of the Universal Declaration of Human Rights.³¹⁶ It has also been included in UN Resolutions and outcome documents from major conferences. The 1995 World Summit for Social Development specifically commits states “at the international level” to “ensure migrant workers benefit from the protections provided by relevant national and international instruments, take concrete and effective measures against the exploitation of migrant workers, and encourage all countries to consider the ratification and full implementation of the relevant international instruments on migrant workers.”³¹⁷

³¹⁴ ILO, *Work in Fishing Convention*, *supra* note 35, art. 37.

³¹⁵ *See, e.g.*, UNCLOS, *supra* note 36, art. 211, § 6(c) (prohibiting states from adopting laws and regulations relating to design, construction, manning, or equipment standards “other than generally accepted international rules and standards”).

³¹⁶ G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (Dec. 10, 1948) (“Everyone has the right to work, to free choice of employment; Everyone has the right to just and favourable remuneration.”).

³¹⁷ Rep. of the World Summit for Soc. Dev., ¶ j, U.N. Doc. A/CONF.166/9 (1995).

The Millennium Development Goals,³¹⁸ the World Summit Outcome Document,³¹⁹ and The Future We Want³²⁰ further elaborate on the concept of decent work and the urgency of ending forced labor. Critically, in The Future We Want, states “recognize that workers should have access to education, skills, health care, social security, fundamental rights at work, social and legal protections, including occupational safety and health, and decent work opportunities.”³²¹

Most recently in the *2030 Agenda for Sustainable Development*, states commit to promote decent work³²² and end forced labor.³²³ Goal 8, for example, specifically calling on states to “take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking,”³²⁴ and to “protect labour rights and promote safe and secure working environments for all workers, including migrant workers.”³²⁵

Nowhere do any of these declarations and resolutions declare the ILO as the sole forum for addressing these issues. Rather, these instruments evidence global commitments by states to address labor conditions at the international level through international cooperation.³²⁶ Such universal objectives must be addressed everywhere and not compartmentalized. The protection of human rights, the provision of

³¹⁸ G.A. Res. 55/2, ¶ 20, United Nations Millennium Declaration (Sept. 18, 2000). (“We also resolve . . . to develop and implement strategies that give young people everywhere a real chance to find decent and productive work.”).

³¹⁹ G.A. Res. 60/1, ¶ 47 (Oct. 24, 2005) (“We strongly support fair globalization and resolve to make the goals of full and productive employment and decent work for all.”).

³²⁰ G.A. Res. 66/288, *supra* note 191, ¶ 23. (acknowledging the need to “promot[e] full and productive employment and decent work for all, complemented by effective social policies, including social protection floors, with a view to achieving the internationally agreed development goals, including the Millennium Development Goals”).

³²¹ *Id.* ¶ 152; *See also id.* ¶ 268 (committing to protect labor rights).

³²² *2030 Agenda for Sustainable Development*, *supra* note 208, ¶ 3 (“We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.”).

³²³ *Id.* ¶ 27 (“We will work to build dynamic, sustainable, innovative and people-centred economies, promoting youth employment and women’s economic empowerment, in particular, and decent work for all. We will eradicate forced labour and human trafficking and end child labour in all its forms.”).

³²⁴ *Id.* Goal 8.7.

³²⁵ *Id.* Goal 8.8.

³²⁶ *See, e.g.,* The World Summit for Soc. Dev., *Report*, ¶ 28, U.N. Doc. A/CONF.166/9 (1995). (“Our global drive for social development and the recommendations for action contained in the Programme of Action are made in a spirit of consensus and international cooperation, in full conformity with the purposes and principles of the Charter of the United Nations. . . .”); G.A. Res. 66/288, *supra* note 191, ¶ 11. (“We reaffirm our commitment to strengthen international cooperation to address the persistent challenges related to sustainable development for all. . . .”).

decent work, and the eradication of forced labor and human trafficking must be addressed in all relevant fora and not subject to some perverse international game of “not it,” in which no one claims responsibility for performing and implementing fundamental rights of fishers.³²⁷

III. COORDINATION

China has also objected to adopting binding labor conditions within the WCPFC because its fisheries agency does not have jurisdiction over such issues.³²⁸ China’s complaint, however, implicates a failure to coordinate at the national level and not a problem that diminishes the authority of the WCPFC to adopt labor standards for crew.

China has simply raised a common issue—the need for inter-agency coordination—that challenges all parties to a wide variety of international negotiations because many international treaties are cross-sectoral. For example, the Convention on International Trade in Endangered Species of Fauna and Flora (CITES)³²⁹ seeks to protect species from over-exploitation due to trade.³³⁰ It covers both marine and terrestrial species and animal and plant species.³³¹ As such, agencies from various departments—wildlife, forestry, fisheries, and others—must coordinate. Moreover, because this treaty protects species by regulating trade, fish and wildlife agencies must coordinate with trade agencies. Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer requires coordination of environmental agencies with trade agencies because it, too, relies in part on trade measures to achieve its environmental goals.³³² The same is true for the various “chemicals

³²⁷ *Not it*, Urban Dictionary (Apr. 3, 2009), <https://www.urbandictionary.com/define.php?term=not%20it> [<https://perma.cc/HX7Y-T89Z>].

³²⁸ WCPFC17 Summary Report, *supra* note 28, ¶ 293 (stating that China’s WCPFC delegation “has no authorization to agree to any compulsory decision by the [WCPFC] on labour issues”).

³²⁹ Convention on International Trade in Endangered Species of Fauna and Flora, CITES, Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

³³⁰ *Id.* pmb., ¶ 4.

³³¹ *The CITES Species*, CITES, <https://cites.org/eng/disc/species.php> [<https://perma.cc/NM88-4YFE>].

³³² The Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

conventions”—the Basel Convention,³³³ Rotterdam Convention,³³⁴ and the Stockholm Convention.³³⁵ Negotiations within the World Trade Organization involve dozens of economic sectors, including pharmaceuticals, agriculture, automotive, and others. In fact, some trade negotiations have specifically incorporated labor issues.³³⁶

The fisheries context is no different. In fact, the UNCLOS negotiations themselves were slowed due to the range and complexity of the issues addressed in the convention.³³⁷ UNCLOS required coordination and harmonization of policies among foreign ministries and defense agencies, as well as fisheries, environmental, and air traffic control agencies, among others.³³⁸ IPOA-IUU, too, specifically recognizes that different agencies are likely to be engaged in efforts to prevent, deter, and eliminate IUU fishing. As such, it directs states to “ensure that national efforts to prevent, deter and eliminate IUU fishing are internally coordinated.”³³⁹ Consistently with IPOA-IUU, FAO advises that measures to improve safety at sea ensure “cross-sector involvement within government.”³⁴⁰ It specifically provides that “[f]isheries managers should also build up mechanisms for close collaboration and cooperation between themselves and the administrations responsible for safety.”³⁴¹

³³³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1994) [hereinafter Basel Convention].

³³⁴ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 U.N.T.S. 337 (entered into force Feb. 24, 2004) (establishing requirements for trade listed chemicals and pesticides).

³³⁵ Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 22, 2001) (establishing rules for trade in certain persistent organic pollutants).

³³⁶ The negotiation of the North American Free Trade Agreement specifically included the negotiation of a labor “side agreement,” known formally as the North American Agreement on Labor Cooperation. See North American Agreement on Labor Cooperation, pmbl. (Sept. 13, 1993). Free trade agreements between the European Union and its trading partners routinely include labor provisions. See *European FTAs*, International Labour Organization (Oct. 19, 2009); see also Draft Consolidated Chair Text, *Fisheries Subsidies*, WTO Doc. TN/RL/W/276 (May 11, 2021).

³³⁷ Tommy T.B. Koh & Shanmugam Jayakumar, *The Negotiating Process of the Third United Nations Conference on the Law of the Sea*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, VOL. I, 29, 46 (Myron H. Nordquist ed. 1985).

³³⁸ *Id.* at 593.

³³⁹ IPOAA-IUU, *supra* note 9, ¶ 27.

³⁴⁰ FAO, *Best Practices to Improve Safety at Sea in the Fisheries*, *supra* note 16, at 12 (“Given the cross-sector involvement within government, it is recognized that there would be a need for coordination between government agencies with regard to the development and implementation of a safety strategy related to activities at sea.”).

³⁴¹ *Id.* at 47.

As such, a delegation may not claim a lack of authorization to address any issue within a treaty body. In fact, the most fundamental of all rules of treaty interpretation is *pacta sunt servanda*, which provides that international agreements which are legally binding must be performed in good faith by parties to the treaty. The Vienna Convention on the Law of Treaties expresses this obligation by stating that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”³⁴² The obligation has also come to mean that national law may not be invoked to justify a failure to perform a treaty obligation.³⁴³

The *pacta sunt servanda* rule “embodies an elementary and universally agreed principle fundamental to all legal systems.”³⁴⁴ The rule is so fundamental to international law and relations that it has been called “axiomatic and self-evident.”³⁴⁵ This rule is of prime importance for the stability of treaty relations because a party to a treaty must know that the other parties commit to implementing their treaty obligations. Stated another way, a state bears the obligation to implement a treaty in good faith, not a particular agency. The failure to properly coordinate is a breach of a state’s international obligation to implement its treaty obligations in good faith.

IV. REASONS TO ADOPT LABOR STANDARDS FOR CREW IN THE WCPFC

Despite the comprehensiveness of the Work in Fishing Convention, compelling reasons urge adoption of labor standards within the WCPFC. Very few states have ratified the ILO Work in Fishing Convention, the WCPFC’s Technical and Compliance Committee (TCC) could monitor compliance with labor standards, and as has occurred with other issues, the adoption of standards in one RFMO can spread to other RFMOs.

³⁴² Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

³⁴³ CRAWFORD, *supra* note 174, at 377. See also VCLT, *supra* note 342, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

³⁴⁴ Anthony Aust, *Pacta Sunt Servanda*, in OXFORD PUBLIC INTERNATIONAL LAW (Feb. 2007).

³⁴⁵ CRAWFORD, *supra* note 174 at 450.

A. WCPFC MEMBERS ARE NOT RATIFYING RELEVANT ILO AND IMO CONVENTIONS

Very few states have ratified the Work in Fishing Convention. More than fourteen years after its adoption, only eighteen states have ratified it,³⁴⁶ and only France among WCPFC members has ratified it.³⁴⁷ None of the five flag states responsible for 90 percent of all distant-water fishing effort—four of which are WCPFC members (China, Chinese Taipei, Japan, and the Republic of Korea)—are among the eighteen ratifications.³⁴⁸ Even if the convention had greater participation, it does not have any convention-based review of implementation, enforcement, and compliance, and the ILO itself does not have any sanctioning authority.³⁴⁹ Instead, compliance and enforcement are left to individual

³⁴⁶ ILO, Work in Fishing Convention, Nov. 16, 2017 (No. 188) (Angola, Argentina, Bosnia and Herzegovina, Congo, Denmark, Estonia, France, Lithuania, Morocco, Namibia, Netherlands, Norway, Poland, Portugal, Senegal, South Africa, Thailand, and the United Kingdom).

³⁴⁷ See generally ILO, Ratifications for France, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200_COUNTRY_ID:102632 [<https://perma.cc/4UH6-PDFZ>] (noting France's ratification).

³⁴⁸ Sally Yozell & Amanda Shaver, SHINING A LIGHT: THE NEED FOR TRANSPARENCY ACROSS DISTANT WATER FISHING 15, fig. 2 (2019) (noting that five countries are responsible for 90% of distant water fishing effort; China accounts for 38%, Chinese Taipei 21.5%, and Japan, Republic of Korea, and Spain account for about 10 percent each).

³⁴⁹ The ILO has established two committees that participate in review of obligations of a range of obligations found in a number of ILO conventions and protocols. The Committee of Experts on the Application of Conventions and Recommendations (CEACR or Committee of Experts) is an independent body that analyzes country reports submitted by parties, relevant legislation, court decisions, and other information to make non-binding "observations" concerning the conformity of a party's national legislation and practices with that party's ILO obligations. The Conference Committee on the Application of Standards (CAS) comprises a tripartite structure of governments, workers, and employers that can make "direct requests" to parties seeking additional information and can recommend that a party take specific measures to remedy an issue of non-compliance. International Labour Conference, *In Record Proceedings*, Eighth Session, Vol. I, Appendix VII 429 (August 1926). For more see, ILO, Monitoring Compliance with International Labor Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations (2019) (providing more information on this process and the roles of the Committee of Experts and the CAS); Faradj Koliev, Thomas Sommerer & Jonas Tallberg, *Compliance without Coercion: Effects of Reporting on International Labor Rights*, 58 J. of Peace Rsch. 494, 503 (2018) (noting that one group of scholars concluded that "compliance review through CEACR reporting is effective in improving the worst cases of non-compliance, but not in getting fairly compliant states to fully comply with international labor standards"); but see KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 102 (2003) (questioning the effectiveness of ILO's compliance procedures to bring parties into compliance, noting that the ILO cannot even require that parties submit their annual report, much less bring their national laws into conformity with ILO obligations; they call another ILO compliance process a "toothless tiger").

parties.³⁵⁰ The scale of the problem, the lack of participation from key flag states and the lack of a central compliance regime all indicate that the ILO and the Work in Fishing Convention are unlikely to meaningfully address abuses to crew on fishing vessels.

Moreover, the history of addressing labor issues relating to fisheries within the ILO indicates that very few additional states are likely to ratify the Work in Fishing Convention in the future. Of the five conventions relating to fisheries that were superseded by the Work in Fishing Convention, none achieved more than twenty-nine ratifications.³⁵¹ Similarly, states have not ratified IMO conventions that address safety on fishing vessels. For example, more than forty-two years after its adoption, the International Convention for the Safety of Fishing Vessels, known as the 1977 Torremolinos Convention, has yet to enter into force.³⁵² Two agreements to update the 1977 Torremolinos Convention—the 1993 Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels and the Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977³⁵³—have also not entered into force.

If the Cape Town Agreement of 2012 enters into force, approximately 64,000 fishing vessels of at least twenty-four meters in length that operate on the high seas³⁵⁴ would be subject to minimum requirements for vessel design, construction, equipment, and inspection.³⁵⁵ These binding safety regulations would prevent practices that place the lives of crew at risk.³⁵⁶ With just sixteen ratifications representing only 1,907 of the 3,600 covered vessels necessary to bring the Agreement into

³⁵⁰ ILO, *Work in Fishing Convention*, *supra* note 35, arts. 40–44.

³⁵¹ ILO, *Conditions of Work in the Fishing Sector*, *supra* note 287, at 19 Tbl. 2.1.

³⁵² Int'l Maritime Org. [IMO], *Torremolinos Statement on the Cape Town Agreement of 2012, Relating to Fishing Vessel Safety, and Combating Illegal, Unreported and Unregulated (IUU) Fishing*, Ministerial Conference Res. 1, FVS-IUU/CONF.1/WP.2 (2019).

³⁵³ The Cape Town Agreement of 2012 updates, amends, and replaces various aspects of the Torremolinos Protocol of 1993. 2012 Cape Town Agreement on the Implementation of the Provisions of the 1993 Torremolinos Protocol Relating to the 1977 International Convention for the Safety of Fishing Vessels, Oct. 11, 2012. The IMO has provided a consolidated text of the three agreements. IMO, *International Regulations for the Safety of Fishing Vessels*, MSC 92/26/Add.2.

³⁵⁴ IMO, *Cape Town Agreement (Made simple)*, 2.

³⁵⁵ See generally IMO, *International Regulations for the Safety of Fishing Vessels*, MSC 92/26/Add.2.

³⁵⁶ IMO, *Cape Town Agreement (Made simple)*, 2.

force,³⁵⁷ the 2012 Cape Town Agreement is not within striking distance of entering into force.³⁵⁸ Notably, moreover, only one WCPFC member, the Cook Islands, has ratified the 2012 Cape Town Agreement.³⁵⁹ The low level of interest in the region is evidenced by only two ratifications among WCPFC members of the earlier 1993 Protocol (Kiribati and France).³⁶⁰ As such, the IMO, like the ILO, is not the best forum for addressing fisheries-related labor standards.

That more than one forum may have authority to address the same or similar issues is not new to international law. The International Court of Justice in *Certain Expenses of the United Nations* concluded that both the Security Council and UN General Assembly could address peacekeeping operations.³⁶¹ In that case, the Court was asked to determine whether or not the General Assembly could conduct its own peacekeeping missions when the UN Charter expressly granted the Security Council “primary responsibility for the maintenance of international peace and security.”³⁶² The Court concluded that the General Assembly had authority, if not primary authority, to “recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.”³⁶³ Moreover, Article 43 of the Charter, which requires UN members to make troops available to the Security Council, did not constitute a rule, *lex specialis*, preventing the UN General Assembly from organizing peacekeeping missions.³⁶⁴

While *Certain Expenses of the United Nations* concerned two subsidiary bodies within the same organization, a similar reasoning can be applied to different treaty bodies. For example, the General Agreement on

³⁵⁷ Cape Town Agreement of 2012, *supra* note 353, art. 4 (“This Agreement shall enter into force 12 months after the date on which not less than 22 States the aggregate number of whose fishing vessels of 24 m in length and over operating on the high seas is not less than 3,600 have expressed their consent to be bound by it.”).

³⁵⁸ IMO, *Status of IMO Treaties*, at 500 (Sept. 29, 2021).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 498.

³⁶¹ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151.

³⁶² Charter of the United Nations, art. 24, June 26, 1945, 1 U.N.T.S. XVI, (entered into force Oct. 24, 1945).

³⁶³ *Certain Expenses of the United Nations*, 1962 I.C.J. at 163 (quoting Article 114 of the Charter of the United Nations).

³⁶⁴ *Id.* at 165–66.

Tariffs and Trade (GATT)³⁶⁵ establishes rules for international trade in all products. Nonetheless, a variety of other treaties establish rules for trade in specific products. CITES establishes rules for trade in species of conservation concern,³⁶⁶ the Montreal Protocol for trade in ozone depleting substances,³⁶⁷ and the Basel Convention for trade in hazardous and other wastes.³⁶⁸

Similarly, the WCPFC and other RFMOs may adopt labor standards for crew without deferring to the ILO. This seems especially true given that the International Court of Justice and other international tribunals have allowed organizations to interpret their mandates to allow them to perform their functions effectively.³⁶⁹ For example, the United Nations could sue on behalf of its agents, even in the absence of an express provision in the UN Charter allowing it to do so, “to ensure the efficient and independent performance” of peacekeeping missions and “to afford effective support to its agents.”³⁷⁰ The Security Council could establish the International Criminal Court for Yugoslavia because it “enjoys a wide margin of discretion” in deciding how to redress breaches of the peace.³⁷¹

As noted previously, Article 10(1)(j) of the WCPF Convention authorizes the WCPFC to “adopt generally recommended international minimum standards for the responsible conduct of fishing operations.”³⁷²

³⁶⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (during the negotiations that established the World Trade Organization (“WTO”), the 1947 version of the GATT was amended to replace the phrase “Contracting Parties” with “Members;” it is now known as GATT 1994 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994).

³⁶⁶ CITES, *supra* note 329, arts. III–V.

³⁶⁷ Montreal Protocol, *supra* note 332, art. 4.

³⁶⁸ Basel Convention, *supra* note 333, arts. 4, 6.

³⁶⁹ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 19 (July 8) (“[T]he very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.”); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 180 (Apr. 11) (“[T]he rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”). *See also* Certain Expenses of the United Nations, 1962 I.C.J. at 157 (stating that the Court would, when interpreting the Charter, consider “the structure of the Charter,” “the relations established by it between the General Assembly and the Security Council,” and how the General Assembly and Security Council “have consistently interpreted the text” in their practice).

³⁷⁰ Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. at 183.

³⁷¹ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision of Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 31 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

³⁷² WCPF Convention, *supra* note 26, art. 10 § (1)(h).

In light of the FAO Code of Conduct for Responsible Fisheries, this report argues that Article 10(1)(j) provides an explicit delegation of authority to the WCPFC to adopt labor standards for crew.³⁷³ Even if that is not the case, the “imperatives associated with effective performance”³⁷⁴ of the WCPFC’s functions argue for an interpretation of the WCPF Convention that results in such an interpretation.

B. COMPLIANCE REVIEW THROUGH THE WCPFC’S TCC

The ability to monitor and review compliance with labor standards provides another compelling reason for the WCPFC to adopt labor standards. As the United Nations Environment Programme has said, “[s]trengthening of compliance with multilateral environmental agreements has been identified as a key issue.”³⁷⁵

Yet, the Work in Fishing Convention provides no means to ensure compliance, and the ILO has no sanctioning power; instead, it allows parties to review compliance with the Convention’s standards.³⁷⁶ In contrast, the WCPF Convention establishes a Technical and Compliance Committee (TCC) to “monitor and review compliance” with CMMs³⁷⁷ and make recommendations to the WCPFC based on this review.³⁷⁸ The WCPFC adopted the Compliance Monitoring Scheme (CMS)³⁷⁹ to facilitate monitoring and review of compliance with CMMs.³⁸⁰

The TCC does not review every obligation. Instead, the WCPFC chooses the obligations to assess based on the WCPFC’s “needs and priorities,” evidence of high levels of non-compliance, and “the potential risks posed by non-compliance by [members] of CMMs to achieve the objectives of the Convention or specific measures adopted thereunder.”³⁸¹

³⁷³ See *supra* Part II.A.5 for a discussion of Article 10(1)(h).

³⁷⁴ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. ¶ 19 (stating that “the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties”).

³⁷⁵ UNITED NATIONS ENT. PROGRAM, GUIDELINES ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS ¶ 5 (2001).

³⁷⁶ See *supra* note 349 and accompanying text.

³⁷⁷ WCPF Convention, *supra* note 26, art. 14 § (1)(b).

³⁷⁸ *Id.* art. 14 § (2)(h).

³⁷⁹ WCPFC CMM 2019-06, *supra* note 39.

³⁸⁰ *Id.* para. 1 (the purpose of the CMS “is to ensure that [members] implement and comply with obligations arising under the Convention and [CMMs] adopted by the Commission”).

³⁸¹ *Id.* para. 6. This CMM uses the acronym “CCMs” to refer to members and cooperating non-members. For simplicity, this report uses “members.”

The WCPFC has approved a new approach that uses a risk-based approach to choose the obligations to assess.³⁸² That approach, however, has yet to be implemented.³⁸³

Under either approach, it seems likely that compliance with the CMM for crew standards would be part of the CMS. Given the scale of the problem, the health and safety risks to crew, and the competitive advantage gained by vessels using forced labor or failing to provide sufficient food and accommodation, WCPFC members would likely decide to review compliance with labor standards under a risk-based approach.

Using the interim, multi-factor approach, the needs and priorities of the WCPFC weigh in favor of assessing compliance with any labor standards. The reputation of the fishery, and thus the reputation of products in the marketplace from this fishery, could be seriously and quickly undermined through social and other media.³⁸⁴ Especially with many WCPFC-managed fisheries certified by the Marine Stewardship Council,³⁸⁵ ensuring the reputation of the fishery should be of high priority. The potential risks of non-compliance are high not only for those certified fisheries, but for all WCPFC fisheries. In addition, the number of reports of poor labor conditions are far worse among a range of WCPFC members, as documented in Part I, provides evidence of a high percentage of non-compliance.

In addition to monitoring and review, the WCPFC has the means to enforce the standards, something that the Work in Fishing Convention does not address. If the WCPFC adopts a binding CMM for labor standards, then those vessels authorized to perform high seas boarding and inspection will have direct authority to inspect for possible violations of adopted labor standards.³⁸⁶ In so doing, the WCPFC members would

³⁸² *Id.* para. 6. For a summary of the CMS, see *Compliance Monitoring Scheme*, W. & CENT. PAC. FISHERIES COMM'N (Feb. 23, 2022), <https://www.wcpfc.int/compliance-monitoring> [<https://perma.cc/4UPB-JNAU>].

³⁸³ See *WCPFC17 Summary Report*, *supra* note 28, para. 375.

³⁸⁴ See *id.* para. 296 (New Zealand stating, "The safety and conditions of fishing vessel crew are critical to the reputation of the Commission and its members; that reputation will be undermined by cases of human rights abuse in the Convention Area").

³⁸⁵ For a list of MSC-certified tuna fisheries, including those fisheries managed by the WCPFC, see *MSC-Certified Tuna Fisheries*, INT'L SEAFOOD SUSTAINABILITY FOUND. (Feb. 9, 2022), <https://iss-foundation.org/what-we-do/fisheries-improvement/marine-stewardship-council-msc-fishery-certification/msc-certified-tuna-fisheries/> [<https://perma.cc/7R6V-T7JZ>].

³⁸⁶ W. & CENT. PAC. FISHERIES COMM'N, WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION BOARDING AND INSPECTION PROCEDURES ¶ 3 (2006), <https://www.wcpfc.int/doc/cmm-2006-08/western-and-central-pacific-fisheries-commission-boarding-and-inspection-procedures>

embrace the duty to cooperate that is at the heart of UNCLOS³⁸⁷ and the WCPF Convention³⁸⁸ itself.

C. FFA ALREADY REQUIRES MINIMUM LABOR CONDITIONS

A third benefit of the WCPFC adopting labor standards for crew is to help WCPFC members implement their duty to impose CMMs for the high seas that are compatible with those that apply under national jurisdiction, as required by Article 8 of the WCPF Convention.³⁸⁹ The seventeen members of the Forum Fisheries Agency (FFA), through their Harmonised Minimum Terms and Conditions for Access by Fishing Vessels,³⁹⁰ already impose minimum standards for labor conditions similar to those included in the ILO Work in Fishing Convention.³⁹¹ The Harmonised Minimum Terms and Conditions require written contracts, respect for human rights, proper medical services, decent and regular remuneration, repatriation, regular rest, appropriate accommodation, and suitable food and water, among other things.³⁹² They also prohibit the deduction from crew wages of any work-related expenses.³⁹³ The vessel operator is responsible for ensuing compliance with these requirements.³⁹⁴

Not only would adoption of a CMM on labor standards for crew implement a WCPFC member's duty under Article 8, it would also harmonize standards applicable to purse seine vessels and longline vessels. The Harmonised Minimum Terms and Conditions apply to all vessels fishing within the waters of FFA members. Because virtually all purse seine vessels registered to fish in the WCPFC Convention fish within FFA

[<https://perma.cc/H4UA-MJR4>]. See also *id.* ¶ 10(b) (prioritizing boarding and inspection of vessels reasonably believed to have engaged in activity in contravention of a CMM).

³⁸⁷ See *supra* Part II.A.1.

³⁸⁸ WCPF Convention, *supra* note 26, pmb., para. 3; *Id.* art. 5 (through the WCPF Convention, WCPFC members are “giving effect to their duty to cooperate”); *Id.* art. 8 § (1) (“[M]embers of the Commission have a duty to cooperate for the purpose of achieving compatible measures.”); *Id.* art. 10 § (1)(b) (function of the WCPFC is to “promote cooperation and coordination”).

³⁸⁹ *Id.* art. 8 § (1).

³⁹⁰ See generally PAC. ISLANDS F. FISHERIES AGENCY, HARMONIZED MINIMUM TERMS AND CONDITIONS FOR ACCESS BY FISHING VESSELS (2019), https://www.ffa.int/system/files/HMTC_as_revised_by_FFC110_May_2019_-_FINAL.pdf [<https://perma.cc/726B-DGMN>].

³⁹¹ *Id.* para. 22.

³⁹² *Id.*; see also *id.* annex 6 (including details of the work agreement).

³⁹³ *Id.* para. 22(m).

³⁹⁴ *Id.* para. 22.

waters,³⁹⁵ these labor standards apply to virtually all purse seine catches regulated by the WCPFC.³⁹⁶

That is not the case with respect to longline vessels. Many longline vessels fish entirely on the high seas.³⁹⁷ Thus, the FFA Harmonised Standards do not apply to them. Moreover, longline vessels compose more than 61 percent of WCPFC registered vessels³⁹⁸ and, consequently, few longline vessels have internationally agreed labor standards that apply to them.³⁹⁹ The adoption of a CMM would thus harmonize standards as applied to purse seine vessels and longline vessels.

V. CONCLUSION

Although China has asserted that the WCPFC is not the proper forum for adopting labor conditions for fishing crews, the WCPFC

³⁹⁵ See PETER WILLIAMS & THOMAS RUAIA, W. & CENT. PAC. FISHERIES COMM'N, OVERVIEW OF TUNA FISHERIES IN THE WESTERN AND CENTRAL PACIFIC OCEAN, INCLUDING ECONOMIC CONDITIONS—2019, at 4–19 (2020), <https://meetings.wcpfc.int/node/11677> [<https://perma.cc/4HXR-D5ZC>].

³⁹⁶ In addition, because all purse seine vessels must have observers on them and transship in port, monitoring and compliance with these labor standards is possible. W. & CENT. PAC. FISHERIES COMM'N, CONSERVATION AND MANAGEMENT MEASURE FOR BIGEYE, YELLOWFIN AND SKIPJACK TUNA IN THE WESTERN AND CENTRAL PACIFIC OCEAN ¶ 34 (2020), <https://www.wcpfc.int/doc/cmm-2020-01/conservation-and-management-measure-bigeeye-yellowfin-and-skipjack-tuna-western-and> [<https://perma.cc/3N72-967Z>] (requiring 100 percent observer coverage on all purse seine vessels operating in the Convention Area between 20°N and 20°S latitude); W. & CENT. PAC. FISHERIES COMM'N, GUIDELINES FOR THE REGIONAL OBSERVER PROGRAMME 2 (2019), https://www.wcpfc.int/system/files/WCPFC_Guidelines_for_Regional_Observer_Programme_May_2019.pdf [<https://perma.cc/69RQ-YRQ4>].

³⁹⁷ In 2016, 32 percent of the longline catch came from the high seas area of the WCPFC Convention Area. Personal Communication with Peter Williams, Oceanic Fisheries Programme (OFP), Secretariat of the Pac. Cmty. (SPC) (Dec. 5, 2017); see also WILLIAMS & RUAIA, *supra* note 395, at 25–29 (describing and showing the general geographic distribution of the longline catch).

³⁹⁸ *Vessels in the RFV by Vessel Type*, W. & CENT. PAC. FISHERIES COMM'N (Feb. 24, 2022), <https://www.wcpfc.int/vessels/charts/types> [<https://perma.cc/WR4H-DUQN>].

³⁹⁹ In addition, the WCPFC does not require observers on most longline vessels. The WCPFC has established a goal of just five percent observer coverage for longline and other non-purse seine vessels. W. & CENT. PAC. FISHERIES COMM'N, CONSERVATION AND MANAGEMENT MEASURE FOR THE REGIONAL OBSERVER PROGRAMME annex c, ¶ 6 (2018), https://www.wcpfc.int/system/files/CMM_2018-05_Conservation_and_Management_Measure_for_the_Regional_Observer_Programme.pdf [<https://perma.cc/3REM-JLHB>]. Many members, however, do not meet even that low standard. Total observer coverage, as measured by number of hooks fished indicate that overall coverage was 4.7% and 3.5% for 2018, and 2019 respectively. PETER WILLIAMS, AURÉLIEN PANIZZA, COLLEY FALASI, EPA LOGANIMOCE & EMMANUEL SCHNEITER, W. & CENT. PAC. FISHERIES COMM'N, STATUS OF OBSERVER DATA MANAGEMENT ¶ 23 (2020), <https://meetings.wcpfc.int/file/7776/download> [<https://perma.cc/XX6B-DC7C>]. As a result, crew on longline vessels are at much greater risk than on purse seine vessels in the WCPFC Convention Area.

Convention provides the WCPFC with an express mandate to do so. International law, including that law embodied in the ILO's Work in Fishing Convention, does not establish the ILO as the only international organization capable of addressing labor standards for crew. Not only does the Work in Fishing Convention establish minimum labor standards for crew, but the international community has directed all states to take action to prevent IUU fishing and take immediate and effective measures to eradicate forced labor. In fact, the WCPFC, by addressing labor conditions, would be taking action to prevent and deter IUU fishing.

Practical reasons also dictate that the WCPFC should adopt binding labor standards for crew. Participation in the ILO Work in Fishing Convention is very low, particularly among WCPFC member states. In addition, the WCPFC has the institutional machinery to review, monitor and compel compliance, whereas the ILO and parties to the Work in Fishing Convention do not. The WCPFC also has the means to enforce the labor standards through high seas boarding and inspection, which the Work in Fishing Convention does not. Moreover, the FFA has already adopted minimum labor standards consistently with the Work in Fishing Convention for any vessel fishing in the jurisdictional waters of the seventeen FFA members, an area that encompasses the vast majority of purse seine fishing but only a relatively small amount of longline fishing. Adopting similar standards for vessels throughout the WCPFC Convention Area would not only help implement the members' duty to adopt compatible measures for the high seas that apply in national jurisdictions, but also harmonize standards between purse seine vessels and longline vessels.

In any event, the WCPFC already has adopted labor standards for observers. It and other RFMOs have also taken measures to ensure the safe release and to minimize harm to sharks and cetaceans caught as bycatch. Only in Superman's Bizarro World⁴⁰⁰ can the WCPFC establish binding labor standards for observers, ensure the safety of whale sharks and cetaceans, but not establish labor standards for the wellbeing of crew. Crew represent a critical component of fisheries and fisheries management, along with gear and the vessel itself and fishing; fishing

⁴⁰⁰ See *Bizarro World*, WIKIPEDIA, (Feb. 26, 2022), https://en.wikipedia.org/wiki/Bizarro_World [https://perma.cc/CPX9-9SW6] ("In popular culture, 'Bizarro World' has come to mean a situation or setting which is weirdly inverted or opposite to expectations.").

cannot take place without each of these three components.⁴⁰¹ The sooner that the WCPFC recognizes these critical linkages and adopts binding labor standards, the sooner it can further prevent and deter IUU fishing, better manage the world's most valuable tuna fishery, and sufficiently protect the lives of the men, women, and children who risks their lives and wellbeing to provide the world with tuna and other fisheries resources.

⁴⁰¹ As the United States has said, "fishing involves gear and people, and the Commission has CMMs regarding gear type, and it [is] time to consider the fishers. . . . [I]t is difficult to separate the gear from the humans who are operating it." *WCPFC17 Summary Report*, *supra* note 28, para. 375.