

THE OUTLAW OCEAN REPORT

Supplemental Research

Stanford Center for Ocean Solutions and the Stanford Law School Law & Policy Lab



SUPPLEMENTAL RESEARCH

I. INTRODUCTION

In preparation for the Outlaw Ocean course, during the Winter Quarter 2020, three students conducted directed research on key topics in maritime law, illegal fishing, and human rights. Their research helped the teaching team work with the clients to identify the research questions for the course. Their papers are included in this section.

Xiao Wang researched the history of China's distant water fishing fleet from industry emergence to present day. He investigated the policies, laws, and enforcement structures developed to manage such a profitable and expansive industry, paying particular focus to recent anti-IUU measures and potential reasons for policy reform.

Hai Jin Park explored issues of data-sharing as a means of combatting IUU fishing through a case study on South Korea. Her research investigates the restrictions placed on sharing of location-monitoring data in the fisheries sector, as well as South Korea's policy interests that have the potential to lead to more transparency in the industry.

Shalini Iyengar investigated two possible business-side approaches to the challenge of forced labor. Her first paper is an exploration of corporate liability for human rights abuses in the fisheries sector; the second is a brief note on ways that the insurance system can help to regulate fishing vessel owners and companies.

II. DISTANT WATER FISHING IN CHINA

Xiao Wang

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A. Introduction

China has the largest and most productive distant water fishing fleet in the world. The sheer size of China's distant water fishing industry and the magnitude of its environmental impacts have drawn global attention. Numerous media reports have blamed Chinese distant water fishing vessels for depleting fisheries resources of coastal countries and the high seas. In contrast, there is a lack of understanding about the development of this industry and China's policies and legal regimes to manage it. This article is intended to fill up the lacuna. For this purpose, the article is structured as follows: in the first step, I will analyse the development of the industry from the founding of the People's Republic of China to the present and identify the policy shift in recent years; in the second step, I will discuss potential reasons for this policy shift; and in the last part, I will shed light on fishing measures intended to combat illegal, unreported, and unregulated (IUU) fishing in the ongoing reform incurred by the policy shift.

B. Evolution of China's Distant Water Fishing Industry

After suffering from one century of foreign invasions and three decades of brutal civil war, China was one of the most impoverished countries in 1949. In the following seven decades, China has been transformed to a global economic and political superpower. During this transition, China's fishing industry also has undergone significant changes. Scholars have already reviewed and summarized the evolution of China's management practices of its domestic marine fishing industry.¹ Nevertheless, because of its international nature and technical characteristics, the distant water fishing industry is distinct from its domestic counterpart. Moreover, due to limited availability of information regarding the industry, it remains unknown to the outside world. Therefore, this sub-section aims to provide a comprehensive review of the industry's evolution in the past seven decades.

1 Shu Su et al., "Evolution of Marine Fisheries Management in China from 1949 to 2019: How Did China Get There and Where Does China Go Next?," *Fish and Fisheries* 21, no. 2 (2019), 435-51.

1. Nonexistence from 1949 to 1971

Since the establishment of the People's Republic of China, recovery and development of the economy became a national priority.² Driven by the economic concern, the Agricultural Ministry instructed local governments to promptly organize fishing activities and increase the supply of seafood to meet the basic food needs of the Chinese people.³ Because China's rivers and offshore waters had abundant fisheries resources at that time and exploitation of such resources did not require high-level fishing skills, large monetary investments, and advanced fishing vessels, domestic fisheries were the focus.⁴ China's distant water fishing industry was non-existent during this period.

2. The Preparation Phase from 1972 to 1984

After the first two decades of exploitation of offshore fisheries, China's marine catch reached 2.658 million metric tons in 1972.⁵ Additionally, during the last period, Japanese motorized fishing vessels entered China's waters to conduct fishing activities.⁶ Fishing activities undertaken by Chinese and Japanese vessels resulted in the decline of some of China's offshore fisheries.⁷ Accordingly, a fishing license system was introduced in 1979 to restrict access to and conserve China's offshore fisheries.⁸ Also in 1979, China realized that distant water fishing would be an effective way to complement offshore fishing and obtain high-value seafood products.⁹ In 1980, China sent its first delegation to Australia, New Zealand, Kiribati, and the Solomon Islands with the purpose of learning distant water fishing vessels' operation in these countries' waters and establishing fishery cooperation relations.¹⁰ In 1984, China signed the first fishery agreement with Guinea-Bissau,¹¹ which provided the legal basis for Chinese fishing vessels to enter West African waters.

2 Yu Liu, "Mao Zedong and Recovery and Development of National Economy at the Early Stage of the People's Republic of China," *Inheritance and Innovation* 10, no. 59 (2009), 4-5. [in Chinese].

3 Xiaohua Zhou and Mingshuang Li, "Recount the Past Sixty Years of China's Fisheries," *China Fisheries* 10, (2009), 4 [in Chinese].

4 Zifei Liu et al., "Research on China's Conservation Policy for Offshore Fisheries in the New Era," *Journal of Agricultural Science and Technology* 20, no. 12 (2018), 2 [in Chinese].

5 Supra, note 1, 438.

6 Fucheng Bai et al., "Analysis of Sino-Japanese Fishery Resources Disputes and Cooperation Based on the Evolutionary Game Theory," *World Agriculture* 454, no. 2 (2017), 100-101 [in Chinese].

7 Supra, note 1, 441.

8 Shuolin Huang and Yuru He, "Management of China's Fisheries: Review and Prospect," *Aquaculture and Fisheries* 4, no. 5 (2019): 174.

9 1972 Report by Agricultural Ministry to the State Council [in Chinese].

10 Huimin Shen, "The Fishery Report on Australia, New Zealand, Kiribati and Solomon Islands," *Fisheries Science and Technology Information* 6, (1980), 4-6 [in Chinese].

11 "China and Guinea-Bissau Agreement on Co-operation in Fishing," signed August 28, 1984, UNTS 24822.

3. The Initial Stage from 1985 to 1990

On March 10, 1985, the first Chinese distant water fishing fleet consisting of twelve fishing vessels and one reefer vessel began its voyage to West Africa.¹² At the end of this initial stage, the distant water marine catch reached 100,000 metric tons, the majority of which was from the West African waters.¹³ Nevertheless, compared to 5.5 million metric tons of domestic marine catch, the scale of China's distant water fishing industry was still negligible.¹⁴ During this period, China established fishery cooperation relations with twenty countries and sent nearly one hundred fishing vessels to foreign waters and high seas.¹⁵ Moreover, China continued to strengthen its fishery management and conservation measures. In 1986, China enacted its first Fisheries Law, which established a basic fishery governance framework. Also, beginning in 1987, China implemented the Single Control Policy, which imposes a cap on the total horsepower of all marine fishing vessels.¹⁶

4. Rapid Development from 1991 to 1997

In 1991, China's distant water catch was 320,000 metric tons.¹⁷ The number grew exponentially and reached 1.037 million metric tons in 1997.¹⁸ At this stage, the majority of China's distant water vessels fished in foreign waters, and bottom trawling was the main fishing practice. Additional fishery cooperation relations were established between Mauritania, Morocco, the Marshall Islands, Papua New Guinea, Myanmar, and China. China began to explore the feasibility of fishing squid and tuna on the high seas. In 1993, China undertook its first expedition for squid resources in the northern Pacific Ocean and discovered the great potential of squid fishing.¹⁹ In 1996, China decided to devote more resources to research on tuna fishing and started to negotiate with other countries to obtain more permits for China's vessels.²⁰ Moreover, the presence of China in international fishery governance became more visible. In 1996, China acceded to the International Convention for the Conservation of Atlantic Tunas and joined ICCAT, the regional fisheries management organization (RFMO) under the Convention.²¹ In the same year, the UN Fish Stocks Agreement was signed by China.²²

Meanwhile, to further conserve offshore fisheries, the Single Control Policy was replaced by the Double Control Policy, which mandated a limitation on both the total horsepower and the

12 Mingshuang Li, "Major Events of Distant Water Fishing from 1985-2015," *China Fisheries* 3, (2015), 19 [in Chinese].

13 Ibid.

14 Ibid.

15 Ibid.

16 Supra, note 1, 441.

17 The Fishery Bureau, 1991 *China Fishery Yearbook* (China Agriculture Press, 1991), 1 [in Chinese].

18 The Fishery Bureau, 1997 *China Fishery Yearbook* (China Agriculture Press, 1997), 2 [in Chinese].

19 Supra, note 12, 21.

20 Ibid.

21 "The International Convention for the Conservation of Atlantic Tunas," acceded to by the People's Republic of China on October 24, 1996, UNTS 673.

22 "The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," signed by the People's Republic of China on November 6, 1996, UNTS 2167.

number of motorized marine fishing vessels.²³ China sought to relieve unemployment pressure from the restriction of offshore fishing through distant water fishing.²⁴ Consequently, a license system was introduced for distant water fishing companies, and heavy subsidies and preferential tax treatment applied to licensed companies to encourage further development.²⁵

5. Restructuring from 1998 to 2016

Three characteristics defined the period from 1998 to 2016. First, China faced mounting economic pressure from restriction of offshore marine catch. With the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), overlapping claims of exclusive economic zones were created between China and neighboring countries. To prevent fishery disputes and to establish a new fishery order for stable exploitation and management of marine living resources, China undertook negotiations with Japan, Korea, and Vietnam. Under China-Korea and China-Japan fishery agreements, some traditional Chinese offshore fishery stocks were placed in exclusive economic zones of Japan and Korea.²⁶ Also, all three agreements imposed more stringent rules on fishing activities in so-called Provisional Measures Zones or Common Fishery Zones.²⁷ Accordingly, after these agreements took effect, Chinese fishermen's activities were restricted. The economic pressure was escalated by China's domestic marine policy as well. Because of decades of intensive exploitation and marine pollution, almost all of China's offshore fishery stocks collapsed. To tackle the collapse of these stocks, in 1999 China implemented Zero Growth, which requires the total catch by Chinese fishing vessels not to exceed that of the preceding year.²⁸ Soon afterward, in 2000 China replaced Zero Growth with Negative Growth and required that the annual marine catch should be reduced.²⁹ The economic pressure forced China's distant water fishing industry to increase its size and target higher-value marine species.

The second characteristic was that catch and its economic value from high sea fishing gradually overtook foreign water fishing and became the cornerstone of China's distant water fishing industry. For instance, in 2015, catch from high sea fishing was 1.557 million metric tons, the value of which reached 13.23 billion Chinese yuan.³⁰ In contrast, catch from foreign water fishing was only 634,000 metric tons and was worth 7.42 billion Chinese yuan.³¹ Although foreign water fishing was negatively impacted by unilateral termination of the fishery agreement by Indonesia in that year, it was undeniable that high sea fishing constituted a new engine for China's distant

23 Zhuli Zhang et al., "Effectiveness and Advice Regarding China's Double Control Policy," *China Fisheries* 4, (2018), 34 [in Chinese]

24 Zhidong Liu et al., "Opportunities and Challenges Around China Distant Water Fishing Industry," *Journal of Anhui Agricultural Sciences* 24, (2014), 8474 [in Chinese].

25 Tabitha Grace Mallory, "Fisheries Subsidies in China: Quantitative and Qualitative Assessment of Policy Coherence and Effectiveness," *Marine Policy* 68, (2016), 74-82.

26 Qiang Gao et al., "The International Law of the Sea's Impacts on China's Distant Water Fishing," *Chinese Fisheries Economics* 6, (2008), 81 [in Chinese].

27 Masahiro Miyoshi, "New Japan-China Fisheries Agreement, An Evaluation from the Point of View of Dispute Settlement," *Japanese Annual of International Law* 41, (1998), 37-39; Keyuan Zou, "Sino-Vietnamese Fishery Agreement for the Gulf of Tonkin," *The International Journal of Marine and Coastal Law* 17, no. 1 (2002), 134-6. Suk Kyoong Kim, "Illegal Chinese Fishing in the Yellow Sea: A Korean Officer's Perspective," *Journal of East Asia and International Law* 5, (2012), 459-64.

28 *Supra*, note 1, 441.

29 *Ibid.*

30 The Fishery Bureau, 2016 Report of China's Distant Water Fishing Industry Development, 4.

31 *Ibid.*, 19.

water fishing industry. The success of high sea fishing should be attributed to China's efforts to ratify international fishery agreements and obtain membership of RFMOs. During this period, China acceded to the Agreement for the Establishment of the Indian Ocean Tuna Commission,³² the Convention for the Establishment for an Inter-American Tropical Tuna Commission,³³ the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean,³⁴ the Convention for the Conservation of Antarctic Marine Living Resources,³⁵ and the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean,³⁶ and also ratified the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean.³⁷ The large-scale fishing fleets and booming seafood market afford China some leverage in negotiations about allocation of catch quotas within these RFMOs.³⁸ The membership of these RFMOs has opened the door for China to gain fishing quotas for Chinese fishing vessels.

32 "The Agreement for the Establishment of the Indian Ocean Tuna Commission," acceded to by China on October 14, 1998, UNTS 1927.

33 "The Convention for the Establishment for an Inter-American Tropical Tuna Commission," acceded to by China on November 14, 2003, UNTS 1041.

34 "The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean," acceded to by China on February 11, 2005, UNTS 2275.

35 "The Convention for the Conservation of Antarctic Marine Living Resources," acceded to by China on September 8 2006, UNTS 1329.

36 "The Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean," acceded to by China on July 6, 2013, UNTS 369.

37 "The Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean," ratified by China on November 28, 2014.

38 Seafood Source, "China Increasingly Dominating Fishing Rule-Making," December 13, 2018, <https://www.seafoodsource.com/news/supply-trade/china-increasingly-dominating-fishing-rule-making>.

Table 1. 2005–2018 Distant Water Fishing Statistics³⁹

Year	Total Distant Water Fishing Catch (Metric Tons)	Catch Shipped Back to China (Metric Tons)	Catch Sold Overseas (Metric Tons)
2005	1,438,084	921,802	516,282
2006	1,090,663	608,435	482,228
2007	1,075,151	585,540	487,422
2008	1,083,309	626,069	457,240
2009	977,226	479,413	497,813
2010	1,116,358	605,344	511,014
2011	1,147,809	634,013	513,796
2012	1,223,441	722,406	501,035
2013	1,351,978	809,446	542,532
2014	2,027,318	1,343,327	683,991
2015	2,192,000	1,406,158	785,842
2016	1,987,512	1,103,772	883,740
2017	2,086,200	1,236,247	849,953
2018	2,257,000	1,462,344	795,106

The last characteristic of this period was that the distant water fishing industry, formerly dominated by state-owned companies, has been changed to an industry largely owned by private companies.⁴⁰ The majority of licensed distant water fishing companies were private,⁴¹ and 70% of the industry was owned by these companies.⁴² An illustrative example of this transformation is the Hong Dong Fishery Corporation, a private company headquartered in Fujian Province, which built China's largest overseas fishing base in Mauritania. The base has 1,400 African employees and 100 fishing vessels.⁴³ Some state-owned companies continue to play an important role. For instance, China National Agricultural Development Group contributes to nearly 10% of the total annual distant water catch.⁴⁴ Nevertheless, China has less control over its distant water fishing

39 Statistics of each year are from China Fishery Yearbook published in that year.

40 Tabitha Grace Mallory, "China's Distant Water Fishing Industry: Evolving Policies and Implications," *Marine Policy* 38, (2013), 101.

41 Supra, note 31, 69–74.

42 Supra, note 40.

43 Fuzhou News, "The Largest Oversea Fishing Base was Made by Fuzhou" December 11, 2016, <http://www.taihainet.com/news/fujian/szjj/2016-12-11/1922019.html> [in Chinese].

44 The Fishery Bureau, 2017 *China Fishery Yearbook* (China Agriculture Press, 2017), 46 [in Chinese].

activities because of the burgeoning growth of private companies. Some private companies have directly negotiated with coastal states in West Africa to obtain preferable treatment over local regulations, without the involvement of Chinese government.⁴⁵

By the end of 2016, there were 162 distant water fishing companies and nearly 2,900 distant water fishing vessels, 1,329 of which were high sea fishing vessels.⁴⁶ These fishing vessels were engaging in longline, trawling, and purse seine fishing in waters of 42 countries and regions and the Pacific Ocean, the Indian Ocean, and the Atlantic Ocean.⁴⁷

6. Building a Responsible Distant Water Fishing Power from 2017 to the Present

In February 2017, the Agricultural Ministry published the 13th Five-Year Plan of National Fisheries Development from 2016-2020 (the Fisheries Plan).⁴⁸ Under the Fisheries Plan, the first fundamental principle governing fisheries development is to “pursue ecological integrity and promote sustainable development,” which calls for the change of development focus from growing quantity to improving quality and efficiency of fisheries.⁴⁹ Another fundamental principle in the Fisheries Plan is that a Go Global strategy should be adhered to. Based on this principle, China’s distant water fishing industry should develop orderly, and bilateral processes, and multilateral fishery cooperation should be strengthened.⁵⁰

In light of the Fisheries Plan, the Agricultural Ministry later issued the 13th Five-Year Plan of Distant Water Fishing Industry from 2016 to 2020 (the Distant Water Plan).⁵¹ Pursuant to the Distant Water Plan, the Chinese distant water fishing industry should balance exploitation of marine living resources with conservation of such resources and should adopt environmentally friendly fishing methods and reduce negative impacts of fishing on the marine environment.⁵² Moreover, according to the Distant Water Plan, China should consolidate the regulatory and legal system of distant water fishing and strengthen monitoring and enforcement measures, thereby improving its ability to fulfill international obligations.⁵³ Finally, under the Distant Water Plan, China hopes to establish itself as a responsible distant water fishing power through the implementation of a Zero Tolerance Policy for (IUU) fishing activities.⁵⁴

45 China Dialogue, “China’s Distant Water Fishing Fleet Growing Unsustainably,” December 6, 2016, <https://chinadialogueocean.net/594-china-distant-water-fishing-fleet>.

46 The Agricultural Ministry, “The 13th Five-Year Plan of Distant Water Fishing Industry from 2016 to 2020,” *China Fisheries* 1, (2018), 5 [in Chinese].

47 Ibid.

48 The Agricultural Ministry, “The 13th Five-Year Plan of National Fisheries Development from 2016 to 2020,” February 20, 2017, http://www.moa.gov.cn/nybg/2017/derq/201712/t20171227_6131208.htm [in Chinese].

49 Ibid.

50 Ibid.

51 Supra, note 46.

52 Ibid.

53 Ibid.

54 Kangzheng Yu (Vice Minister of Agriculture), “Interpretation of the 13th Five-Year Plan of Distant Water Fishing Industry from 2016 to 2020,” *China Fisheries* 1, (2018), 4 [in Chinese].

Following the two aforementioned guidance documents, China has initiated amendment procedures for its fisheries law and relevant administrative regulations of distant water fishing to solidify the aforementioned fundamental principles. Many anti-IUU fishing policies have been introduced. Section C will delineate the details of China's ongoing reform regarding its distant water fishing activities.

C. Possible Reasons behind the Policy Shift

China has the largest distant water fishing fleet in the world, and Chinese vessels represent a significant portion of global fishing efforts on the high seas and exclusive economic zones. As a flag state, China has the obligation to effectively exercise its jurisdiction and control over distant water fishing vessels flying the Chinese flag and the responsibility to ensure that its nationals and fishing vessels comply with conservation measures and regulations established by coastal states and RFMOs.⁵⁵ Nevertheless, China has been accused of imposing a very low level of oversight on the Chinese-flagged fleet in distant waters to allow its vessels to catch more fish.⁵⁶ With the introduction of Building a Responsible Distant Water Fishing Power Policy⁵⁷ after 2017, a question arises as to why China is willing to sacrifice its economic interests to protect the marine environment and biodiversity of the high seas and other countries' exclusive economic zones. This part attempts to give an answer to this question.

1. Frequent and High-Profile Cases of Illegal Fishing

Although China has significantly improved its cooperation track record after joining several RFMOs,⁵⁸ its distant water fishing vessels have still been found to participate in IUU fishing activities on the high seas. In 2014, two RFMOs, namely the Western and Central Pacific Fisheries Commission (WCPFC) and the International Commission for the Conservation of Atlantic Tunas, reported that China had breached the catch quotas in a number of years.⁵⁹ Based on the information provided by the two RFMOs, in the years 2005, 2006, 2007, 2009, 2010, and 2012, the catch of bigeye and yellowfin tuna by Chinese fishing vessels was in excess of the quotas allocated to China.⁶⁰

Chinese distant water fishing vessels have frequently been involved in IUU fishing in foreign waters. According to the data supplied by the Surveillance Operations Coordination Unit of the Sub-Regional Fisheries Commission, in six West African countries' waters (Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, and Sierra Leone), during the periods from 2000 to 2006 and from 2011 to 2013, there were 183 cases of IUU fishing involving Chinese vessels.⁶¹ Greenpeace's

55 Valentin Schatz, "Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ," *Ocean Development & International Law* 47, no. 1 (2016), 329-34.

56 Stimson Center, *Shining a Light: The Need for Transparency Across Distant Water Fishing* (November 1, 2019), 23-4.

57 *Supra*, note 54.

58 The Directorate General for Internal Policies, *The Role of China in World Fisheries* (European Parliament, 2012), 13.

59 China Dialogue, "Chinese Tuna Firm Admits Companies Have Breached Quotas for Years," September 30, 2014, <https://www.chinadialogue.net/article/show/single/en/7362-Chinese-tuna-firm-admits-companies-have-breached-quotas-for-years>.

60 *Ibid.*

61 Greenpeace, *Investigating Chinese Companies' Illegal Fishing Practices in West Africa* (May 2015), 16.

investigation in 2014 revealed that an average of one new Chinese IUU fishing case was identified every two days.⁶²

Besides the frequency, some cases of IUU fishing were very high profile and had profound implications. On August 13, 2017, Fu Yuan Yu Leng 999, a Chinese fishing vessel, was arrested by Ecuadorian authorities in waters near the Galapagos Islands for an illegal catch of 300 metric tons of endangered species, including 6,623 sharks.⁶³ This incident had global media reach and spurred protests against China in Ecuador.⁶⁴ On March 15, 2016, after repeated warnings, the Argentine Coast Guard opened fire on and sank Lu Yan Yuan Yu 010, another Chinese fishing vessel, in Argentina's exclusive economic zone.⁶⁵ Argentina claimed that the fishing vessel turned off its AIS while fishing inside Argentina's territorial waters.⁶⁶ This rare use of force caught the attention of managers and officials in the global fishing community.

Casualties occasionally occur in conflicts between foreign coastal guardsmen and Chinese fishermen, as was the case in December 2011, when a Chinese fisherman stabbed a Korean coast guardsman to death.⁶⁷ Conflicts also sometimes appear between Chinese fishermen and local fishermen when Chinese vessels deplete all local fisheries and force local fishermen out of business. Such conflicts and casualties can result in civilian antagonism and spark diplomatic crisis between China and foreign countries.⁶⁸ Because distant water fishing is an important element of the Belt and Road Initiative, a global infrastructure investment strategy adopted by China in 2013, the diplomatic crisis from fishing activities might jeopardize the initiative. Moreover, high-profile cases of IUU fishing have tarnished China's image on the international stage, prompting China to take a tougher stance on IUU fishing.

2. Higher Requirements by RFMOs and Coastal States

Based on the UNCLOS, the UN Fish Stocks Agreement requires coastal countries and countries with flagged vessels fishing on the high seas to cooperate to ensure the conservation and optimal sustainable yield of straddling and highly migratory fish stocks.⁶⁹ According to the UN Fish Stocks Agreement, RFMOs are the primary mechanisms for countries to cooperate, and conservation measures adopted by RFMOs should be followed by countries.⁷⁰ Each RFMO is different because

62 Ibid, 19.

63 Reuters, "Ecuador Jails Chinese Fishermen Found with 6000 Sharks," August 28, 2017, <https://www.reuters.com/article/us-ecuador-environment-galapagos/ecuador-jails-chinese-fishermen-found-with-6000-sharks-idUSKCN1B81TS>.

64 The Strait Times, "Protests in Ecuador After Chinese Vessel Intercepted with Catch of Endangered Species from Marine Reserve," August 25, 2017, <https://www.straitstimes.com/asia/se-asia/protests-in-ecuador-after-chinese-vessel-intercepted-with-catch-of-endangered-species>.

65 Seafood Source, "Argentina Coast Guard Opens Fire on Chinese Fishing Vessel," March 4, 2019, <https://www.seafoodsource.com/news/supply-trade/argentine-coast-guard-opens-fire-on-chinese-fishing-vessel>.

66 Ibid.

67 The New York Times, "Chinese Fisherman Kills South Korean Coast Guardsman," December 13, 2011, <https://www.google.com/search?q=chinese+fisherman+stabbed+korean+to+death+civil+agantagins%2C&oq=chinese&aqs=chrome.0.69i59l3j69i57j69i59j69i60l3.650l1j0j4&sourceid=chrome&ie=UTF-8>.

68 Qingchang Qiu, "Fishery Disputes Between China and Neighboring Countries and Their Impacts on China's Foreign Relations" *Socialism Studies* 212, no. 6 (2013), 150-151 [in Chinese].

69 Supra, note 22, Article 5(a).

70 Ibid, Article 8.

variances exist among RFMOs in terms of the species they focus on, the marine areas they cover, and the institutional frameworks they adopt. Nevertheless, all have suffered from one common issue: the lack of effective compliance and enforcement mechanisms.

Fortunately, progress has been made by some RFMOs to improve compliance and effectiveness. In 2010, the WCPFC implemented a compliance monitoring scheme. Under the scheme, every member of the WCPFC provides information regarding performance of its obligations.⁷¹ At the annual meeting of the Technical and Compliance Committee, the Committee reviews information received, identifies compliance issues, and assigns a preliminary compliance status to each member.⁷² After taking the Committee's opinions into consideration, the WCPFC adopts a final and public compliance monitoring report, including a compliance status for each member.⁷³ If a member is assigned a status of priority noncompliant for its actions, such as exceeding agreed catch quotas, the WCPFC can determine necessary responses to address the noncompliance.⁷⁴

Australia, a member of the WCPFC, suggested that such responses should include reduction or removal of catch quotas (how much a vessel is allowed to take) and withdrawal of the member's vessels from the authorized list.⁷⁵ While the latest version of the scheme does not confirm the Australia's proposal, the language of the scheme is still vague enough to preserve the possibility that the WCPFC can take harsh measures to tackle priority noncompliance.⁷⁶

The South Pacific Regional Fisheries Management Organization (SPRFMO) adopted a similar compliance monitoring scheme with some revisions.⁷⁷ Both the WCPFC and the SPRFMO have found China to be noncompliant in the past. Although no drastic measures have been imposed on China, the threat of losing catch quotas and of negative publicity might promote China to reconsider its distant water policy.

The West African waters have long been regarded as one of the most diverse and fertile fishing zones in the world. Since the first Chinese fishing fleet went to the region, China has been fishing there for 35 years. Traditionally, coastal countries in West Africa have provided Chinese fishing vessels with easy access to their fishery resources. Also, due to local authorities' lack of robust legal frameworks, inadequate inspection, and poor technology, Chinese fishing vessels have frequently participated in IUU fishing activities to reap more economic benefits. However, some changes are taking place. First, according to "The 13th Five-Year Plan of Distant Water Fishing Industry from 2016 to 2020", West African countries are demanding more restrictive

71 Western and Central Pacific Fisheries Commission, *Conservation and Management Measure for Compliance Monitoring Scheme* (2010), CMM 2010-03, paragraph 9.

72 Ibid, paragraphs 13-15.

73 Ibid, paragraphs 17-19.

74 Western and Central Pacific Fisheries Commission, CMM 2015-07, *Conservation and Management Measure for Compliance Monitoring Scheme*, Annex I Compliance Status Table.

75 Australia, *Working Paper on the Proposed Structure for the Western and Central Pacific Fisheries Commission Compliance Monitoring Scheme* (September 3, 2010), WCPFC-TCC6-2010/21.

76 Western and Central Pacific Fisheries Commission, *Conservation and Management Measure for Compliance Monitoring Scheme* (December 11, 2019), Annex I 11.

77 South Pacific Regional Fisheries Management Organisation, Report of the Third Meeting of the Commission of the South Pacific Regional Fisheries Management Organization (February 6, 2015), paragraph 12.

requirements for access to fishery resources.⁷⁸ Chinese vessels now need to comply with more stringent conservation measures, more expensive license fees, and higher technical standards. Second, national and international efforts are devoted to curbing IUU fishing activities in the region. For instance, the Ivory Coast published a new fisheries law to increase criminal and monetary penalties to guarantee protection against IUU fishing activities.⁷⁹ With support from Germany, Stop Illegal Fishing, an Africa-based NGO, is cooperating and coordinating with the Food and Agriculture Organization (FAO) to implement port state control measures in selected African countries.⁸⁰ Moreover, supported by European Union, the Fisheries Committee for the West Central Gulf of Guinea, made up of six West African countries, is building the capacities of competent national and regional monitoring, control, and surveillance authorities to deter IUU fishing.⁸¹ In light of these new circumstances, China has to update its distant water fishing policy to retain access to fishery resources and avoid penalties for violations in West Africa.

D. Ongoing Reforms

To realize its transition into a responsible distant water fishing power, China is undergoing a systemic reform of its distant water fishing legal regimes. In July 2019, the Agricultural Ministry solicited comments regarding the draft of new Regulations on the Administration of Distant Water Fishery (Fishery Regulations).⁸² One month later, China published new Measures on Distant Water Fishing Vessel Monitoring (Monitoring Measures).⁸³ At the end of August 2019, the draft of new Fisheries Law was issued for public comments.⁸⁴ In April 2020, China disclosed a letter regarding new policy about a transshipment system for distant water fishing (Transshipment Letter).⁸⁵ The regulations and legislation mentioned above have taken effect or are expected to take effect in the foreseeable future. This part is intended to illustrate new rules pertinent to IUU fishing activities in the ongoing reform.

1. More Severe Penalties

Article 74 of the draft new Fisheries Law lists seven violations of distant water fishing, including the following:

78 *Supra*, note 46.

79 JuriAfrica, "Ivory Coast Faces Up to Illegal Fishing," November 27, 2016, <https://juriafrique.com/eng/2016/11/27/ivory-coast-faces-up-to-illegal-fishing>.

80 Stop Illegal Fishing, *2019 Annual Report*, 10-26.

81 Fisheries Committee for the West Central Gulf of Guinea, "Improving Fisheries Governance in Western Africa," <https://fcwc-fish.org/projects/pescao>.

82 The Agricultural Ministry, "The Notification about Solicitation for Public Comments on Regulations for Administration of Distant Water Fishery (Draft)," July 1, 2019, http://www.moa.gov.cn/hd/zqyj/yfzj/201907/t20190701_6319950.htm [in Chinese].

83 The Agricultural Ministry, "The Notification about Issuance of Measures on Distant Water Fishing Vessels Monitoring," August 19, 2019, http://www.gov.cn/xinwen/2019-08/19/content_5422285.htm [in Chinese].

84 The Agricultural Ministry, "The Notification about Solicitation for Public Comments on Fisheries Law (Draft)," August 29, 2019, http://www.moa.gov.cn/xw/bmdt/201908/t20190829_6326836.htm [in Chinese].

85 The Agricultural Ministry, "The Notification about Strengthening Administration of Distant Water Fishing High Sea Transshipment and Transportation," April 14, 2020, https://www.sohu.com/a/388673771_769126 [in Chinese].

- Fishing in the high seas or foreign waters without license or approval from the Fishery Bureau under the Agricultural Ministry
- Obstructing or refusing enforcement measures taken by Chinese fisheries authorities or coast guards, obstructing or refusing boarding by authorized third parties on the high seas, or obstructing or refusing inspection by port states
- Obstructing or refusing to admit observers designated by China and RFMOs that have jurisdiction, or interfering with observers' work and leaving them unable to complete their tasks
- Failing to accurately report information about distant water fishing activities or failing to keep accurate fishing logs
- Making unauthorized changes of the vessel name or the vessel identifier, or intentionally turning off, removing, or manipulating vessel monitoring systems or automatic identification systems
- Undertaking, supporting, or abetting IUU fishing as discovered by RFMOs that have jurisdiction
- Being involved in major incidents with foreign governments or being in fishing vessel accidents

Compared to the 2013 Fisheries Law, the draft significantly increases penalties for infractions. The maximum monetary penalty has been upgraded from 100,000 yuan to 1,000,000 yuan (\$US145,222). According to Article 74, violations will lead to automatic suspension or revocation of the captain's seafarer certificate. Moreover, depending on the seriousness of violations, distant water fishing projects and company licences can be suspended or revoked, and fishing vessels can be confiscated.

Additionally, Article 74 specifically incorporates a blacklist as a potential penalty for serious violations. The blacklist system was initially introduced in 2017 with nine distant water fishing company managers and six captains on the list.⁸⁶ According to Article 34 of the new Fisheries Law, which has taken effect since April 1, 2020, the blacklisted company managers shall not be in charge of any distant water fishing project or company for the next three years, and blacklisted captains shall not be allowed to apply for a seafarer certificate for the following five years. It is nearly impossible for blacklisted captains to regain their seafarer certificate after not being employed in the industry for five years. The Agricultural Ministry added more managers and captains to the blacklist in 2018, including those arrested by Ecuador for catching endangered sharks.⁸⁷

86 The Paper, "The Agricultural Ministry Established Blacklist for Distant Water Fishing Practitioners for the First Time, Already 15 on the List," December 26, 2017, https://www.thepaper.cn/newsDetail_forward_1922262 [in Chinese].

87 The Agricultural Ministry, "The Notification about Administrative Penalties for Violations by Some Distant Water Fishing Companies and Vessels," March 20, 2018, http://www.moa.gov.cn/nybg/b/2018/201803/201805/t20180528_6143244.htm [in Chinese].

Compared to the potential economic benefits, the penalties for violations stipulated by the 2013 Fisheries Law were trivial. However, in the new legislation and regulations, the higher monetary penalty, the disqualification of distant water fishing projects and companies, the confiscation of fishing vessels, and the blacklist system might be severe enough to deter fishermen from engaging in IUU fishing.

2. Port Designation and Port Control

Although China has not yet ratified the Food and Agriculture Organization of the United Nations (FAO) Agreement on Port State Measures, in July 2019 the Agricultural Ministry said that it is working with other ministries to accede to and implement the agreement.⁸⁸ At the same time, the Agricultural Ministry has compiled a list of 247 IUU fishing vessels identified by eight RFMOs of which China is a member and has distributed the list to all Chinese ports to deny the entry of IUU fishing vessels.⁸⁹ Article 65 of the new Fisheries Law incorporates this port control measure and further requires that the illegal catch of IUU fishing vessels that are already within Chinese ports should be confiscated.

Article 36 of the draft new Fisheries Law also provides that middle-size and large-size fishing vessels shall unload their catch only at designated Chinese ports and that catch traceability systems should be set up at these ports. The Fishery Bureau will publish a list of designated Chinese ports. Fishing ports and non-fishing ports in China have been managed by different authorities, and in most situations foreign fishing vessels have been accepted by non-fishing ports where checks are carried out by customs authorities.⁹⁰

There has been some confusion about which authority should deal with the illegal catches of foreign vessels, and customs authorities might lack the expertise to detect IUU fishing.⁹¹ The port designation measure has the potential to address this issue. Fishing and customs authorities can coordinate and cooperate with each other at designated ports. Moreover, in 2018, China initiated a plan to build ten modern fishing port clusters,⁹² which would increase the ability of fishing ports to collect and verify data for distant water fishing. After the construction, more Chinese fishing ports will be capable of enforcing port control measures.

Strong port control measures at designated Chinese ports with facilitates to implement a catch traceability system may be an effective way to preclude illegal catches from entering the booming Chinese seafood market.

88 The Agricultural Ministry, "Advice of Furthering Curbing IUU Fishing Activities," July 10, 2019, http://www.moa.gov.cn/gk/jyta/201907/t20190710_6320683.htm [in Chinese].

89 Ibid.

90 Tiantian Wang and Yi Tang, "Effectiveness of the Port State Measures on Combating IUU Fishing and the Influence of Port State Measures Agreement on China," *Journal of Shanghai Ocean University* 26 no. 5 (2017), 754-756 [in Chinese].

91 Ibid.

92 National Development and Reform Commission and the Agricultural Ministry, "National Coastal Fishing Ports Development Plan (2018-2025)," May 3, 2018, http://www.moa.gov.cn/gk/ghjh_1/201805/t20180503_6141333.htm.

3. Mandatory Installation of Vessel Monitoring Systems

Vessel Monitoring Systems (VMS) enable flag states and coastal states to enhance monitoring, control, and surveillance over distant water fishing activities.⁹³ More frequent VMS data reporting by distant water fishing vessels can lead to a more accurate determination of their location, direction, and fishing patterns.⁹⁴ According to Article 3 of the 2014 Monitoring Measures, installing VMS is a precondition for approval of distant water fishing projects and entitlement to governmental subsidies.⁹⁵ Articles 11 and 15 of the 2014 Monitoring Measures prescribe that VMS shall be turned on for 24 hours a day and transmit their data to the China National Distant Water Fishing Association every 4 hours.⁹⁶ The Association is a government-funded representative body of the industry. The 2019 Monitoring Measures, effective from August 1, 2019, increase reporting rates and require that distant water fishing vessels should transmit VMS data every hour. Moreover, when entering unauthorized fishing zones or disputed marine areas, VMS should automatically send alerts, and provincial fisheries authorities should launch an investigation into such incidents, with the results reported to the Fishery Bureau.

4. Transparent Transshipment

Far from a Chinese port, a Chinese distant water fishing vessel can offload its catch to a refrigerated vessel through transshipment at sea.⁹⁷ This practice can obscure the source of the catch and potentially allow illegal catches to enter the Chinese market in spite of China's port designation and control measures. To tackle the negative consequences resulting from unregulated transshipment, the Agricultural Ministry proposed in the Transshipment Letter a regulatory regime for transshipment. Pursuant to the letter, any vessels providing transportation service to Chinese distant water fishing vessels must be registered before the Agricultural Ministry and relevant RFMOs. Chinese distant water companies must report any transshipment activities to the China National Distant Water Fishing Association at least 72 hours before such activities occur. Then the Association will notify relevant RFMOs in accordance with regulations adopted by these RFMOs.

Moreover, all transport vessels will be subject to inspection by observers appointed by Chinese government. Observers will record all transshipment activities that occur on the high seas. Since 2016, China has provided technical and legal training to observer candidates and established a national talent pool of observers to ensure that observers are capable of carrying out their tasks.⁹⁸ The Transshipment Letter is the first move by China to regulate transshipment on the high seas. After constructive input from stakeholders, a final regulatory regime based on the letter might reduce the problem of transshipment as a component of IUU fishing.

93 The Pew Charitable Trusts, *Tracking Fishing Vessels Around the Global* (April 2017), 2–4.

94 *Ibid.*, 9.

95 The Agricultural Ministry, “The Notification Measures on Distant Water Fishing Vessels Monitoring,” October 27, 2014, http://www.moa.gov.cn/nybgb/2014/shiyi/201712/t20171219_6111611.htm [in Chinese].

96 *Ibid.*

97 Nathan A. Miller et al., “Identifying Global Patterns of Transshipment Behavior,” *Frontiers in Marine Science* 5, (2018), 240–241.

98 The Agricultural Ministry, “Regulations on National Observers of Distant Water Fishing,” December 1, 2016, http://zsoaf.zhoushan.gov.cn/art/2017/3/14/art_1563874_25965714.html [in Chinese].

5. International Fisheries Obligations Research Center

On September 23, 2017, with the support from the Fishery Bureau, the China National Distant Water Fishing Association and Shanghai Ocean University jointly established the International Fishery Obligation Research Center.⁹⁹ The center's mission is to improve China's ability to fulfill its obligations arising from international, regional, and bilateral fisheries agreements.¹⁰⁰ The center will closely follow the development of fisheries law in the FAO, RFMOs, and coastal countries.¹⁰¹ Eight working groups have been established to research the eight RFMOs of which China is a member.¹⁰² Based on the center's research, China will promptly incorporate international obligations into its domestic law.¹⁰³

The center offers annual training sessions to managers of distant water fishing companies and crew members to enhance their understanding of international and domestic fisheries law and relevant technical standards. Through these training sessions, practitioners' awareness of compliance is raised, and their technical skills are improved, thereby reducing the likelihood of unintentional violations.

6. Closed Seasons for Squid Fishing

Squid fishing constitutes an important part of China's distant water fishing industry. In 2015, squid fishing accounted for 40% of the total distant water catch and 30% of its value.¹⁰⁴ In the past nine years, China has had the largest squid catch in the world.¹⁰⁵ Squid fishery resources spread across a vast amount of marine areas. In some areas on the high seas, there are no RMFOs to manage and conserve squid fishery resources. Overexploitation and climate change have resulted in a plummeting squid catch. In 2016, the global catch decreased by over a million metric tons.¹⁰⁶ From 2007 to 2011, each Chinese fishing vessel in the southwest Atlantic Ocean could catch more than 2,000 metric tons every year.¹⁰⁷ However, in recent years the catch per Chinese vessel has decreased to less than 400 metric tons.¹⁰⁸

99 Shanghai Ocean University, "The Establishment of International Fishery Obligation Research Center," September 26, 2017, <https://www.shou.edu.cn/2017/0925/c147a212038/page.htm> [in Chinese].

100 Ibid.

101 Ibid.

102 The Agricultural Ministry, "Xianliang Zhang (Head of the Fishery Bureau) Answers Journalists' Questions About the Amendment of Regulations for the Administration of Distant Water Fisheries," March 25, 2020, http://www.moa.gov.cn/xw/bmdt/202003/t20200325_6339878.htm [in Chinese].

103 Ibid.

104 Supra, note 31, 1 and 13.

105 Shanghai Observer, "China's Distant Water Squid Fishing Catch Has Been the Largest in the World for the Past Nine Consecutive Years," June 6, 2019, <https://www.shobserver.com/news/detail?id=155812> [in Chinese].

106 Undercurrent News, "Slump in Global Squid Catch Spark Fisheries Management Efforts," July 12, 2018, <https://www.undercurrentnews.com/2018/07/12/global-squid-catch-slump-ignites-fisheries-management-efforts>.

107 Zhoushan Daily, "China Plans to Implement Closed Seasons for the High Sea Squid Fishery Stocks, Zhoushan Has Repeatedly Called China to Do So," April 19, 2020, http://www.zhoushan.cn/newscenter/zsxw/202004/t20200419_969166.shtml [in Chinese].

108 Ibid.

To realize the sustainable development of squid fishery resources on the high seas, the Agricultural Ministry decided in 2020 that between July 1 and September 30 of each year, Chinese fishing vessels should not catch squid in the southwest Atlantic Ocean between 32°S and 44°S and between 48°W and 60°W.¹⁰⁹ Also, between September 1 and November 30 of each year, the ministry prohibits Chinese fishing vessels from catching squid in the eastern Pacific Ocean between 5°N and 5°S and between 110°W and 95°W.¹¹⁰ This is the first time that China has voluntarily imposed closed seasons on its fishing vessels on the high seas. The two parts of the high seas covered by the closed seasons are believed to be the main spawning grounds of Humboldt squids and Argentine shortfin squids, respectively.¹¹¹

Moreover, China will explore the feasibility of establishing a squid catch quota system for its fishing vessels.¹¹² Also, China will advocate for the establishment of squid RFMOs and promote international closed seasons for squid fishing.¹¹³ In addition to efforts at the government level, China will encourage international cooperation of private sectors and academia to achieve the conservation and sustainable development of squid fishery resources.¹¹⁴

E. Conclusion

From 1949 to the present, China's distant water fishing industry has grown considerably through six stages. The two most recent stages are particularly important. From 1998 to 2016, faced with economic pressure from conservation of offshore fisheries, China has restructured its distant water fishing industry. High sea fishing has replaced foreign water fishing as the cornerstone of the industry, and private companies have become the backbone of this formerly state-owned industry. Since 2017, China has emphasized ecological integrity and sustainable development and has expressed its desire to be a responsible distant water fishing power by cracking down on IUU fishing.

Two possible reasons might explain this policy shift. First, frequent and high-profile cases of illegal fishing have tarnished China's reputation, and rising tensions with foreign countries because of these violations have the potential to threaten the implementation of the Belt and Road Initiative. Second, RFMOs and coastal countries have enhanced monitoring and enforcement measures, and the requirements for access to fisheries resources have been tightened. China has to remake its policy to retain access and avoid penalties. Since the policy shift, China has initiated systemic legal reform. They have introduced more severe penalties for infractions, port control measures, VMS monitoring, transparent transshipment, and closed seasons for squid fishing. Despite all of these efforts, the effectiveness of these measures remains to be seen in the future.

109 The Agricultural Ministry, "The Notification about Strengthening the Conservation of High Sea Squid Fishery Resources to Sustainably Develop China's Distant Water Fishing Industry," June 1, 2020, http://www.gov.cn/zhengce/zhengceku/2020-06/03/content_5516936.htm [in Chinese].

110 Ibid.

111 China Dialogue, "China Announces Closed Season on Squid Spawning Grounds," June 18, 2020, <https://chinadialogueocean.net/14146-china-announces-closed-season-squid-spawning-grounds>.

112 Supra, note 109.

113 Ibid.

114 Ibid.

III. IUU FISHING AND DATA POLICY: South Korea Case Study

Hai Jin Park

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A. Background

When it comes to the ongoing battle against illegal fishing, South Korea is an important flag state as well as a port state. It is one of five countries responsible for 90% of distant water fishing efforts, and it has 221 licensed distant water fishing vessels with an annual export of about 200,000 metric tons per year.¹ Busan, the largest port in South Korea, is the most frequently visited port by foreign vessels with a sizable hold capacity.² South Korea was the nineteenth country to ratify the Food and Agriculture Organization of the United Nations Agreement on Port State Measures (PSMA). South Korea is currently a member of a number of regional fisheries management organizations (RFMOs). See Table 1 below.

Table 1. RFMOs and International Fisheries-Related Organizations of Which South Korea Is a Member (cont. on next page)

RFMO	Year of Accession	Mandate
Fishery Committee for the Eastern Central Atlantic (CECAF)	1968	Fisheries resources management in the eastern central Atlantic area
International Commission for the Conservation of Atlantic Tuna (ICCAT)	1980	Conservation and management of Atlantic tuna
Fisheries Committee for the Western and Central Atlantic (WECAFC)	1974	Fisheries resources management in the western and central Atlantic area

1 Aaron Orlowski, "NGOs Urge Caution Even as They Praise South Korean Fisheries Reform," SeafoodSource, January 17, 2020, <https://www.seafoodsource.com/news/environment-sustainability/ngos-urge-caution-even-as-they-praise-south-korean-fisheries-reform>.

2 The Pew Charitable Trusts, "Study Measures Countries' Exposure to Illegal Catch, Actions to Keep It from Markets," July 19, 2019, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/study-measures-countries-exposure-to-illegal-catch-actions-to-keep-it-from-markets>.

RFMO	Year of Accession	Mandate
International Whaling Commission (IWC)	1978	Conservation and management of whales and oversight of commercial whaling
Commission for the Conservation and Management of Antarctic Marine Living Resources (CCAMLR)	1985	Conservation and management of Antarctic marine living resources
North Atlantic Fisheries Organization (NAFO)	1993	Fisheries resources management in the North Atlantic area
Central Bering Sea Pollack Commission (CBSPC)	1995	Conservation and management of pollack in the central Bering Sea
Indian Ocean Tuna Commission (IOTC)	1996	Conservation and management of tuna in the Indian Ocean
Commission for the Conservation and Management of Southern Bluefin Tuna (CCSBT)	2001	Conservation and management of southern bluefin tuna
North Pacific Anadromous Fisheries Commission (NPAFC)	2003	Conservation and management of salmon in the North Pacific area
Western and Central Pacific Fisheries Commission (WCPFC)	2004	Conservation and management of tuna in the western and central Pacific area
Inter-American Tropical Tuna Commission (IATTC)	2005	Conservation and management of tuna in the eastern Pacific area
Southeast Atlantic Fisheries Organization (SEAFO)	2011	Optimum utilization of the fisheries resources in the southeast Atlantic area
South Pacific Regional Fisheries Management Organization (SPRFMO)	2012	Non-tuna, pelagic species management in the South Pacific area
South Indian Ocean Fisheries Agreement (SIOFA)	2014	Fisheries resources management in the western and central Atlantic area
North Pacific Fisheries Commission (NPFC)	2015	Bottom fishing and non-tuna pelagic species management in the North Pacific area

B. Legal Framework

1. General

South Korea's national legislation that supports prevention, deterrence, and elimination of illegal, unreported, and unregulated (IUU) fishing includes the Fisheries Act, the Fishery Resource Management Act, the Distant Water Fisheries Development Act (DWFD Act), the Fishing Vessel Act, the Inland Water Fisheries Act, the Act on the Exercise of Sovereign Rights over the Fishing Activities by Foreign Fishing Vessels in the Exclusive Economic Zone of Korea, and the Wild Fauna and Flora Protection Act. Korean nationals engaged in IUU fishing on high seas or in exclusive economic zones (EEZs) outside of South Korea's jurisdiction are subject to sanctions under the DWFD Act. The DWFD Act also includes a port state inspection scheme that is mostly consistent with the PSMA requirements; it requires prior notification, approval or denial of port entry, and sharing the result of inspections with the flag state of the vessel and relevant RFMOs.³ In May 2020, the ordinance under the DWFD Act was amended to further align the national law with the PSMA by allowing denial of use of port service to IUU fishing vessels.⁴

2. Installation of VMS and Other Vessel Position Transmitting Devices

Almost all South Korean fishing vessels are required to have a type of vessel position transmitting device on board. The DWFD Act mandates all South Korean-flagged distant water fishing vessels to install a vessel monitoring system (VMS).⁵ Moreover, all the fishing vessels operating in South Korea's EEZ should have at least one of the vessel position transmitting devices as prescribed by the Ordinance of the Ministry of Oceans and Fisheries.⁶ Fishing vessels larger than 10 metric tons must have automatic identification system (AIS) devices, and those smaller than 10 metric tons but larger than 2 metric tons should have very high frequency digital selective calling (VHF-DSC) devices, while the rest of the fishing vessels are required to install V-Pass devices, which are similar to AIS devices.⁷

3 The DWFD Act, Article 14.

4 The Ministry of Oceans and Fisheries, press release, May 7, 2020.

5 The DWFD Act, Article 15 (Installation of Fishing Vessel Monitoring System).

(1) A distant water fishery operator shall install a fishing vessel monitoring system on the permitted fishing vessel under Article 6 (1) prior to departing from port.

(2) An operator of an overseas cargo transportation business who has been registered as a fishery products transportation business pursuant to Article 24 (2) of the Marine Transportation Act shall install a fishing vessel monitoring system.

(3) Requirements for vessel monitoring systems under paragraphs (1) and (2) and other matters shall be prescribed by Ordinance of the Ministry of Oceans and Fisheries.

6 The Fishing Vessels Act, Article 5-2 (Automatic Identification System Equipment for Fishing Vessels)

(1) In order to ensure the safe navigation of a fishing vessel, the owner of each fishing vessel prescribed by Ordinance of the Ministry of Oceans and Fisheries shall equip his/her fishing vessel with an automatic identification system which automatically provides information about the location of the vessel (hereinafter referred to as "AIS equipment") and operate such AIS equipment in accordance with the criteria set by the Minister of Oceans and Fisheries (...)

7 The Fishing Vessels Act, Article 5-2; the Criteria for Fishing Vessels' Equipment, Articles 188 and 191; the Criteria for Structure and Equipment of Fishing Vessels Smaller Than 10 Tons, Article 72.

3. Restrictions on Sharing Information

Under the Fishing Vessels Act Article 5-2, there is an explicit restriction on sharing the location information collected from vessel-location transmission devices, such as AIS, VHF-DSC, or V-Pass. The location information obtained from these devices can be used only for safely navigating the fishing vessel, investigating IUU fishing, investigating marine resources, responding to maritime accidents, and managing entry and departure of the fishing vessel. It should not be provided to a third party without obtaining consent from the owner or captain of the ship.⁸

However, no explicit restriction can be found in the DWFD Act regarding the sharing of VMS data collected from distant water fishing vessels. If the VMS data can be understood as personal information as defined in the Personal Information Protection Act (PIPA), some of the restrictions under the law would be applicable. The term “personal information” under PIPA refers to information relating to a living individual that identifies a particular individual by his or her full name, resident registration number, image, and so on.⁹ It also includes information that—even if by itself it does not identify a particular individual—may be easily combined with other information to identify a specific individual.¹⁰ If the VMS data contains any of the personally identifiable information as described above or can be easily combined with additional information to identify the individual, it can be shared with a third party only when consent has been obtained from the data subject or when it is within the scope of purposes for which it was collected.¹¹

Since the VMS installed under the DWFD Act Article 15, §1, needs to be able to automatically report certain information to the Minister of Oceans and Fisheries, international fisheries organizations, or coastal states,¹² sharing the VMS data with RFMOs or coastal states would be understood to fall within the purposes for which the VMS was collected, and therefore additional consent from the affected person would not be necessary. However, sharing the VMS data with third parties other than those listed above, such as Global Fishing Watch, would not be understood as within the purposes for which the VMS was collected and would necessitate consent from the affected person if the VMS data are construed as “personal information” under the PIPA.

8 The Ordinance of Ministry of Oceans and Fisheries under the Fishing Vessels Act, Article 42-2 (3).

9 The PIPA, Article 2 (1).

10 Ibid.

11 The PIPA, Article 17 (Provision of Personal Information)

(1) A personal information controller may provide (or share; hereinafter the same shall apply) the personal information of a data subject to a third party in any of the following circumstances:

1. Where the consent is obtained from the data subject;

2. Where the personal information is provided within the scope of purposes for which it is collected pursuant to Articles 15 (1) 2, 3 and 5 and 39-3 (2) 2 and 3.

12 The Ordinance of the Ministry of Oceans and Fisheries under the DWFD Act, Article 24 (1).

C. South Korea's Policy Interests

1. AIS Data Analysis Platform

In 2018, South Korea's Fisheries Management Center (SK-FMC), which belongs to the East Sea Fisheries Management Service, established an online platform that connects South Korea's Electronic Fishing Monitoring System with satellite-based AIS data to support prevention and monitoring of IUU fishing.¹³ The platform finds and stores location information of vessels, expresses the location of the vessels on an electronic map, compare the tracks of multiple vessels, and provide real-time location information of the vessels.¹⁴ This platform includes not only location information of South Korean-flagged distant water fishing vessels, but also that of foreign fishing vessels. The concept of this service is similar to what the Global Fishing Watch is providing, except that it does not employ any algorithms to automatically detect fishing efforts or transshipment using the location information.¹⁵ Instead, they are utilizing experts in the SK-FMC to analyze the location information of South Korean-flagged distant water fishing vessels and foreign vessels that potentially engage in transshipment with South Korean-flagged vessels.¹⁶

2. Improving Domestic Law in Response to the Threat of Trade Sanctions

The major improvement of the DWFD Act over the last decade came in response to the threat of trade sanctions by the European Union (EU) and the United States (US). In 2013, the EU issued South Korea a yellow card after patterns of serious labor abuse were reported, warning that the country would be subject to trade sanctions if it did not improve fisheries management.¹⁷ In response, South Korea's DWFD Act was amended to increase consistency with international law and regulations, to strengthen control over IUU vessels and South Korean nationals, to mandate VMS installation on fish carriers, to require the prior authorization of any transshipment, and to increase sanctions for violations (including imprisonment).¹⁸ Subsequently, in 2015 the European Commission lifted the threat of trade sanctions.¹⁹

South Korea has recently amended the DWFD Act and enabled a quicker and more efficient application of sanctions. The improvement came after South Korea was placed on the US preliminary list of countries engaged in illegal fishing in September 2019.²⁰ Two Korean fishing vessels had allegedly violated conservation measures of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The US National Oceanic and Atmospheric Administration (NOAA) had reported to the US Congress that the fine imposed on South Korean fisheries under

13 Personal communication with an official at the East Sea Fisheries Management Service.

14 The East Sea Fisheries Management Service, notice, March 12, 2020, <http://eastship.mof.go.kr/ko/board.do?menuIdx=264&bbsIdx=5562>.

15 Supra, note 13.

16 Ibid.

17 Seafish, *Focus on Ethical Issues in Seafood: South Korea Profile* (September 2015), https://www.seafish.org/media/Publications/SouthKorea-EthicsProfile_201509.pdf.

18 Ibid.

19 Ibid.

20 Kyu-won Kim, *Korea No Longer Designated as Illegal Fishing Nation by US*, Hankyoreh, January 24, 2020, http://english.hani.co.kr/arti/english_edition/e_international/925676.html.

the DWFD Act, which diminished profits gained from illegal fishing, was insufficient. After the amendment to the DWFD Act was made to strengthen the sanctions, the US lifted the preliminary designation as an IUU fishing country.

D. Coda

As both a key port state and a flag state, South Korea has been playing an important role in fighting illegal fishing. Every distant water fishing vessel is required to install VMS on board, and there is no explicit restriction on sharing VMS data with a third party under the DWFD Act. However, insofar as VMS data is construed as personal information, the PIPA prevents the sharing of VMS data with Global Fishing Watch (GFW) without the data subject's consent. This is different from sharing VMS data with RFMOs, which would fall within the scope of the purpose of data collection and thus be allowed under the PIPA. Since South Korea has established its own AIS data platform that tracks not only South Korean fishing vessels but also foreign fishing vessels, it is less likely to appreciate the additional AIS data analysis service the GFW might be able to provide. Moreover, although South Korea has strengthened its control over South Korean nationals and port controls by amending its domestic law in response to the threat of trade sanctions by the EU and the US, it is unclear whether South Korea will voluntarily provide its VMS data to the GFW without such strong incentives.

IV. FORCED LABOR AND FISHERIES: Corporate Liability for Human Rights Abuses in the Fisheries Sector

Shalini Iyengar

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A. Research Question

How can forced labor on board fishing vessels be prevented and sanctioned? I am studying corporate accountability for forced labor on board wild-catch fishing vessels to understand how the rights of workers on these vessels can be protected. I hope this research will contribute to understanding the links between human rights violations and illegal, unreported, and unregulated (IUU) fishing and also to addressing the larger and more important question of how to end corporate impunity for human rights violations.

B. Background

In recent years, numerous reports have highlighted the seemingly endemic nature of human rights violations on board fishing vessels.¹ While by some accounts, this is hardly a new phenomenon,² its prevalence and pervasiveness are a source of significant concern. Investigations have revealed, for instance, that slavery, underage labor, less than minimum wage payments, poor working conditions, and human trafficking are common issues on these vessels. Moreover, reports have emphasized that such violations are especially pronounced in instances of ships conducting IUU

1 C4ADS, *Strings Attached: Exploring the Onshore Networks Behind Illegal, Unreported, and Unregulated Fishing* (2019); Environmental Justice Foundation, *Blood and Water: Human Rights Abuse in the Global Seafood Industry* (2019); Environmental Justice Foundation, *Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans* (2015); Human Rights Watch, *Hidden Chains: Rights Abuses and Forced Labor in Thailand’s Fishing Industry* (2018); Oceana, *Illegal Fishing and Human Rights Abuses at Sea: Using Technology to Highlight Suspicious Behaviors* (2019), <https://osf.io/juh98>, accessed February 17, 2020.

2 See generally, Ian Urbina, *The Outlaw Ocean: Journeys Across the Last Untamed Frontier* (2019).

fishing.³ The scale of the problems is considerable—more than 38.3 million workers are employed on board fishing vessels at sea,⁴ and IUU fishing accounts for 11 to 26 million metric tons of seafood⁵ valued at between \$US15.5 to \$US36.4 billion.⁶

However, apart from a few highly publicized instances, sanctions for the human rights violators have been few and far between. Notably, this is in spite of the near universal ratification of two of the three International Labour Organization (ILO) Forced Labour Conventions.⁷ There are several reasons for this:

- First, the victims are often migrant laborers, who are more vulnerable to abuse and are less willing to report such behavior. Moreover, the reality of fishing practices and migration law means that their documents are held by the ship captains, making these laborers extremely vulnerable to abuse. Additionally, poverty, illiteracy, and the reality of debt bondage mean that fisheries workers may not be aware of their rights and/or might be unable to exercise them effectively.
- Second, the difficulty in monitoring abuses at sea means that it is difficult for third parties to accurately know and report violations.
- Third, the inherently transnational nature of fishing and the fragmented nature of existing legal and governance mechanisms makes it difficult to hold violators accountable. This is true for both the recruitment aspect of the work and the actual performance of the work itself. Recruiters have frequently been implicated in human trafficking and holding fishers in debt bondage situations, while the fact that the work is performed on the high seas on boats that might carry flags of convenience often confounds efforts to impose liability. Moreover, recruiters often work informally, i.e. under the table, making it even more difficult to trace them and their activities.
- Fourth, even in cases where such complaints are made by the ship workers and/or third parties, the complaints are often directed against the ship captains. While this is understandable and wholly justified, it often obscures the fact that conditions on board fishing vessels are due to systemic and endemic issues, the responsibility for which should rest with the ultimate owner of these fishing vessels. Holding owners accountable, however, can bring about serious legal and logistical issues.

3 Environmental Justice Foundation, *Blood and Water: Human Rights Abuse in the Global Seafood Industry* (2019), <https://ejfoundation.org/resources/downloads/Blood-water-06-2019-final.pdf>; C4ADS, *Strings Attached: Exploring the Onshore Networks Behind Illegal, Unreported, and Unregulated Fishing* (2019), <https://static1.squarespace.com/static/566ef8b4d8af107232d5358a/t/5d7022301845f300016ee532/1567629912450/Strings+Attached.pdf>.

4 International Labour Organization, *Forced Labour and Human Trafficking in Fisheries* (Geneva: 2013), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_216003.pdf.

5 Environmental Justice Foundation, *Blood and Water: Human Rights Abuse in the Global Seafood Industry* (2019), <https://ejfoundation.org/resources/downloads/Blood-water-06-2019-final.pdf>.

6 Ibid.

7 The ILO Forced Labour Convention, 1930 (No. 29), the ILO Abolition of Forced Labour Convention, 1957 (No. 105), and the ILO Work in Fishing Convention, 2007 (No. 188). The first two have been ratified by most of the governments in the world, but the last Convention has only had very few signatories.

- Fifth, the nature of the work lends itself to the potential for abuse. Fishers work long and irregular hours that are often dictated by proximity to fishing grounds. Moreover, fishers tend to spend long periods at sea, thus increasing the potential for being at the mercy of those controlling the ships, since the fishers' freedom of movement is necessarily restricted.

However, there have been some encouraging signs that indicate that corporate violators can no longer escape penalties. On the international stage, the advent of both soft law and treaty instruments has been notable—the 2011 United Nations Guiding Principles on Business and Human Rights, Organisation for Economic Co-operation and Development (OECD) guidelines, and International Organization for Standardization (ISO) standards have all been amended to respond to the need to address corporate human rights abuses. Countries have begun to draft domestic laws incorporating business and human rights obligations for companies within their jurisdictions. Equally significantly, domestic courts have also shown an increasing willingness to hold companies accountable for the human rights violations committed by their subsidiaries. For instance, in the specific case of labor violations on board fishing vessels, courts have begun holding companies accountable for not paying appropriate wages,⁸ and class action suits have been filed against companies for not ensuring that their supply chain is free from slavery.⁹ Finally, although addressed more at states than at individual corporations, the ILO C188 Work in Fishing Convention is also an important step forward in addressing this issue.¹⁰ Similarly, at an interstate level, the European Union (EU) “yellow card” mechanism has also been an important step in curbing forced labor, even though it is technically aimed at issues of IUU fishing.¹¹

Taken as a whole, it is arguable that this entire body of international and domestic law and state practice is indicative of an emerging trend toward corporate accountability in the fisheries sector, and that is the subject that this research will explore in more detail.

As an important caveat, rather than focusing on the normative case for curbing forced labor (which I believe is self-evident), I am aiming to focus on the pathways through which the matter

8 Asia Times, “Fisherman paid missing wages after three-year legal struggle,” November 23, 2018, <https://asiatimes.com/2018/11/fishermen-paid-missing-wages-after-three-year-legal-struggle/>.

9 Associated Press, “More Than 2,000 Enslaved Fishermen Rescued in 6 Months,” September 17, 2015, <https://www.ap.org/explore/seafood-from-slaves/more-than-2,000-enslaved-fishermen-rescued-in-6-months.html>.

10 The C188 Convention is a critical international convention that specifically addresses labor conditions in the fisheries sector. It entered into force in 2017 and requires, *inter alia*, that fishermen have safe working conditions and written agreements setting out their terms of employment. Its potential to curb exploitative working conditions became even more clear in July 2018 when South African authorities inspected and detained a Taiwanese fishing vessel after the crew complained about working conditions on board. The authorities required the owner to address and correct the identified issues; International Labour Organization, “First Fishing Vessel Detained under ILO Fishing Convention,” July 17, 2018, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_634680/lang--en/index.htm.

11 The EU's IUU Regulation came into force in 2010 and aims to ensure that only fisheries that have been certified as operating within legal parameters may access EU markets. Given that the EU is the world's largest importer of fish and fisheries products, the threat of losing access to this market can provide significant leverage for countries to ensure that their fisheries operate in compliance with legal requirements. If countries do not comply with regulation norms, they can be “carded” – yellow cards are issued as a way of warning the country in question that they are not in compliance and marks the beginning of a dialogue. However, if the dialogue is unsuccessful, the countries may be declared as uncooperative and issued a red card. While the EU regulation does not directly address the issue of forced labor, there are likely to be positive impacts from tackling the issue of IUU fishing. For instance, the Commission notes on its website that “the EU IUU Regulation does not specifically address working conditions on-board fishing vessels, neither human trafficking. Nonetheless, improvements in the fisheries control and enforcement system on IUU fishing may have a positive impact in the control of labour conditions in the fisheries sector,” and the yellow card issued to Thailand has been credited for the country's steps to address both IUU fishing and labor abuse; European Commission, “Questions and Answers – Illegal, Unreported and Unregulated (IUU) Fishing in General and in Thailand,” January 8, 2019, https://ec.europa.eu/commission/presscorner/detail/pt/memo_19_201.

can be addressed. In this paper, I will specifically focus on the issue of how companies can be held liable for forced labor on shipping vessels. To do this, I will first map the legal state of play, including domestic and international definitions of forced labor and the cases on the specific issue of forced labor and fishing and on the issue of corporate human rights violations more broadly. Second, I will then turn to potential bases under which companies can be held liable for forced labor and slavery, with specific attention paid to the international business and human rights framework and the domestic corporate liability regimes. Finally, I will attempt to outline some important policy recommendations that might assist in addressing the issue of forced labor.

C. Defining Forced Labour

Forced labor suffers from a multiplicity of definitions at the international and domestic levels. For the purposes of this paper, I have adopted the definition set out in the ILO 1930 Forced Labour Convention, which defined it as “all work or service which is exacted from any person under the threat of a penalty and for which a person the person has not offered himself or herself voluntarily.” In addition, international human rights law also offers a useful lens to understand the opposite of forced labor—that is, the definition of “just and favorable” conditions of work. Articles 23 and 24 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Economic, Social, and Cultural Rights, and CESCR General Comment 23 identify four key elements of the right to just and favorable work:

- I. Fair, equal, and sufficient remuneration
- II. Healthy and safe working conditions
- III. Equal opportunity for promotion
- IV. Rest, leisure, reasonable limitation of working hours, and holidays with pay

Notably, all the above are obligations of states, and recent developments in international law have shown an increasing willingness by governments to hold companies accountable for their human rights impacts. Over the course of the past decade, the United Nations Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 23 have all opined on the matter. Most relevantly, as per the UNGP, corporations are required to:¹²

- I. Identify and assess actual and potential adverse human rights impacts
- II. Assign responsibility for addressing these impacts in an integrated manner
- III. Cease or prevent adverse human rights impacts
- IV. Account for how they address their impacts
- V. Provide for remediation

Additionally, as per paragraph 42 of Chapter IV of the OECD Guidelines, companies are mandated to use their “leverage” to address and correct their impacts on human rights both in cases where their own actions are implicated and in cases where the actions of their subsidiaries and business partners are involved with “leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that causes adverse human rights impact.” Finally, General Comment 23 of the CESCR states that “while only States are parties to the Covenant,

12 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: 2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

business enterprises [...] have responsibilities to realize the right to just and favorable conditions of work. This is particularly important in the case of occupational safety and health given that the employer's responsibility for the safety and health of workers is a basic principle of labour law, intrinsically related to the employment contract, but it also applies to other elements of the right."

Notably, however, all of the above provisions represent international soft law principles and are not binding on companies. While a draft of a business and human rights treaty is being negotiated, it has often fallen upon domestic jurisdictions to give teeth to these norms and to hold companies accountable for human rights violations. In the sections that follow, we outline how domestic courts and states have dealt with the issue of corporate liability for human rights violations.

D. Domestic Laws on Corporate Accountability

California Transparency in Supply Chains Act of 2010: This act covers slavery and trafficking and requires every retail seller and manufacturer doing business in California and having worldwide gross receipts that exceed \$US100 million to disclose their efforts to eradicate slavery and human trafficking from their supply chains. The disclosure must be posted on the retail seller's or manufacturer's website.

UK Modern Slavery Act 2015: This act is limited to slavery, servitude, and forced or compulsory labor, as well as human trafficking, which are all traditional criminal offenses. Under Part 6, which relates to transparency in supply chains, commercial organizations must prepare a slavery and human trafficking statement. The statement must indicate the steps the organization has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains, nor in any part of its own business.

European Union Directive 2014/95: This Directive on disclosure of nonfinancial information requires undertakings that exceed 500 employees to present a nonfinancial statement. The material scope of this directive encompasses human rights in general, including all four core elements of the right to just conditions of work.

Devoir de vigilance des entreprises donneuses d'ordre: This 2017 French law makes it compulsory for large French companies to "[e]stablish and implement a diligence plan which should state the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers on whom they have a significant influence."

E. Judicial Decisions on Corporate Liability

Domestic cases against companies have taken two primary forms. First, companies have been sued for actions within their supply chains, and second, companies have been sued for the actions of their subsidiaries. We profile some of the most relevant cases below.

1. Cases against Buyers for Actions within Their Supply Chains

*The Costco Shrimp Case*¹³

In 2015, plaintiff Monica Sud and other plaintiffs who bought Costco shrimp sued Costco, Charoen Pokphand Food, PCL, and C.P. Food Products, Inc. under California's Unfair Competition Law (UCL), Business and Professions Code, False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA), alleging that the defendants had sold farmed shrimp from Southeast Asia "for which the supply chain was tainted by slavery, human trafficking, and other illegal labor practices," with specific reference to the fishmeal used for feeding the shrimp. The plaintiffs alleged that the defendants were aware of the dubious provenance of the fishmeal and that the statements on their website that they had a "supplier code of conduct which prohibits human rights abuses in our supply chain" and a "Disclosure Regarding Human Trafficking and Anti-Slavery" were misleading. Moreover, the plaintiffs alleged that Costco had failed to warn customers about these facts. The plaintiffs also alleged that the other defendants were aware of the issues with the prawn fishmeal but had both continued to issue public statements about being "committed to ensure that the supply chain was free from these human rights violations" and failed to inform California consumers, claiming that the company's supplier code of conduct hid the fact that the company was sourcing shrimp from companies with slave labor within their production lines. The district court noted that the case raised "significant ethical concerns" and asked questions that were similar to those asked in previous cases involving child labor in cocoa supply chains and slave labor in pet food¹⁴—that is, "whether California law requires corporations to inform customers" of these facts "on their product packaging and point of sale advertising." The court, however, ruled that the plaintiffs lacked the standing to pursue the case against both Costco and the non-Costco defendants.

With respect to Costco, the court accepted the company's argument that it had no duty to disclose the facts in issue to the plaintiffs and that the FAL did not apply to omissions. The court relied on previous decisions, including the cocoa and pet food cases, to note that the plaintiffs' claims under CLRA and UCL had not alleged that "these horrific labor practices" either "posed a safety risk to consumer [or] alleged they were a product defect." Additionally, the plaintiffs were not able to allege that Costco had superior or exclusive knowledge of the labor conditions alleged. Moreover, the court ruled that the plaintiffs were not able to show that they had substantially relied upon the disclosure and the code of conduct or indeed that they had "read or relied" or even that they were aware of these documents prior to making their purchase. While the plaintiffs also alleged that Costco had made "false statements" in its advertising, they were not able to show any particular advertisements they relied upon or even that Costco had engaged in a "long-term advertising campaign" that would allow them to avoid showing particularity. Finally, the court dismissed the plaintiffs' claims under the UCL prongs. The plaintiffs had alleged that the defendants' actions "actively contribute[d] to the use of slave labor in violation of bans on such human trafficking enacted by the U.S., California and by international conventions, including but not limited to the Tariff Act of 1930, [t]he Anti-Trafficking in Persons Act, the UN Declaration on Human Rights, and California Penal Code § 236, § 237 *et seq.* , and the Supply

¹³ Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1080 (N.D. Cal. 2017).

¹⁴ Cf. McCoy v. Nestle USA, Inc., 173 F.Supp.3d 954, 956 (N.D. Cal. 2016); Hodsdon v. Mars, Inc., 162 F.Supp.3d 1016 (N.D. Cal. 2016); Dana v. The Hershey Company, Inc., 180 F.Supp.3d 652 (N.D. Cal. 2016); Wirth v. Mars Inc., No. SA CV 15-1470-DOC, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016); Barber v. Nestle USA, Inc., 154 F.Supp.3d 954, (C.D. Cal. 2015).

Chains Act.” However, the court dismissed these arguments because the plaintiffs were not able to support these allegations. With respect to the unfair prong under the UCL, the court relied upon the previous Mars cocoa case to rule that given that such information was readily available otherwise, its absence on packaging did not pose an issue. Building on the Mars dicta that “Mars’s failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical,” the court dismissed this prong of the UCL claim, too. The court also dismissed the case against the non-Costco defendants because they could not establish that the prawns they purchased were sourced by these defendants—thus, the injury they alleged could not be traced to the actions of the defendants. The district court’s dismissal was affirmed by the Ninth Circuit.

The court’s dismissal is particularly worrying in light of legal developments in July 2020. In 2005, a group of child laborers filed cases against Nestle, Archer Daniels Midland and Cargill alleging that they had been forced to work on the cocoa plantations supplying these companies and that the companies had “aided and abetted violations of international law norms that prohibit slavery, forced labor, child labor, torture; and cruel, inhuman, or degrading treatment”. Although the case suffered a series of early losses, in 2018, the 9th US Circuit Court of Appeals called the case “plausible” and allowed it to proceed under the Alien Torts Claims Act (ATCA) on the basis that the companies were alleged to have paid kickbacks to local farmers to “guarantee the cheapest source of cocoa” and had, thus, facilitated child slavery on the cocoa plantations. Cargill and Nestle then appealed to the US Supreme Court and requested that the Court hold that corporations cannot be sued under ATCA. In recent years, courts in the US have significantly attenuated the scope and reach of ATCA but a ruling along the lines requested in this case would ring a death knell for similar human rights cases to be brought in the US.

Jabir et al. v. Kik

The Jabir case arose out of a fire that broke out in a Karachi garment factory and caused the deaths of approximately 260 people in 2012.¹⁵ Four Pakistani nationals subsequently filed a case in the Regional Court of Dortmund against KiK Textilien and Non-Food GmbH (KiK) because they were the main buyer associated with Ali Enterprises, the company operating the factory in question. The plaintiffs sought compensation for all families impacted by the fire as well as an apology and a commitment from the company to implement workplace safety measures at all of its outsourced clothing factories. After the case was filed, the ILO facilitated a negotiation, following which KiK paid \$5.15 million that would be used to, *inter alia*, provide pensions to the affected families. The company, however, did not acknowledge any responsibility and alleged that the fire was caused by arson and not due to unsafe working conditions. The case was significant because it was the first claim brought in German courts against a multinational company for human rights violations abroad. The Dortmund court dismissed the case, holding that under Pakistani law the statute of limitations to bring that case had expired. Moreover, the compensation paid by KiK was held to be a one-off payment that was not tantamount to a written admission of liability—the latter would have extended the limitation period. The plaintiffs have appealed the case.

15 Business & Human Rights Resource Centre, “KiK Lawsuit (re Pakistan),” <https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan>.

*Doe I et al. v. Wal-Mart Stores, Inc., 2009*¹⁶

The Wal-Mart case arose out of claims by employees of Wal-Mart suppliers located in Bangladesh, China, Indonesia, Nicaragua, and Swaziland and were based on a code of conduct that Wal-Mart included in its supply contracts. The code laid down minimum labor standards that the suppliers were bound to follow and allowed Wal-Mart to inspect and monitor these factories. The plaintiffs alleged that the emphasis on short deadlines and low prices in the supply contracts ensured that the suppliers were compelled to breach the code to fulfill the contract. Moreover, the plaintiffs alleged that in spite of knowing that the suppliers were breaching the code, Wal-Mart had not taken any steps to inspect the suppliers' facilities or to redress the violations. The Court of Appeals for the Ninth Circuit found, however, that the supply contracts relied upon by the employees were not meant to provide for the workers' protection and that Wal-Mart was not the plaintiffs' joint employer. Moreover, the court stated that the code did not impose a duty on Wal-Mart to inspect its suppliers' facilities but gave it a *right* to do so. Finally, the court ruled against the parties on their unjust enrichment claim in which the parties alleged that Wal-Mart had profited from knowingly contracting with suppliers with "substandard labor practices." The Court held that there was no prior relationship between the plaintiffs and Wal-Mart and that the connection between the parties "was too attenuated to support an unjust enrichment claim."

2. Cases against Parent Companies for Actions by Subsidiaries

The jurisprudence on holding parent companies liable for actions of their subsidiaries with respect to the treatment of employees is extremely mixed between different jurisdictions and even within jurisdictions. For instance, in the 2012 decision in *Chandler v. Cape plc*¹⁷ in the United Kingdom, the Court of Appeal upheld a High Court decision that a parent company had a duty of care toward its subsidiaries' employees to guarantee safe working conditions. The case was brought by an employee of Cape Building Products Ltd, a wholly owned subsidiary of the defendant, due to the asbestos exposure and subsequent asbestosis suffered by him. Since Cape Building had ceased to exist, the plaintiff brought a negligence claim against the parent company in the United Kingdom (UK), alleging that they had violated the duty of care owed to him. The High Court upheld the plaintiff's claim and set out a three-part responsibility test to determine when a parent company would be responsible for the actions of its subsidiary. First, the damage must be foreseeable; second, there must be sufficient proximity between the parties; and third, it should be "fair, just, and reasonable" for a duty of care to exist. The Court of Appeal affirmed the High Court's ruling and added that parent companies would be liable for the health and safety conditions in their subsidiary when: (1) the businesses of the parent and subsidiary companies were "in a relevant respect the same"; (2) the parent company had or should have superior knowledge about health and safety in that industry; (3) the parent knows or should have known that the working conditions in the subsidiary company are unsafe; and (4) the parent knows or should have known that the subsidiary's employees would rely on the former to use its knowledge for their protection.

¹⁶ *Doe I et al. v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (2009).

¹⁷ *Chandler v. Cape plc* [2012] EWCA Civ 525.

However, this decision does not represent an unambiguous willingness on the part of British courts to lift the corporate veil. In the subsequent case of *Thompson v. The Renwick Group plc*,¹⁸ which also dealt with the employee of a subsidiary company suffering from asbestos exposure, the court distinguished the case from *Chandler* on facts and held that in this case insufficient grounds existed for holding the parent company liable. Thus, while the *Chandler* test was affirmed, the case showed that meeting it could prove to be a challenge for claimants. The Court noted, for instance, that simply the appointment of a director to the subsidiary by the parent company could not give rise to an assumption of a duty of care between the parent and the subsidiary's employees.

In 2019, however, the UK courts allowed Zambian claimants to continue pressing their case against Vedanta in England.¹⁹ *Vedanta Resources PLC et al. v. Lungowe et al.* was brought by 1,826 Zambian villagers who alleged that Vedanta and its Zambian subsidiary had operated the Nchanga copper mine in a manner that caused water pollution and harmed neighboring communities. Both defendants challenged the jurisdiction of the English courts to hear the case because the alleged violations and harms had occurred in Zambia. Both the High Court and the Court of Appeal held that the courts in England had jurisdiction, a decision affirmed by the Supreme Court. The Court partly based its decision on the findings of the lower courts that the plaintiffs intended to pursue a genuine claim against Vedanta, at least in part because the subsidiary might be judgment-proof. Moreover, the court also ruled that multinational companies could put in place several models of management and control, which might give rise to a duty of care toward third parties. While the substantive issues will only be settled in due course, this case represents an important step forward in allowing cases to proceed against parent companies for violations by their subsidiaries.

Finally, in February 2020, the Canadian Supreme Court rendered a significant decision for business and human rights in *Nevsun Resources Ltd. v. Araya*.²⁰ The case concerned the working condition in the Bisha mine in Eritrea, which was operated by Nevsun's subcontractor and owned by Eritrea's ruling party. The plaintiffs in the case alleged "cruel, inhuman and degrading treatment," long hours, intimidation, and living in fear of being tortured. Nevsun rejected the allegations and declared that "the Bisha Mine has adhered at all times to international standards of governance, workplace conditions, and health and safety." In October 2016, the Supreme Court of British Columbia ruled that the case should proceed in British Columbia because there were doubts that the plaintiffs would get a fair trial in Eritrea. In November 2017, the British Columbia Court of Appeal rejected Nevsun's appeal to dismiss the suit and also allowed claims of crimes against humanity, slavery, forced labor, and torture to go forward against Nevsun. On February 28, 2020, the Canadian Supreme Court dismissed Nevsun's appeal and ruled that the lawsuit can proceed. Notably, the court held that international norms can be applied to the plaintiff's case. Nevsun argued the case should be thrown out because domestic courts are precluded from assessing the acts of foreign governments. This argument was rejected by the court.

18 *Thompson v. The Renwick Group plc* [2014] EWCA Civ 635.

19 *Vedanta Resources PLC et al. v. Lungowe et al.* [2019].

20 *Nevsun Resources Ltd. v. Araya* [2020] SCC 5.

F. Summary of Recommendations

In brief, as the cases above show, holding companies liable for human rights violation is not straightforward or predictable. In spite of that, however, courts are beginning to take steps to hold companies liable. What is also clear is that these cases are crystallizing important principles for sanctioning corporate human rights violations in the fisheries sector:

- The fisheries sector is unique by virtue of several of its characteristics, especially with respect to its transnationalism and the nature of the work itself. As such, solutions must draw upon an understanding of the networks and factors that perpetuate abuse and human rights violations within this sector.
- It is clear that repurposing laws intended for a different purpose (for instance, false advertising, consumer safety, and so on) for sanctioning human rights violations is likely to founder. Attempting to draft clear and unambiguous laws and regulations setting out company obligations and penalties is likely to go a lot farther.
- It is also clear that courts in jurisdictions like the US have faulted individuals for failing what might be called the “reliance” barrier—that is, the need to show that individuals have relied on company human rights statements prior to purchases. However, this barrier is likely to be met if more and more companies are required to make public statements and conduct campaigns about their efforts and if consumers can be shown to have relied on such representations prior to making their purchases.
- Regulation needs to be holistic and integrated. Surya Deva’s integrated model of addressing corporate liability is particularly appropriate in this context. Deva notes that regulation should occur at three levels—institutional (via, for example, voluntary codes), national (through home and host country laws), and international (through international agreements and binding treaties setting out corporate human rights obligations). Moreover, Deva argues that regulatory initiatives should make an effort to include both incentives and disincentives and should impose civil, criminal, and social sanctions simultaneously to ensure robust enforcement of corporate human rights responsibilities.

G. Role of Different Stakeholders

- Media: Investigations, campaigns, report on abuses and status of compliance, publicize existing cases and NGO efforts, publicize existing company codes so that consumer reliance on those codes and declarations becomes easier to prove.
- Legal community:
 - Judicial options: File cases in domestic courts in countries where the abuse occurs, file cases in the headquarters where the companies are located, target both the operators and the buyers. Contemplate strategic litigation for policy change as

well as compensation, push for countries to sign Convention C188 and enact implementing legislation for the international agreements.

- Legislative/policy options: Work with governments to set up rigorous domestic requirements for safe labor practices and push for integrated legal change that addresses, *inter alia*, criminal law, labor law, migration law, and environmental laws.
- Private sector options: Work with companies to set up robust due diligence, monitoring, and enforcement policies and actions, and incorporate contractual clauses that establish environmental and human rights obligations.
- International bodies: Publicize the issue more broadly, conduct investigations on human rights abuses in the fisheries sector, and work with the UN Special Rapporteur on Human Rights and the Environment to discuss the matter at a broader level, file a petition before the CESCR.
- Governments: Legislate, inspect, investigate, prosecute, monitor. Respect, protect, fulfill. Especially ensure that the full suite of reforms is adequately implemented and enforced.
- Academic community: Research abuse both qualitatively and quantitatively, build data platforms to analyze and predict hotspots, research gaps in laws and conventions.
- NGOs: Sensitize workers to their rights (for example, job orientations), educate employers, publicize and train different stakeholders about existing laws and legal changes, investigate issues, file cases, lobby the government for change.

H. Future Research Questions

- How do you build a campaign around sensitizing consumers to human rights abuses in the fishing industry?
- Why and how have certification programs in fishing and other natural resources succeeded and failed in the past?
- What would a model law that addressed corporate liability for human rights look like?
- What national legislative changes were introduced by Thailand after the Associated Press (AP) investigation? Are they replicable and generalizable in countries like the United States?
- What are the barriers to implementation of Convention C188?

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- Compare and analyze the model action plans of major companies with respect to eradicating slavery in fishing.
 - Examine Convention C188 compliance measures by countries as a guide for other nations.
 - Is there any obligation that can be argued for countries to move to a closed registry instead of an open one? How many of the countries implicated in IUU fishing and human rights abuses have open registries? What is their level of treaty compliance?
 - Can states be sued for the actions of their flagged ships?
 - What methodologies are used by benchmarks like Corporate Human Rights Benchmark to assess the robustness of human rights due diligence?
 - Conduct case studies and process tracing for existing cases.

V. FORCED LABOR AND INSURANCE: A Legal Note

Shalini Iyengar

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A. Introduction

The insurance sector occupies a curious place within the broader corporate world. On one level, as corporate actors, they are subject to the vagaries of the markets. On the other hand, by determining which risks are acceptable and which risks can be spread out over time and space, insurance companies in a very real sense create the markets themselves. This puts insurance companies in a powerful position to effect change in the business-as-usual paradigm—after all, without the insurance companies’ imprimatur, the wheels of global commerce would quite quickly draw to a standstill. This paper explores the many roles that insurance companies can play in curbing forced labor within the fishing industry, with a specific focus on the distinct space occupied by these companies.

B. Background

The insurance sector has had a long and problematic history with human rights violations. For instance, within the American context, insurance companies have been held to be directly complicit in supporting the practice of slavery through insuring enslaved people so as to give slave owners three-fourths of the value of the slave if the slave happened to die. In other cases, enslaved people were considered to be collateral and were, on occasion, repossessed by the insurance companies in cases of default. At one point, some companies saw up to a third of their profits come from slave-related policies.

In more recent years, companies have increasingly begun to acknowledge this ugly legacy. From a legislative standpoint, in 2000, the Slave Era Insurance Policies Bill (SB 2199) became law in California. This requires insurers to disclose slaveholder insurance policies issued during the slavery era.¹ This background provides an important framing for the current context of understanding the role and influence of insurance companies. It also adds urgency to the issue

¹ California Department of Insurance, “Slavery Era Insurance Policies - SB 2199,” accessed August 2020, <http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/sb2199.cfm>,

of the insurance sector's obligations to address endemic instances of forced labor and slavery within the fisheries sector. Arguably, this ugly backdrop creates a sharper sense of urgency for insurance companies to take steps to curb modern-day slavery by amending their insurance practices

In addition to the background of previous insurance company support for slavery, there has been increasing consciousness about the importance of identifying the human rights responsibilities and obligations of insurance companies. To begin with, the business and human rights legal framework (for instance, the United Nations Guiding Principles on Business and Human Rights) applies to insurance companies as well. Additionally, the United Nations Environment Program Financial Initiative published the Principles for Sustainable Insurance to identify the standards and obligations of the insurance sector.² These principles call for insurance companies to address environmental, social, and governance issues internally, with clients, and to work with governments to develop regulations in this sector. Companies also commit to publishing their progress in implementing the principles. A combination of these principles and company disclosure responsibilities under legislations such as the United Kingdom Modern Slavery International Institute for Environment and Development Act and the French Duty of Vigilance law arguably creates positive obligations for insurance companies.

Finally, there is a very real business case to be made for more attention by insurers to the risks associated with human rights violations in their insured companies. Human rights violations in supply chains, on property, and in working conditions potentially expose insurance companies to costly payouts and higher risk profiles, in addition to being damaging to their reputations.

C. Risks, Moral Hazards, and Insurance

Insurance plays several roles in the commercial sphere. The first and perhaps most obvious role is that of risk shifting and risk pooling, since insurance works by guaranteeing *ex-post* indemnification.³ However, insurance also has important roles to play in risk reduction and management.⁴ The former is achieved by way of instruments such as “deductibles, exclusions, and experience-rating,” which incentivize insured entities to reduce their risk exposure.⁵ In addition, insurance companies rely on large collated databased to “classify and price” risk *ex-ante*, as well as to determine the validity of claims on an *ex-post* basis.⁶

All of these measures lead to understanding the ways in which insurance addresses the issues of moral hazard. Broadly speaking, moral hazard refers to the phenomenon of insurers taking less care than they otherwise would because they assume that the risks ensuing from their actions

2 United Nations Environment Programme Finance Initiative, “PSI: Principles for Sustainable Insurance,” accessed August 2020, <https://www.unepfi.org/psi>.

3 Kyle D. Logue and Omri Ben-Shahar, *Outsourcing Regulation: How Insurance Reduces Moral Hazard* (Chicago: University of Chicago Law School, 2012), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1358&context=law_and_economics.

4 Ibid.

5 Ibid.

6 Ibid.

have been outsourced to the insurer.⁷ In the specific context of forced labor, the phenomenon of moral hazard would lead to considerations of whether the insured parties would be more cavalier about the risks associated with trafficking and forced labor if they knew that they carried insurance specifically to reduce the costs of the risk. While it is beyond the scope of this paper to delve deeper into the issue, available literature suggests that this risk can be obviated in a variety of ways. This literature suggests that insurance has the potential to convert concerns over risks and potential liability to concrete losses and harm mitigation measures.⁸ For instance, the insurers might impose certain obligations including due diligence, adequate procedures, and monitoring on the companies employing workers. Insurers also tend to impose exclusionary clauses, including criminality, personal responsibility, and a lack of certain precautions being taken. In addition, insurers often establish acceptable standards for their insured clients and monitor their clients to ensure that these standards are maintained. Finally, by retaining the power to refuse to pay out in the event that their requirements are not satisfied, insurers possess a powerful instrument to ensure continuing compliance with the conditions under which the insurance was granted.

D. Types of Actions

The following is a list of possible avenues for research:

- Getting the insurance sector to exclude risks arising from slavery and forced labor across their various product lines. In the section that follows, I outline some recent jurisprudence from the United States where insurance companies have attempted to use exclusionary language in the insurance contract to argue that they do not have a duty to indemnify or defend their customers in trafficking cases.
- Developing new insurance lines that specifically address issues of human trafficking, forced labor, and slavery. This could, for instance, cover fishermen and pay out in situations of slavery and forced labor. In the case of antitrafficking insurance, each person employed on a fishing vessel would be required to be protected by a policy against human trafficking whose premium would be paid by the employer. In the event that the employee in question was trafficked, the policy might cover compensation and repatriation for the insured. Such a policy would have the dual effect of helping protect the insured against labor exploitation while also dissuading the employer from employing trafficked labor, since the insurance company would presumably retain the right to sue the employer to recover the payout. The risk of the latter would ideally make the employer more diligent in ensuring that the labor they employ has not been trafficked. Similarly, insurance programs could be modeled along the same lines as existing workmen's compensation funds—these could be required to pay out in case of onboard injuries suffered by workmen.
- Creating and disseminating knowledge. Insurance companies are distinguished by their ability to take a macro-level view of circumstances and risks. As such, they are able to contribute to the information space in multiple ways. First, insurance companies can share

7 Christopher Parsons, "Moral Hazard in Liability Insurance," *The Geneva Papers on Risk and Insurance* 28, no. 3 (July 2003): 448–71.

8 [Supra, note 3.](#)

their projections of long-term risks with their customers to allow them to make more long-term sustainable decisions. For instance, given that the generation and synthesis of information is the bedrock of insurance companies' practice, it is possible for such information to be valuable for smaller companies that have neither the capacity nor the resources to generate similar insights. Second, insurance companies can use their informational heft to nudge companies into making better socially and environmentally responsible decisions. Additionally, insurance companies are in a position to signal human rights violations within different industries and locations. One interesting example of how this information can help in achieving human rights goals arises from the partnership between Aviva and the Amsterdam-based Seafood Stewardship Index (SSI).⁹ The SSI-Aviva partnership arose out of a perceived need to build a risk assessment tool for rating seafood companies on their sustainability performance.¹⁰ The tool has the stated objective of providing information to investors and the potential for such methods to generate and thereby improve transparency and accountability in cases of abuse.

- Developing a human rights due diligence process.¹¹ The idea underlying such a process would include decisions on how human rights considerations can be integrated within the risk management and underwriting processes undertaken by the insurance companies. One example of such integration is visible in the Allianz environmental, social, and governance (ESG) guidelines discussed below.¹²
- Monitoring and accountability. Insurance companies have a role to play in several stages of the insurance process. Not only can risks be triggered at the time that the insurance is initially granted, such risks can be identified and highlighted in later stages of the process as well. For example, in one instance, Munich Re provided insurance coverage to a hydroelectric power plant, and during the construction of the dam, risk engineers noted poor working conditions at the site. The construction company was unwilling to engage, but the insurer was able to coordinate with the financiers (arguably also because insurance is a necessary precondition to the continuation of funds) to improve site conditions.
- Getting insurance companies to deny insurance to those companies that have been involved in any incident having to do with forced labor, illegal, unreported, and unregulated fishing, or slavery.
- Getting insurance companies to deny insurance to fishing vessels without International Maritime Organization numbers or to those that have flags of convenience.

9 The Seafood Stewardship Index was established with the intention "to independently and objectively measure the performance of companies across the seafood industry that have a major impact on the environment as well as on social issues."

10 University of Oslo, *The Rights of the Fishermen: A Study of Why the Human Rights Situation within the Seafood Industry Should Be Addressed*, Faculty of Law (2018), https://www.duo.uio.no/bitstream/handle/10852/63813/masterthesis_HUMR5200_2018_KAND8014.pdf?sequence=1&isAllowed=y.

11 CRO Forum, *Human Rights and Corporate Insurance* (Amstelveen, the Netherlands, 2014), <https://www.thecroforum.org/wp-content/uploads/2014/11/human-rights-and-corporate-insurance-november-2014-2.pdf>.

12 Allianz, *ESG Integration Framework* (Group ESG Office, 2018), https://www.allianz.com/content/dam/onemarketing/azcom/Allianz_com/sustainability/documents/Allianz_ESG_Integration_Framework.pdf.

E. Jurisprudence on Insurer Liability for Human Rights Abuses

The case of *Nautilus Insurance Company v. Motel Management Services, Inc.*¹³ concerned a suit for trafficking being brought by a minor woman against motel operators under Pennsylvania's Human Trafficking Law.¹⁴ The plaintiff alleged, *inter alia*, that the motel operators' negligence and failure to intervene had allowed the trafficking to occur. In the course of the proceedings, the motel owners sought to have the insurers defend it in the matter. However, the insurer challenged this effort and argued that the assault and battery exclusion clauses in the insurance contract precluded any obligation to defend on the insurer's part. The district court ruled in the insurance company's favor and held that since the matter arose from "facts alleging negligent failure to prevent an assault or battery," the company was not bound to defend and indemnify the motel operators. The district court's decision was affirmed by the Court of Appeals for the Third Circuit.

In another case in Massachusetts, however, the court saw the insurer's liability differently. In *Peerless*,¹⁵ a trafficking victim filed a case against a motel under the civil remedy provisions of the Trafficking Victims Protection Act. The court was, *inter alia*, asked to rule on whether the insurer had a duty to defend motel owners against trafficking charges. Unlike the *Nautilus* case, the court in this case held that the insurer had such an obligation, owing to the wording of the policy that covered "false imprisonment." The court thus noted that the insurer was liable to defend the claim. Taken together, the cases show how insurers face potential liabilities in trafficking cases.

F. Human Rights Due Diligence: The Allianz Case

The insurance giant Allianz unveiled a policy to address ESG risks across its group of companies. The policy includes human rights risks and fisheries as two of their thirteen "sensitive business areas."¹⁶ Once ESG risks are identified, it triggers a mandatory referral to a specialized team that then analyzes the issue further. The guidelines note that the human rights aspect of the ESG screening is informed by the United Nations (UN) Universal Declaration of Human Rights, ILO standards, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights. The company specifically examines the risks arising from the following workplace practices: (1) disregard for labor rights, including collective bargaining and unionization rights; (2) physical harm or inappropriate conduct of security personnel; (3) involvement in child labor; (4) substandard working conditions, including poor health and safety standards and low wages; and (5) substandard working conditions of subcontractors.

With respect to fisheries, Allianz bases its assessment on a variety of sources, including the Marine Stewardship Council, the Greenpeace International Blacklist, Food and Agriculture Organization of the United Nations guidelines, and international human rights law. In addition to fisheries risks, Allianz also examines workforce conditions, including (1) disregard for labor

¹³ *Nautilus Insurance Company v. Motel Management Services, Inc.*, No. 18-2290 and 18-3436 (3d Cir. 2019).

¹⁴ 18 Pa.C.S. § 3011 (Feb. 5, 2020).

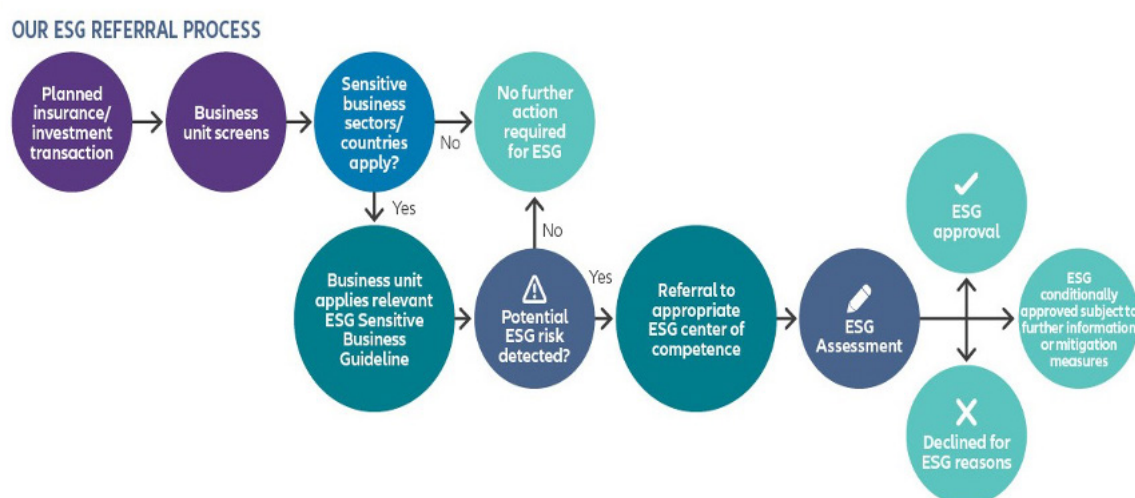
¹⁵ *Ricchio et al. v. BIJAL, INC.*, Dist. Court, D. Massachusetts (2019)

¹⁶ *Supra*, note 12. The other areas include agriculture, fisheries and forestry, agricultural commodities investments, animal welfare in agriculture, betting and gambling, clinical trials, animal testing, defense, human rights, hydroelectric power, infrastructure, mining, nuclear energy, oil and gas, and the sex industry.

rights, including collective bargaining and unionization rights; (2) involvement in child labor; (3) involvement in forced labor or human trafficking; and (4) substandard working conditions, including health and safety standards and wages.¹⁷

Allianz uses these guidelines to screen insurance transactions and score the ESG performance of listed assets. (Companies that score below a certain threshold require either an explanatory note from the asset manager or divestment.) Moreover, as per its website, Allianz helps the lowest-scoring listed assets in their portfolio improve their ESG performance and also excludes certain sectors from investment based on ESG considerations. In assessing ESG issues, the company follows the steps in Figure 1.

Figure 1. Allianz ESG Referral Process¹⁸



¹⁷ Ibid.

¹⁸ Allianz, "Our ESG Approach," accessed August 2020, <https://www.allianz.com/en/sustainability/business-integration/esg-approach.html>.