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**The Imposition and Enforcement of International Labour
Standards on Fishing Vessels in South East Asia: Challenges
and Potential Solutions**

Abstract

This paper is made up of four parts. Consideration is given to the labour conditions that exist aboard fishing vessels in the region of South East Asia, and in particular in the fishing industry of Thailand. Secondly, international labour standards applicable to the South East Asia fisheries context are identified and discussed. Thirdly, challenges to the implementation of these standards at a multilateral, regional and domestic level are discussed, using Thailand as a case study at a domestic level. Finally, potential means of remedying such challenges, including unilateral action by states or non-state actors are considered. This paper concludes that both regional agreements, and unilateral actions by states, which allow for the implementation of economic sanctions if international labour standards are violated, may effectively encourage states in South East Asia to implement international labour standards in a meaningful fashion.

Word length

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I Introduction

In an increasingly competitive global marketplace, ensuring that a business remains viable requires a fastidious focus on increasing efficiency in production and minimising operating costs. Constant attention is required in this environment to ensure that working standards are not sacrificed in a bid to promote the economic viability of any one industry.¹ International standards for appropriate labour conditions provide guidance on what basic conditions should be expected in an industry, no matter where that industry is based. However, it is simpler to impose, monitor and enforce labour standards in some workplaces than others. Fishing vessels, in particular, have proven to be unique workplaces posing their own particular challenges for adherence to labour standards. This is largely because fishing vessels have no fixed location, may spend long periods at sea without returning to land, do not always bring their catch to the same port, and may move between jurisdictions and the high seas in the course of their operations.²

The South East Asian region is home to abundant, albeit rapidly depleting, fish stocks, and for that reason, a number of states in the region have well-established fishing industries of considerable economic importance.³ Media reports over the last five years have, however, alleged that poor working conditions are prevalent aboard fishing vessels in the region.⁴ This research paper considers what international labour standards are applicable to the fishing industries of South East Asia, and to what extent breaches of these international labour standards have been documented. The paper then addresses the challenges evident at a multilateral, regional and domestic level in ensuring that the identified international labour standards are complied with. Finally, the paper identifies options for remedying these challenges through multilateral and regional action, and through unilateral steps taken by both state and non-state actors.

¹ Sigrid Koch-Baumgarten and Melanie Kryst “Trade Unions and Collective Bargaining Power in Global Labour Governance” in A Marx, J Wouters, G Rayp and L Beke (eds) *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edgar Elgar Publishing Limited, Cheltenham, 2015) 150 at 152 .

² International Labour Organisation *Caught at Sea: Forced Labour and Trafficking in Fisheries* (International Labour Office, May 2013) at 25.

³ International Labour Organisation *Employment Practices and Working Conditions in Thailand’s Fishing Sector* (International Labour Organisation Country Office for Thailand, Cambodia and Lao People’s Democratic Republic, 2013) at 14-15.

⁴ International Labour Organisation, above n 3, at 33.

II Background: Conditions in South East Asian Fisheries

A range of assessments by international actors such as the United Nations Office on Drugs and Crime (UNODC), the International Labour Organisation (ILO), and the International Organisation on Migration (IOM) have concluded that poor labour practices exist in the fishing industry in South East Asia, and particularly in Thailand's fishing industry.⁵ Such poor labour practices are reported to include forced labour, child labour, physical violence, and the non-payment of wages.⁶ Some of these conditions are argued to have come about as a result of a drive to cut labour costs, resulting in a labour market primarily constituted of migrants, amongst whom knowledge of Thailand's labour rights and standards is relatively poor.⁷

Allegations of poor labour conditions have also been made more broadly in the South East Asian region. Labour concerns were the focus of reporting by the Associated Press in 2015, with reports that more than 1000 migrant fishermen from across South East Asia were subject to forced labour on fishing vessels in Indonesia.⁸ Along with poor labour practices, this case highlighted the cross-regional nature of the fishing industry in South East Asia, with employees drawn from across the region, and companies with both Indonesian and Thai linkages.⁹ These factors can impact upon the ability of observers to monitor and understand the scale of poor labour standards being applied in the South East Asia fishing industry. Poor labour practices in Thailand's EEZ have been well documented, however, while there is significant anecdotal evidence suggesting that similar conditions are widespread throughout the rest of South East Asia, empirical data establishing such suspicions as fact is limited.¹⁰

III International Labour Standards, Rights and Obligations on Fishing Vessels in South East Asia

It is evident that poor labour practices have been documented to some degree in the fishing industry in South East Asia, and in particular in the Thai fishing industry, the

⁵ Douglas MacFarlane "The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand" (2017) 7(1) *Asian Journal of International Law* 94 at 99.

⁶ MacFarlane, above n 5, at 99.

⁷ International Labour Organisation, above n 3, at 33.

⁸ International Organisation on Migration *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (International Organisation for Migration, 2016) at 35.

⁹ International Organisation on Migration, above n 8, at xi.

¹⁰ International Organisation on Migration, above n 8, at 3.

largest fishing industry in the region.¹¹ The issue of whether international labour standards govern such activity must, as a result, be considered. Several instruments established under the auspices of the ILO set out international labour standards applicable to the South East Asian fishing industry.

Prominent among the international labour standards that exist is the prohibition on forced labour (established in ILO Conventions of 1930 and 1957).¹² The prohibition on forced labour was highlighted in the ILO's Declaration on Fundamental Principles and Rights at Work¹³ (Declaration) which set out obligations for states to adhere to even if states have not ratified the individual conventions setting out the rights referred to in the Declaration.¹⁴ As such all South East Asian states, including Thailand, are required under international law to abide by the prohibition on forced labour within their domestic jurisdictions, including in the fisheries sector.

Other key international labour standards pertinent to the fishing industry are established by the Declaration, and include the freedom of association, effective recognition of the right to collective bargaining, and a prohibition on child labour.¹⁵ All of these international labour standards are applicable to the South East Asian fishing industry, given their wide acceptance as global norms.¹⁶ Evidence of violations of at least some of these key standards in the South East Asian context is also evident (particularly the prohibition on child labour), with violations most clearly apparent in the Thai fishing industry.¹⁷

A number of more granular labour standards established at an international level and relating directly to the fishing industry are set out in the ILO Work in Fishing Convention of 2007 (Work in Fishing Convention),¹⁸ which lays down expectations for safety on board vessels, rest periods, recruitment, and social security for workers on fishing

¹¹ MacFarlane, above n 5, at 98.

¹² International Labour Organisation, above n 2, at 26.

¹³ International Labour Organisation Declaration on Fundamental Principles and Rights at Work 37 ILM 1233 (adopted 18 June 1998).

¹⁴ Declaration on Fundamental Principles and Rights at Work, above n 13, at art 2(b).

¹⁵ Declaration on Fundamental Principles and Rights at Work, above n 13, at art 2.

¹⁶ Declaration on Fundamental Principles and Rights at Work, above n 13, at art 1(a).

¹⁷ MacFarlane, above n 5, at 99.

¹⁸ International Labour Organisation Work in Fishing Convention No. 188 (adopted 14 June 2007, not in force).

vessels.¹⁹ Its application is broad, encompassing all commercial fishing operations, regardless of their size.²⁰ It sets out minimum standards designed to be appropriate for implementation by both developed and developing states.²¹ The Work in Fishing Convention is also accompanied by the non-binding Work in Fishing Recommendation,²² which offers guidance as to good regulation in this area.

The Work in Fishing Convention also provides innovative options for ensuring that the standards set out in the Convention may be monitored and enforced. In particular, the Convention provides optional port state jurisdiction for states that are party to the Convention to investigate, report on and take steps to rectify, alleged violations of the Convention on ships in its ports, even in cases where the flag state of the ship in question has not ratified the Convention.²³ While an optional power rather than an obligation, this enforcement mechanism under the Work in Fishing Convention goes some way to making the labour standards contained in the Convention meaningful in a practical sense.²⁴

Despite the significant advances that the Work in Fishing Convention demonstrates in establishing credible, implementable and enforceable international labour standards for the fishing industry, the Convention has yet to come into force. It will only do so twelve months after ten ILO Member States have ratified it, and of these, eight must be coastal states.²⁵ No South East Asian country has yet ratified the Work in Fishing Convention. For Thailand to do so, significant changes would be required with regard to domestic legislation, particularly in the fields of minimum working age, standards on rest hours, training, and occupational safety and health.²⁶ Indonesia, too, has not ratified this Convention nor expressed an intention to do so.²⁷ As such, these international labour

¹⁹ International Labour Organisation *Work in Fishing Convention and Recommendation, 2007: Action Plan 2011 – 2016* (International Labour Office, 2011), at 3.

²⁰ International Labour Organisation, above n 3, at 18.

²¹ International Labour Organisation, above n 3, at 18.

²² International Labour Organisation Recommendation Concerning Work in the Fishing Sector No. 199 (adopted 14 June 2007).

²³ George Politakis “From Tankers to Trawlers: the International Labour Organization’s New Work in Fishing Convention” (2008) 39 *Ocean Development and International Law* 119 at 125

²⁴ Politakis, above n 23, at 126.

²⁵ International Labour Organisation *Work in Fishing in the ASEAN Region: Protecting the Rights of Migrant Fishers* (International Labour Organisation Office for Asia and the Pacific, 2014) at 4.

²⁶ International Labour Organisation, above n 3, at 19.

²⁷ International Organisation on Migration, above n 8, at 11.

standards remain relevant aspirational targets for South East Asian fishing industries but are not yet legally binding on these states.

IV Challenges to the Efficient Application of these Standards in South East Asia

1 Multilateral Challenges

International labour standards are an effective tool for establishing widely accepted global norms for industries such as fishing. However, the primary multilateral-level challenge to the promotion of such standards is that international standards are difficult to enforce, both by states, and by international organisations.

For states, enforcement difficulties may arise through a lack of will to pursue complaints against other states, rather than the absence of an appropriate mechanism for doing so. In relation to violation of obligations set out in ILO Conventions, states do have recourse to some degree of international dispute settlement. The ILO Constitution makes provision for members of the ILO to file a complaint with the International Labour Office if the member believes that another member has failed to observe a Convention which both members have ratified.²⁸ These complaints may lead to a Commission of Inquiry, and if either member does not agree with the recommendations of that Commission, the issue may be referred to the International Court of Justice.²⁹ However, in practice, no case has been brought before the International Court of Justice through this mechanism.³⁰ As such, while recourse to international arbitration bodies is available in the context of international labour standards, it is arguably difficult to incentivise a state to bring an international dispute against another state for violations of international standards taking place within a state's own domestic jurisdiction.

International organisations may have more will to pursue states in violation of their international obligations, but may have limited capacity to enforce international standards developed under their auspices. This difficulty makes labour standards complicated to

²⁸ International Labour Organisation Constitution 15 UNTS 40 (opened for signature 1 April 1919, entered into 28 June 1919), art 26.

²⁹ International Labour Organisation Constitution, above n 28, art 29.

³⁰ Yoshinobu Takei "International Legal Responses to the Flag State in Breach of its Duties: Possibilities for Other States to Take Action against the Flag State" (2013) 82 Nordic Journal of International Law 283 at 290.

enforce at an international level.³¹ Notable examples are the prohibitions on child labour and on forced labour, set out in the Declaration. While undoubtedly global norms, the ILO has no capacity to enforce such norms among its membership. It can register complaints against bodies that it considers to have breached international law, but cannot impose sanctions on states.³² As such the effectiveness of international labour standards depends to a large extent on the degree to which these standards are incorporated in domestic legislation and enforced by domestic bodies.

2 *Regional Challenges*

Regional-level challenges in South East Asia also add complications to the enforcement of international labour law standards. Particular challenges in the fisheries context include the difficulty of monitoring the activities of long-distance fishing ventures traversing jurisdictions; the challenge of managing and monitoring flows of migrants that make up a large part of the regional fisheries workforce; and difficulties related to establishing jurisdiction over labour law violations on vessels fishing within a state's EEZ.

The capacity of states in the region to monitor the activities of fishing vessels operating at great distance from their flag state's ports may create complications in the effective implementation of international labour standards in South East Asia's fisheries sector. As the potential catch available close to shore has decreased, vessels in the region are now travelling further from coastal waters than had been the case in the second half of the last century.³³ Long-distance operations bring with them challenges in the form of long periods offshore for fishing vessels. This can make compliance with international labour standards difficult for states or observers to monitor, and can also add to the difficulty faced by workers seeking to leave employment if working standards are poor or exploitative.³⁴ The ability of South East Asian states to monitor and enforce international labour standards in such circumstances is complicated by the overlapping claims to EEZs that exist in the region, making it unclear which state is best placed, or has the jurisdiction, to monitor or enforce labour standards in these zones.³⁵ A number of states

³¹ Koch-Baumgarten and Kryst, above n 1, at 152.

³² Ceren Pekdemir, Pieter Glasbergen and Ron Corvers "On the Transformative Capacity of Private Fair Labour Arrangements" in A Marx, J Wouters, G Rayp and L Beke (eds) *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edgar Elgar Publishing Limited, Cheltenham, 2015) 209 at 209.

³³ International Labour Organisation, above n 3, at 11.

³⁴ International Labour Organisation, above n 3, at 31.

³⁵ International Labour Organisation, above n 3, at 11-12.

in the region have entered into joint venture arrangements with other states, allowing vessels of one flag state to fish legally in the EEZs of other states in the region.³⁶ Such arrangements should, in theory, also extend the capacity of other states in the region to monitor and enforce labour conditions on vessels operating across jurisdictions. However, in practice, capacity for such activities is low.³⁷

A second challenge at a regional level is the lack of coordinated policy or legislation promulgated by states in South East Asia to manage and monitor flows of migrants (both regular and irregular) in the region. Migrant labourers make up a large part of the fishing industry in South East Asia, and are more likely than others in this sector to be victims of violations of international labour standards such as the prohibition on forced labour.³⁸ An effective regulatory framework across the region managing flows of migrant labour and ensuring that those travelling for economic reasons are covered by domestic labour regimes in destination jurisdictions would protect many of those most at risk of violations of international labour standards. However, Thailand, Cambodia, the Philippines, Viet Nam and Indonesia are all considered by the ILO to have regulatory gaps in the field of management and protection of migrant workers.³⁹

Limits to jurisdiction are a final regional challenge for states looking to ensure adherence to international labour standards in the fishing industry in South East Asia. This is principally due to the fact that jurisdiction over labour-related activities on board fishing vessels, under international law, falls primarily to the flag state.⁴⁰ As such, South East Asian states would have no jurisdiction to enforce their domestic labour laws on fishing vessels fishing legally within their EEZs if those vessels were not flagged to their own state. Other regions have also grappled with this jurisdictional complexity, and identified creative solutions for managing such issues. New Zealand, for example, required in 2016 that vessels fishing in New Zealand's EEZ be registered in New Zealand.⁴¹ This change ensured that New Zealand would have jurisdiction over labour matters on board vessels fishing within New Zealand's EEZ.⁴²

³⁶ International Labour Organisation, above n 3, at 11.

³⁷ International Organisation on Migration, above n 8, at 8.

³⁸ International Labour Organisation, above n 3, at 11.

³⁹ International Labour Organisation, above n 25, at 11.

⁴⁰ United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), arts 92 and 94.

⁴¹ Fisheries Act 1996, s 103.

⁴² International Labour Organisation, above n 4, at 38.

3 *Domestic Challenges*

At a domestic level, there is a range of challenges associated with ensuring the effectiveness of international labour standards in the context of the fishing industry of South East Asia. Potential impediments include the readiness of states to implement international standards in domestic law; and the willingness and capacity of states to enforce such domestic provisions when they are in place. Thailand, with the largest fishing industry in the South East Asia region, is a useful case study for analysing these potential limitations.

The implementation of international labour standards in domestic law is the first fundamental step a state can take to ensure domestic consistency with international law and the establishment of domestic protections that meet international expectations. In the context of labour protections in the fisheries sector, Thailand has developed legislation that goes some way towards meeting international standards. Several key pieces of legislation govern the fishing industry in Thailand's EEZ: the Fisheries Act 1947,⁴³ the Act Governing the Right to Fish in Thai Fishery Waters 1939,⁴⁴ and the Thai Vessel Act 1938.⁴⁵ The primary piece of Thai legislation focusing on labour matters is the Labour Protection Act,⁴⁶ with Ministerial Regulation 10 on Sea Fisheries Work (1998)⁴⁷ establishing which provisions of this Act may apply in the fisheries sector.⁴⁸ The Anti-Trafficking in Persons Act 2008⁴⁹ also contains provisions of relevance to labour protections.

Thailand's legislative framework seeks to implement its international labour obligations in a range of ways. While the Labour Protection Act 1998 provides a range of protections focused on wages, hours of work and health and safety, the fishing sector is exempted from the application of the Act.⁵⁰ Ministerial Regulation 10 on Sea Fisheries Work 1998, under the Labour Protection Act 1998, establishes which provisions of the Labour Protection Act 1998 apply in the fisheries sector. It requires documentation of crew, tasks and remuneration arrangements by the employer, which are required to be signed by crew members, establishing a contractual arrangement. The Ministerial Regulation also

⁴³ Fisheries Act 1947 (Thailand).

⁴⁴ Act Governing the Right to Fish in Thai Fishery Waters 1939 (Thailand).

⁴⁵ Thai Vessel Act 1938 (Thailand).

⁴⁶ Labour Protection Act 1998 (Thailand)

⁴⁷ Ministerial Regulation No. 10 on Sea Fisheries Work 1998 (Thailand).

⁴⁸ International Labour Organisation, above n 3, at 17.

⁴⁹ Anti-Trafficking in Persons Act 2008 (Thailand)

⁵⁰ International Labour Organisation, above n 3, at 17.

prohibits children aged under 16 from working in the fishing industry.⁵¹ The Anti-Trafficking in Persons Act 2008 also corrects a gap in Thailand's legislative framework protecting migrants from forced labour. The Act prohibits all forms of trafficking, including against victims who are male. Prior to the enactment of the legislation, only females could legally be considered victims of trafficking, and as such the widening of the definition accords significantly more legal protection for migrant men forced to work in the fishing industry.⁵²

These measures go some way to meeting Thailand's obligations under various ILO Conventions, including those relating to forced labour, equal remuneration, minimum age and the worst forms of child labour.⁵³ While Ministerial Regulation 10 on Sea Fisheries Work 1998 would require strengthened protections in several areas, including working hours, in order to achieve consistency with the standards set out in the Work in Fishing Convention, because Thailand has not ratified that Convention such limitations in the regulatory framework cannot be considered to breach international labour law.

In addition to establishing fundamental labour protections consistent with international labour law, Thailand's legislative framework also provides, to some degree, the means for such protections to be monitored and enforced. While the Fisheries Act 1947 does not establish permission for inspections of vessels to be carried out with regard to crew members (instead focusing on inspections of fishing equipment and catch),⁵⁴ this gap is remedied to some degree by the Act Governing the Right to Fish in Thai Waters 1939, which does allow officials to board vessels and determine if any non-Thai nationals are aboard (including those who may have been trafficked from other parts of South East Asia).⁵⁵ The monitoring framework could, however, be significantly more robust to ensure that international labour standards adopted into domestic legislation are being effectively implemented.

A significant challenge for the implementation of international labour standards, even where appropriate domestic implementing legislation is in place, however, is the enforcement by states of domestic regulations. A number of issues may play into a state's

⁵¹ International Labour Organisation, above n 3, at xi.

⁵² International Labour Organisation, above n 3, at 18.

⁵³ International Labour Organisation, above n 3, at xi.

⁵⁴ International Labour Organisation, above n 3, at 16.

⁵⁵ Shelby Stephens "Show, Don't Tell: How Thailand Can and Must Make Advancements in the Fight against Human Trafficking in the Thai Fishing Industry" (2017) 31(3) *Emory International Law Review* 477 at 485.

inability to enforce its own laws, including budgetary restraints, capacity and capability of the agency tasked with responsibility. In the fisheries context, observers have alleged that some states are also financially incentivised by a strong fisheries sector to avoid enforcing labour laws too stringently.⁵⁶

In the case of Thailand, enforcement is arguably the step towards fulfillment of international labour standards that remains incomplete. While Ministerial Regulation 10 on Sea Fisheries Work does ensure that a range of important labour protections are extended to the fisheries sector, observers argue that these provisions are not regularly applied or enforced.⁵⁷ Commentators have also argued that successful prosecutions under the Anti-Trafficking in Persons Act 2008 have been limited, and the worst violators of the legislation remain at large.⁵⁸ Monitoring limitations have also been criticised by commentators. The Fisheries Act 1947, for example, does not provide authorities with the right to inspect vessels for compliance with labour standards.⁵⁹ Observers also allege that the power to board vessels and investigate violations of the Act Governing the Right to Fish in Thai Waters 1939 is irregularly drawn upon.⁶⁰ These difficulties are argued to be exacerbated by constraints on the capacity of law enforcement authorities.⁶¹ Finally, as a number of employees in the Thai fishing industry are alleged to be irregular migrants, labour protections may not extend to these workers in the same way as they do to lawful migrants or citizens of Thailand.⁶²

In Thailand's case, it is arguable that political will to see labour standards improved extends principally to a superficial establishment of legal protections without the necessary efforts to effectively implement such standards. Enforcement actions, and inaction, of both democratically-elected, and military-led governments in Thailand over the course of the last decade have been largely constant, suggesting that while democratic governance or lack thereof may be influential in ensuring that appropriate legal protections are established, it may not be of central importance in relation to enforcement of those protections in Thailand's case. Instead, commentators have suggested that competing drivers may be behind the lackluster enforcement efforts, including the

⁵⁶ MacFarlane, above n 5, at 98.

⁵⁷ International Labour Organisation, above n 3, at 17.

⁵⁸ International Labour Organisation, above n 3, at 18.

⁵⁹ Stephens, above no 55, at 485.

⁶⁰ International Labour Organisation, above n 3, at 16.

⁶¹ International Labour Organisation, above n 3, at 33.

⁶² International Labour Organisation, above n 3, at xxi.

significant labour shortfall within Thailand, requiring the attraction of large numbers of migrants to staff the fishing industry in order to ensure that the industry remains viable.⁶³ This, in turn, is driven by the strength of the fishing sector in Thailand, which contributes billions of dollars to the Thai economy each year.⁶⁴ These financial incentives for continuing to support the Thai fishing industry at a cost to the rights of workers may weigh favourably in political calculations when measured against the weak multilateral-level sanctions that exist through the ILO for contraventions of international labour standards.

As such, challenges to the adherence to international labour standards are evident at several different levels. While at a multilateral level great strides have been made in establishing international labour standards applicable in the fisheries context in South East Asia, enforcement capacity at a multilateral level remains weak. At a regional level, complexity over overlapping EEZs, lack of protection for and management of migrant workers moving around the region, and difficulty establishing jurisdiction over foreign flagged vessels, all overlaid with low capacity for monitoring, create difficulties for ensuring regional adherence to international labour standards. At a domestic level, political will to incorporate international labour standards in domestic legislation has been demonstrated by Thai Governments over the course of the last decade. However, poor enforcement of these domestic protections leaves fisheries workers vulnerable to the possibility of breaches of domestic labour law and, by extension, international labour standards.

V Potential Means of Remediating Challenges

Just as challenges exist at the multilateral, regional and domestic level, so too do potential means for remediating these challenges and improving adherence to international labour law standards.

1 Multilateral Actions

Multilateral fora, as discussed earlier, provide a useful function in setting the labour standards at an international level which come to be seen as global norms. Some of those standards (such as the prohibition on child labour and the prohibition on forced labour) have been widely adopted at the domestic level.⁶⁵ Others, such as the specific labour

⁶³ Stephens, above n 55, at 480.

⁶⁴ Stephens, above n 55, at 480.

⁶⁵ Declaration on Fundamental Principles and Rights at Work, above n 13, at art 1(a).

standards applicable in the fishing industry, remain aspirational targets but have not yet been established as international norms.⁶⁶ While enforcement is a clear gap in the multilateral framework, there are other efforts that could be made to encourage compliance with the international standards that have been ratified or at least negotiated.

The first step would be for the ILO to direct the attention of the International Labour Conference to the potential for ongoing ‘technical cooperation’ with the states of South East Asia, to support efforts of those states to comply with internationally accepted labour standards such as the prohibition on child labour and the prohibition on forced labour in the fisheries sector. The Follow Up to the Declaration on Fundamental Principles and Rights at Work mandates the ILO to produce a ‘Global Report,’ which provides an overarching view of global trends in relation to adherence to international labour standards.⁶⁷ The International Labour Conference may draw from the annual Global Report in its discussions, which feed in to priorities and plans of action with regard to the provision of technical cooperation.⁶⁸ It may be possible, in this way, for the ILO to highlight on an ongoing basis the difficulties faced by South East Asian states in implementing and enforcing labour standards in the fishing industry, and provide active encouragement for the International Labour Conference to consider ongoing technical support to countries in that region. Technical cooperation might, for example, focus on building the capacity of local authorities to monitor compliance with labour standards that have been brought into force in domestic legislation, or support for the judiciaries of South East Asian states to bring prosecutions for owners of non-complying vessels.

The second step that could be taken at a multilateral level to encourage adherence to international labour standards the South East Asia region would be continuing efforts by the ILO to encourage ratification of the Work in Fishing Convention. If ratified and brought into force, the Work in Fishing Convention could provide a useful tool for supporting states within the South East Asia region to collectively uphold international labour standards relevant to the fishing sector. In particular, application of the Convention would ensure that port states that become a party to the Convention may take steps to investigate and remedy breaches of the Convention’s standards, even with regard to ships flagged to states that are not party to the Convention.⁶⁹

⁶⁶ Work in Fishing Convention, above n 18.

⁶⁷ Declaration on Fundamental Principles and Rights at Work, above n 13, at Annex, Clause III(A)(1).

⁶⁸ Declaration on Fundamental Principles and Rights at Work, above n 5, at Annex, Clause III(B)(2).

⁶⁹ Politakis, above n 23, at 126.

Despite the poor uptake of this Convention among South East Asian states, the Convention itself does not appear to be the subject of ILO employer-state tensions. It is close to achieving the required ratifications for it to come in to force. Its largest complication, perhaps, is the prescriptive nature of its suggestions for compliant regulation of labour in the fishing industry, and the economic impact this may have on the export earnings of developing nations that would need to impose much higher standards (with associated costs) on fishing operators.

The ILO has already taken a number of concrete steps to promote the Convention, including through the development of promotional material, guidelines on port state control, training material, and seminars.⁷⁰ However, it is arguable that further efforts that are more targeted to the specific circumstances and challenges facing the South East Asia region could be undertaken by the ILO, to provide expertise on how the provisions of the Work in Fishing Convention could be adopted in the legislative frameworks of the region. Such moves may encourage ratification of the Work in Fishing Convention in the region, leading, eventually, to greater implementation of and adherence to international labour standards.

2 Regional actions

There is undoubtedly more that could be done at a regional level to encourage compliance with international labour standards by the states in the South East Asian region. Ensuring that the practices of fishing vessels operating throughout the region could be effectively monitored by states in the region, and that breaches of international labour standards could potentially be met with economic sanctions, may encourage improved compliance with international labour standards. A regional agreement could provide a possible mechanism for such monitoring and enforcement. The practices of other regions that have developed Regional Fisheries Management Organisations (RFMOs) may provide a model for this form of regional collaboration. Alternatively, enforceable labour chapters in Free Trade Agreements (FTAs) could provide a further mechanism for regional enforcement of international labour standards.

RFMOs are concerned with the management of fisheries stocks that traverse jurisdictional boundaries, rather than working conditions aboard vessels themselves. However, their approach to enforcement could, in theory, be adopted by a grouping of South East Asian states looking to mutually reinforce labour standards that are

⁷⁰ International Labour Organisation, above no 19, at 6-10.

collectively considered to be fundamental, aboard fishing vessels operating in the region. RFMOs set out provisions that all parties to the agreement establishing the RFMO must abide by. In a number of RFMOs, these provisions are accompanied by frameworks allowing parties to take action against another flag state acting in violation of these provisions.⁷¹ In some cases, action in response to violation can be taken even against vessels that are flagged to a state that is not party to the agreement.⁷² This action can include consultations with the flag state, and progress, potentially, to more severe measure such as barring non-compliant vessels from entering port; a move equivalent to an economic sanction in that it would prevent a vessel from selling its catch.⁷³ In theory, a group of South East Asian states could collectively agree to appropriate labour standards to be adhered to in the regional fisheries area, and adopt the enforcement model that some RFMOs have established to counter illegal, unreported and unregulated fishing practices.

However, it is possible that the enforcement approach adopted by some RFMOs may work well for managing fisheries and suppressing illegal, unreported and unregulated fishing practices, but be less appropriate for promoting adherence to labour standards. For example, barring access to port of a vessel on which violation of labour standards was suspected may serve to further exacerbate the poor working conditions aboard. Additionally, even where the possibility of consultations between states existed, states party to the agreement would still need to be sufficiently incentivised to raise concerns with a party allegedly in breach of their obligations, a threshold that may be difficult to establish in the field of labour. In this way, RFMOs provide an example of the level of collaboration with regard to the fishing industry that could in theory be possible in the South East Asia region. However, the specific powers established under these organisations may not be entirely fit for purpose in the context of working standards.

The possibility of including enforceable labour chapters in regional FTAs that might in future be negotiated between states in the South East Asia region, and major trading partners outside the region, could also be a means of encouraging states within the South East Asia region to comply with international labour standards. Ensuring that labour standards set out in the labour chapter were subject to dispute settlement would allow countries concerned about labour conditions to bring proceedings against an offending state, and could allow the state bringing the complaint to withdraw relevant trade

⁷¹ Takei, above n 30, at 291.

⁷² Takei, above n 30, at 291.

⁷³ Takei, above n 30, at 292.

concessions made under the FTA if the responding state was found to be in breach of its labour obligations. This course of action would have the benefit, like RFMOs, of ensuring some enforcement action could be taken by interested states in the region, rather than relying on the weaker multilateral enforcement options. This enforcement mechanism could also have clear negative economic consequences for the responding state, which could act as an incentive for states in the region to ensure that they act consistently with their labour obligations under their FTAs. However, such an approach would, like all multilateral and international collaborations, fundamentally rely on the willingness of states in the region to bring disputes against neighbouring states on the basis of violation of labour standards. For these reasons, the incorporation of enforceable labour chapters in regional FTAs might play some role in deterring poor labour practice of states in the region, even if such chapters were unlikely to be subject to dispute settlement regularly in practice.

3 Unilateral Actions by States and Non-State Actors

External actors may also play a role in assisting and encouraging states in South East Asia to effectively implement international labour standards on fishing vessels. Relevant actions may take a variety of forms, including unilateral sanctions by one state against another for alleged violations of international standards, consumer boycotts, and certification and labelling schemes.

Unilateral actions by states that place sanctions on other states seen to be violating international standards may, potentially, place some financial pressure on states to improve adherence to international labour standards. Such sanctions may take the form of prohibitions or limitations on the importation of certain products. Several states and trading blocs have brought into effect such prohibitions, most prominently the United States and the European Union.⁷⁴ The United States prohibits the import of goods produced by forced labour, under the Smoot-Hawley Tariff Act 1930.⁷⁵ While this prohibition was not directed solely at South East Asia, or at seafood products, it did provide a legal basis for exerting pressure on states whose industries violated internationally accepted labour standards relating to forced labour. An exception under the Smoot-Hawley Tariff Act 1930 previously allowed the United States to import goods, even if produced by forced labour, if there was domestic demand for that product. However, the implementation of the Trade Facilitation and Trade Enforcement Act 2015

⁷⁴ Stephens, above n 55, at 487.

⁷⁵ Smoot-Hawley Tariff Act 1930 (United States).

removed that exception.⁷⁶ These recent changes to long-standing United States legislation may serve as a possible incentive for Thailand to take steps to prevent forced labour in its fishing sector, as the United States is a primary market for Thailand's seafood exports.⁷⁷

Another unilateral action by the United States with the potential for economic consequences is the annual 'trafficking in persons' report that the State Department of the United States produces. This report assesses countries on their efforts to counter trafficking, and a low ranking by a country in this annual report may lead to economic sanctions.⁷⁸ In practice, Thailand received a low ranking in the United States trafficking in persons report in 2014, and observers have suggested that the threat of economic sanctions inherent in this ranking encouraged Thailand to introduce changes to its laws on countering trafficking.⁷⁹ While the legislative changes may not, yet, have been entirely successful in preventing forced labour in the fisheries sector in Thailand, the readiness of the Thai Government to make changes to its domestic framework when faced with possible economic consequences suggests that unilateral actions taken by interested states may assist in encouraging states in South East Asia to take steps to improve adherence to international labour standards in a domestic context.

Non-state actors may also have a role to play in encouraging state compliance with international labour standards. Consumers of seafood products are one group that has the capacity to exert pressure on states where products originate. By protesting labour conditions in the place of origin of seafood products and boycotting products associated with violations of international labour standards, consumers may reduce the profitability of seafood distributors who source their products from vessels that are known to be violating international labour standards.⁸⁰ It is clear that consumers in the developed world, in particular, are becoming more conscious of conditions in the seafood industry in the country of origin of the products they consume, and efforts such as a 2015 petition by United States consumers to encourage Walmart to more carefully assess the conditions of workers in the places where they source their seafood demonstrate an awareness by consumers of their importance in the seafood industry, and the readiness of consumers to use that position in order to demand higher labour standards in the production of their

⁷⁶ Trade Facilitation and Trade Enforcement Act 2015 (United States).

⁷⁷ International Labour Organisation, above n 3, at ix.

⁷⁸ Stephens, above n 55, at 486.

⁷⁹ Stephens, above n 55, at 487.

⁸⁰ Koch-Baumgarten and Kryst, above n 1, at 153.

food.⁸¹ The power of consumers is, however, directed largely at the companies supplying seafood, rather than at the states where such seafood products originate. For that reason, consumer pressure alone is arguably insufficient in encouraging the compliance of South East Asian states with international labour standards.

Companies, acting at the behest of consumers, may be more significant in promoting South East Asian state compliance with international labour standards. Companies may seek to ensure that the seafood products they distribute originate from vessels where international labour standards are adhered to, and that at all points along the supply chain, labour rights and principles are being respected. Products that reach the market having met conditions set by these companies may then be ‘certified’ by those companies as being produced in a manner consistent with international labour standards.⁸² Pressure from these companies may, arguably, encourage South East Asian states to better monitor and enforce labour standards, in an effort to protect export earnings and sustain a significant industry.

However, these private arrangements for encouraging adherence to international labour standards throughout the supply chain are not without their own risks. Such arrangements have been alleged to be largely unaccountable both to consumers and to affected businesses along the supply chain, neither of which have a voice in what standards are measured in order to qualify for certification, or how these standards are measured.⁸³ Given the unaccountable nature of such arrangements, it is also possible that the arrangements would not be appropriately designed and would not, in practice, have the effect of promoting appropriate labour standards.⁸⁴ Such initiatives may also have a punitive effect on small, low-budget fishing operations in South East Asia that are otherwise acting in compliance with their domestic legislative framework, by creating additional administrative burdens inherent in demonstrating that such operations are worthy of certification.⁸⁵ The effect of such arrangements may as a result harm the competitive advantage of South East Asian seafood producers, potentially without making practical gains in adherence to international labour standards in the industry. For this reason, while ‘fair labour’ certification arrangements may well affect consumer choice and for that reason provide an incentive for South East Asian states to ensure

⁸¹ International Labour Organisation, above n 3, at 33-34.

⁸² International Labour Organisation, above n 3, at 33-34.

⁸³ Pekdemir, Glasbergen and Corvers, above n 32, at 211.

⁸⁴ Pekdemir, Glasbergen and Corvers, above n 32, at 211.

⁸⁵ International Labour Organisation, above n 2, at 44.

domestic adherence to international standards, such mechanisms should be carefully designed and applied to ensure that these arrangements meet their objectives and do not simply create a barrier to trade for developing country seafood producers.

It is therefore apparent that a number of potential mechanisms could be utilised to remedy the challenges posed at a multilateral, regional and unilateral level towards the adoption, implementation and enforcement of international labour standards in the fishing industry in South East Asia. At a multilateral level, more technical assistance could be provided by the ILO to South East Asia in order to help these states to develop the capacity to meet their international obligations. South East Asian states could also look to develop regional-level agreements with economic implications, drawing from the example of RFMOs, or developing enforceable labour chapters within regional FTAs. States representing the final destination for seafood produced in South East Asia could also take unilateral steps to prevent the import of products known to be produced under conditions inconsistent with international labour standards. Such steps are likely to be most effective in stimulating action to implement, monitor and enforce appropriate labour standards by South East Asian states where the state taking unilateral action represents a significant export market for South East Asian seafood products. Finally, consumers and distributors can also act to make informed choices about the origins of the products they consume or sell, to ensure that their choices do not further entrench poor labour practices. Unilateral consumer or distributor action should, however, be exercised with caution to ensure that any new practices supported are accountable and effective in genuinely stimulating adherence to international labour standards.

VI Conclusion

International labour standards are established at international law, primarily through ILO Conventions and the Declaration on Fundamental Principles and Rights at Work. These standards apply to the operation of the fishing industry in South East Asia. They are complemented by more specific guidance on the labour standards, set out in the Work in Fishing Convention, which is not yet in force and as such sets out no binding obligations, but provides useful direction to the international community in the fisheries area. Despite clear labour standards in evidence at an international level, enforcement at a multilateral level of such standards is weak. As such, domestic legislative action is imperative in order to give effect to such international standards.

Thailand, as the home of the most significant fishing industry in the region, demonstrates that efforts have been taken in domestic legislation to protect the rights of workers, and to

draw from international standards in doing so. However, compliance with international labour standards is arguably hampered by inconsistent enforcement by South East Asian governments of domestic laws and regulations, difficulties in monitoring compliance, and uncertainties inherent in establishing jurisdiction over foreign-flagged fishing vessels in order to ensure the protection of workers on vessels operating within another state's EEZ. A variety of steps could be taken at the multilateral and regional level to address both the reluctance of states to effectively enforce domestic provisions protecting fisheries workers, and the impediments to effective implementation and enforcement that are evident among the states in the South East Asia region. External pressure by states and non-state actors may have a role to play in encouraging states to ensure that labour conditions experienced by workers on South East Asian fishing vessels are consistent with multilaterally-developed expectations. At their core, the poor labour conditions suffered by workers in the fishing industry in South East Asia arguably come about because of the lucrative nature of the fishing industry, which is achieved in part through allowing such conditions to continue unchecked. Improvements to such conditions will likely come about if these economic gains are threatened, or if financial incentives for more actively enforcing labour standards can be demonstrated. The moral imperative of the existence of international labour standards alone will not be sufficient to ensure their implementation and enforcement.

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