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The True Cost of “Cheap” Seafood: An Analysis of Environmental and Human Exploitation in the Seafood Industry

By Tiffany T.V. Duong*

Introduction

When we sit down to a fancy seafood¹ dinner and order sizzling Thai shrimp or grilled Hawaiian swordfish, we don’t realize our meal comes with a side of slavery: it’s quite likely that foreign fishermen working in slave-like conditions caught the cheap seafood on our plates.² Environmental destruction and forced labor are negative externalities in many fisheries worldwide, with abuses largely ignored in the pursuit of catching more fish from an emptier sea.

This comment explores how global overfishing and resource exploitation have created a situation ripe for environmental and human rights abuses. Section 1 examines rising seafood consumption to highlight how overfishing has led to resource exploitation and collapse of the majority of global fish stocks. Section 2 discusses how increased demand for cheap seafood, coupled with a shortage of fish in the sea, encourages suppliers to abuse the environment and their labor pool in order to keep catching enough fish. Sections 3 and 4 examine legal loopholes that have allowed forced labor to taint the seafood being served in American restaurants, grocery stores, and homes. They describe when and how those loopholes have been closed or, if they remain open, how we might work to close them. Finally, Section 5 concludes that overfishing and human rights abuses are inextricably linked and must be addressed together.

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1. The author uses “seafood” and “fish” interchangeably throughout the comment.
2. See, e.g., Martha Mendoza and Margie Mason, *Hawaiian Seafood Caught by Foreign Fishing Crews Confined on Boats*, ASSOCIATED PRESS (Sept. 8, 2016), <https://www.ap.org/explore/seafood-from-slaves/hawaiian-seafood-caught-foreign-crews-confined-boats.html> [<https://perma.cc/X78U-V6M3>] [hereinafter *AP—Hawaiian Seafood*] (“The investigation found men living in squalor on some boats, forced to use buckets instead of toilets, suffering running sores from bed bugs and sometimes lacking sufficient food.”); see also Lisa Gutierrez, *The List of Slave-Labor Imports You Use Might Surprise You*, MCCLATCHY DC BUREAU (Mar. 3, 2016), <http://www.mcclatchydc.com/news/nation-world/national/article63810932.html> [<https://perma.cc/D4RJ-VDJV>] (“Bonded labor is used for most of Southeast Asia’s shrimping industry, which sends more shrimp to the United States than any other country.”).

Fish as Food

Seafood has long been a significant part of the world diet.³ Today, the skyrocketing demand for and dwindling supply of fish create a context in which consumers are desperate for more fish faster. Fishermen would oblige, but there's just one problem: there aren't enough fish in the sea.

Seafood as a "Healthy" Alternative Food Source

Current health trends promote fish as a healthy alternative to red meat.⁴ In the United States, "[t]he American Heart Association recommends eating fish at least two times a week" for heart health.⁵ Additionally, the U.S. Department of Agriculture's ("USDA") dietary guidelines for Americans, the "cornerstone of Federal nutrition policy and nutrition education activities,"⁶ tout seafood as a healthy food source for Americans in federal and state policies, education, and reports.⁷ Consequently, seafood consumption in the United States has increased over the years.⁸

This large appetite for seafood is not unique to the United States. The United Nation's Food and Agriculture Organization ("FAO") reports that global fish consumption has risen over the last four decades, with "[w]orld apparent per capita fish consumption . . . increasing steadily, from an average of 9.9 kg in the 1960s to 11.5 kg in the 1970s, 12.5 kg in the 1980s, 14.4 kg in the 1990s and reaching 16.4

3. See generally The Food Timeline, *Food Timeline FAQs: Fish & Shellfish*, <http://www.foodtimeline.org/foodlobster.html> [<https://perma.cc/XHR3-DN3V>] (last visited Feb. 4, 2018) (surveying various fish and shellfish recipes throughout history around the world).

4. See, e.g., *Fish and Omega-3 Fatty Acids*, AMERICAN HEART ASS'N (Mar. 24, 2017) <https://healthyforgood.heart.org/Eat-smart/Articles/Fish-and-Omega-3-Fatty-.Acids#.WCncj1UrLIV> [<https://perma.cc/ASG4-64H4>] (analyzing fish as an alternative protein source that, unlike "fatty meat products," is low in saturated fats).

5. *Id.* (describing two servings a week as desirable and more for those with coronary artery disease) (internal parentheticals omitted).

6. *Dietary Guidelines*, USDA, <https://www.fns.usda.gov/usda-foods/other-resources> [<https://perma.cc/K6PU-UKSD>] (last visited Feb. 4, 2018) (discussing the importance of the USDA Dietary Guidelines to federal nutrition and food policies).

7. USDA: DIETARY GUIDELINES FOR AMERICANS 2015–2020, 8TH EDITION (Dec. 2015), at 24, available at https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

8. See, e.g., *Fisheries of the United States, 2015*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION ("NOAA"), NATIONAL MARINE FISHERIES SERVICE, at 105, available at https://www.st.nmfs.noaa.gov/Assets/commercial/fus/fus15/documents/09_PerCapita2015.pdf [<https://perma.cc/4YP3-G6AP>] (last visited Mar. 19, 2018) (discussing increased U.S. per capita consumption of fresh, frozen, and canned fish and shellfish).

kg in 2005.”⁹ The FAO recorded “[w]orld per capita fish supply [at] a new record high of 20 kg in 2014,”¹⁰ and most recently, above 20 kg in 2016.¹¹

Overfishing: Fish Stocks Cannot Meet Global Demands

The increasing demand for fish has resulted in expanded fishing practices globally.¹² This expansion, coupled with technological advances, should be producing record catches. This is not the reality, and, “despite becoming more efficient and being heavily subsidized, many fishing fleets are reporting lower and lower yields.”¹³ The reason is simple: “[o]verfishing is happening all over the world”¹⁴ and “the ocean is running out of fish.”¹⁵

Global catches were at an all-time high in the mid-1990s,¹⁶ but these “very high catches . . . achieved globally in the 1990s were probably not sustainable.”¹⁷ The most recent FAO report available finds that “[t]he world’s marine fisheries expanded continuously to a production peak of 86.4 million tonnes in 1996 but

9. *The State of World Fisheries and Aquaculture 2008*, (FAO Rome), FAO FISHERIES AND AQUACULTURE DEPT., at 58–59, available at <http://www.fao.org/3/a-i0250e.pdf> [<https://perma.cc/8CC6-PQ2U>] [hereinafter *FAO 2008*] (mapping out global increase in fish consumption).

10. *The State of World Fisheries and Aquaculture 2016, Contributing to Food Security and Nutrition for All*, FAO FISHERIES AND AQUACULTURE DEPT., (FAO Rome), at ii, available at <http://www.fao.org/3/a-i5555e.pdf> [<https://perma.cc/PP88-EQ9P>] [hereinafter *FAO 2016*].

11. *Global per capita fish consumption rises above 20 kilograms per year*, FAO (July 7, 2016), <http://www.fao.org/news/story/en/item/421871/icode/> [<https://perma.cc/P4EW-XJHU>] (discussing “firm demand” despite many fish stocks being at biologically unsustainable levels).

12. See generally *FAO 2008*, *supra* note 9, and *FAO 2016*, *supra* note 10, for discussions of global fishing practices.

13. Mihai Andrei, *Oceans Are Running Out of Fish—Much Faster Than We Thought*, ZME SCIENCE (Jan. 20, 2016), <https://www.zmescience.com/science/oceanography/fish-stocks-ocean-20012016/> [<https://perma.cc/Y3NK-F93M>] (analyzing the findings of Pauly and Zeller, *Reconstruction infra* note 16, and concluding that the oceans are running out of fish).

14. Anaya Elizabeth Johnson & Jennifer Jacquet, *Will the Ocean Ever Run Out of Fish?*, NATIONAL GEOGRAPHIC: HUMAN JOURNEY (Aug. 11, 2017), transcript available at <https://blog.nationalgeographic.org/2017/08/11/will-the-ocean-ever-run-out-of-fish/> [<https://perma.cc/Y3NK-F93M>].

15. Andrei, *supra* note 13.

16. See generally Daniel Pauly & Dirk Zeller, *Catch Reconstructions Reveal That Global Marine Fisheries Catches Are Higher Than Reported and Declining*, NATURE COMMUNICATIONS (Jan. 19, 2016), at Figure 3 and accompanying text, <https://www.nature.com/articles/ncomms10244.pdf> [<https://perma.cc/Q25P-NLVA>] [hereinafter *Reconstruction*] (depicting reconstructed and reported catches by FAO areas around the globe).

17. *Id.* at 5.

have since exhibited a general declining trend.”¹⁸ A 2016 catch reconstruction study proposes instead that global catches actually peaked in 1996 at 130 million tonnes and have “declined more strongly since.”¹⁹ The study concludes that the FAO data set “may considerably underestimate actual fisheries catch” and that more accurate estimates of global fisheries shows an even more dire depletion of fish stocks.²⁰

Some governmental agencies have suggested that aquaculture can bridge the increasing gap between low fish supplies and soaring demands in the present and future.²¹ In fact, in its latest report, the FAO suggests that aquaculture is *the* solution to feeding the planet’s expected nine billion people by 2050.²² There’s a central issue with this proffered solution—aquaculture uses wild fish as meal for the farmed fish.²³ Additionally, aquaculture is often ill-managed, creating, *inter alia*, seafood with parasites or diseases, pollution from farms, and invasive foreign species.²⁴ The solution of aquaculture is not a Hail Mary that will provide food when our oceans run out of fish.

So, wild-caught or farmed, we still won’t have enough fish to meet global demands. The situation is critical: “[i]f the world keeps fishing at its current pace, there will [be] no more fish left to eat by 2048. This is largely because “the planet’s fishing fleet is two to three times larger than the oceans can support, and . . . 85 percent of the world’s fisheries are either fully exploited or overexploited, depleted, or recovering from depletion.”²⁵ We’re fishing the oceans dry of fish.

18. FAO 2016, *supra* note 10, at 38 (finding that the world’s marine fisheries are overfished, resulting in lower production).

19. Reconstruction, *supra* note 16, at 2.

20. *Id.* (“We find that reconstructed global catches between 1950 and 2010 were 50% higher than data reported to FAO suggest, and are declining more strongly since catches peaked in the 1990s.”). Accord generally Daniel Pauly & Dirk Zeller, *Comments on FAOs State of World Fisheries and Aquaculture (SOFIA 2016)*, 77 MARINE POL. 176-81 (2017), available at <https://www.sciencedirect.com/science/article/pii/S0308597X16305516?via%3Dihub> [<https://perma.cc/7R67-DYEX>] [hereinafter *Comments on FAOs*] (raising concerns about why the FAO data ignores “well-documented” reconstruction data).

21. See generally FAO 2016, *supra* note 10 (discussing aquaculture’s role in providing fish as food).

22. FAO 2016, *supra* note 10, at 22, 70 (claiming that aquaculture produced more fish for food than capture methods). Cf. *Comments on FAOs*, *supra* note 20, at 180 (critiquing the FAO’s inclusion of fish intended as fishmeal for farmed fish in their estimates of fish being used as “food supply”).

23. FAO 2016, *supra* note 10, at 6 (“Fishmeal and fish oil are still considered the most nutritious and digestible ingredients for farmed fish feeds.”).

24. See generally Michael Souza, *Problems Inherent to Aquaculture*, THE BALANCE (June 5, 2017) <https://www.thebalance.com/aquaculture-problems-inherent-to-aquaculture-1301970> [<https://perma.cc/93QS-9SHY>] (discussing some problems with aquaculture).

25. Chris Crowley, *A New Warning Says We Could Run Out of Fish by 2048*, HUFFINGTON POST: GRUB STREET (Dec. 13, 2016), https://www.huffingtonpost.com/grub-street/a-new-warning-says-we-cou_b_13615338.html [<https://perma.cc/Y53Z-2JCX>]; Accord *Stock status in the global ocean*, SEA AROUND US, <http://www.searoundus.org/data/#/global/stock-status> [<https://perma.cc/Y7KX-Y5FC>] (last visited Feb. 4, 2018) (analyzing 2014 global fish stocks as 84% collapsed, over-exploited, and exploited).

Overfishing as a Driver of Environmental and Labor Exploitation

Fisheries around the world are being challenged to synthesize these opposing market forces of increasing demand and dwindling, overfished supplies. Unfortunately, some fleets accomplish this by cutting costs through environmental and labor exploitation.

Basic Economics and Externalities—Why Are We Still Fishing?

As fish stocks continue to decline, fishing boats need to go further out to sea for longer periods of time to keep finding fish.²⁶ Longer cycles at sea cost owners more in fixed costs like fuel and maintenance.²⁷ And while fishermen work harder, they catch fewer fish.²⁸ Basic economics teaches us that these two supply chain influences—higher costs and scarce natural resources—should lead to an increase in the price of seafood and/or less suppliers willing to supply seafood at the same quantity and price.²⁹ The following paragraphs will explore how artificial price ceilings are instead keeping prices low and creating negative externalities in the seafood market.

There are some instances where these supply-and-demand basics appear (at first) to have proven true. Tuna, for instance, is prized around the world. As stocks of tuna dwindle, demand continues to skyrocket.³⁰ The most expensive fish ever

26. See, e.g., Trevor Sutton & Avery Siciliano, *Human Trafficking in the International Fishing Industry*, CENTER FOR AMERICAN PROGRESS (Dec. 15, 2016), <https://www.americanprogress.org/issues/green/reports/2016/12/15/295088/seafood-slavery/> [<https://perma.cc/JP99-YVLL>] (“As fish populations become depleted in their nearshore waters, fishermen are forced to travel farther distances for their catch.”); accord *The HRAS Interview: Steve Trent, Co-founder of the Environmental Justice Foundation (EJF)*, HUMAN RIGHTS AT SEA (May 11, 2016), <https://thehrasinterview.wordpress.com/2016/05/11/the-hras-interview-steve-trent-co-founder-of-the-environmental-justice-foundation-ejf/> [<https://perma.cc/2CS6-DJMM>] (“The boats need to stay out longer, use more fuel and fish harder to catch a product that is diminishing all the time.”).

27. Melissa Marschke & Peter Vandergeest, *Slavery Scandals: Unpacking Labor Challenges and Policy Responses Within the Off-Shore Fisheries Sector*, 68 MARINE POLICY 39, 41 (2016), available at <https://www.sciencedirect.com/science/article/pii/S0308597X16000622?via%3Dihub> [<https://perma.cc/YZZ7-LSPV>] (discussing how overfishing forces longer voyages with increased fixed costs).

28. Joanna G. Sylwester, *Fishers of Men: The Neglected Effects of Environmental Depletion on Labor Trafficking in the Thai Fishing Industry*, 23 PAC. RIM L. & POL’Y J. 423, 430 (2014), available at <https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/1368/23PRLPJ0423.pdf;sequence=1> [<https://perma.cc/TS4W-F39T>] (discussing declining catch per unit effort between 1963 to the 1990s due to overfishing and exploitation of labor to work longer hours).

29. See generally *Supply, demand, and Market Equilibrium*, KHAN ACADEMY, <https://www.khanacademy.org/economics-finance-domain/microeconomics/supply-demand-equilibrium> [<https://perma.cc/8PGD-FCYB>] (discussing supply curve shifts due to increases in production costs).

30. See, e.g., Zachary M. Seward, *Single Tuna Sells For Record \$1.76 Million in Sign of Prices to Come*, QUARTZ MEDIA (Jan. 5, 2013), <https://qz.com/40904/single-tuna-sells-for-record-1-76-million-in-sign-of-prices-to-come/> [<https://perma.cc/LR9B-A2FL>] (“[T]he

sold was a large bluefin tuna, which sold in Japan in 2013 for almost \$1.8 million.³¹ However, even this record-breaking fish did not follow true supply-demand pricing and valuations. The restaurateur who purchased the tuna paid about \$176 per sushi piece but sold the fish “at his restaurant chain’s regular prices, which are much lower.”³² One agency reported that the prized sushi could sell for only “up to \$24” a piece.³³ Suppliers of prized fish often do not pass the true supply cost of the fish along to their patrons, who would likely refuse to pay those high prices for seafood. These customers, then, do not get an accurate sense of the true cost of the fish, one that takes into account all of the costs associated with labor, environmental stewardship, and resource availability. Seafood subsidies cause the same imbalance, “contribut[ing] to overcapacity and overfishing, as well as illegal, unreported, and unregulated (“IUU”) fishing.”³⁴ False price ceilings that create unrealistic and unsustainable prices for seafood ignore these negative externalities. Consumers operate under a false sense of abundance and continue demanding more cheap fish. Restaurateurs are then pressured to keep selling fish for too cheap, and seafood suppliers have to find other ways to cut their costs, like through labor and environmental exploitation. The true cost of fish is much higher than consumers will pay, and fish stocks and fishermen are taking the hit.

Cutting Costs Through Environmental Exploitation

When consumers demand cheap seafood, suppliers “[prioritize] price at the expense of labor”³⁵ and environmental degradation.³⁶ The connection is clear—“extended [fishing] trips increase industry costs, such as fuel and labor, and incentivize illegal operations as a way to make a profit.”³⁷ The main environmental harms are overfishing and IUU fishing practices, which remain “one of the greatest

auction reflects a basic supply-and-demand problem: bluefin tuna populations are dwindling as Japan’s appetite for *otora* sushi, taken from the tuna’s belly, continues to grow.”).

31. *Id.*

32. *Id.*

33. Patrick Boehler, *Japan: World’s Most Expensive Fish Sold for \$1.8 million*, TIME (Jan. 7, 2013), <http://newsfeed.time.com/2013/01/07/japan-worlds-most-expensive-fish-sold-for-1-8-million/> [<https://perma.cc/E53F-YHV9>].

34. Jewel Fraser, *WTO Working on Agreement to Eliminate Fisheries Subsidies*, SEAFOOD SOURCE (Aug. 16, 2017), <https://www.seafoodsource.com/news/supply-trade/wto-working-on-agreement-to-eliminate-fisheries-subsidies> [<https://perma.cc/9QRC-97XM>].

35. Diep Tran, *Cheap Eats, Cheap Labor: The Hidden Human Costs of Those Lists*, NPR (Feb. 12, 2017), <https://www.npr.org/sections/thesalt/2017/02/12/512905725/cheap-eats-cheap-labor-the-hidden-human-costs-of-those-lists> [<https://perma.cc/EC4M-F4G2>] (highlighting how cheap food remains “cheap” rather than “affordable” because of the hidden human cost of exploited labor); *see also* Brian Barth, *The High Cost of Cheap Labor*, MODERN FARMER (Feb. 21, 2017), <https://modernfarmer.com/2017/02/migrant-farm-workers-the-high-cost-of-cheap-labor/> [<https://perma.cc/V4PY-YBB7>] (explaining the connection between cheap food and cheap, often-exploited labor in the agricultural sector).

36. *See, e.g.*, Sutton and Siciliano, *supra* note 26 (discussing how depleted near-shore stocks compel fishermen to go further out to keep catching fish).

37. *Id.*

threats to marine ecosystems due to [their] potent ability to undermine national and regional efforts to manage fisheries sustainably as well as endeavors to conserve marine biodiversity.”³⁸

Cutting Costs Through Human Exploitation

Vessel owners also employ another illegal, cost-cutting endeavor that is much more insidious: labor exploitation. In fact, “[a]s the appetite for cheap fish worldwide grows, so does the demand for men who are paid little or nothing to catch it.”³⁹

Between 2015 and 2016, the Associated Press (“AP”) investigated modern-day slavery in the global seafood industry.⁴⁰ Burmese fishermen held as slaves on Thai fishing boats in Indonesian waters testified to the AP about horrid conditions:

[C]aptains on their fishing boats forced them to drink unclean water and work 20 to 22-hour shifts with no days off. Almost all said they were kicked, whipped with toxic stingray tails or otherwise beaten if they complained or tried to rest. They were paid little or nothing, as they hauled in heavy nets with squid, shrimp, snapper, grouper and other fish.⁴¹

Fishermen who asked to stop working and/or go home were “locked up.”⁴² Many reported having “boat leaders” assigned as enforcers, who intimidated and beat up fishermen who weren’t working fast enough.⁴³ These amoral conditions “[fall] under the U.S. government’s definition of slavery, which includes forcing people to keep working even if they once signed up for the jobs, or trafficking them into situations where they are exploited.”⁴⁴

38. *Illegal, Unreported, and Unregulated (IUU) Fishing*, FAO (2016) <http://www.fao.org/fishery/iuu-fishing/en> [<https://perma.cc/4BQX-NBAJ>].

39. Robin McDowell, Margie Mason & Martha Mendoza, *AP Tracks Slave Boats to Papua New Guinea*, ASSOCIATED PRESS (July 27, 2015), <https://www.ap.org/explore/seafood-from-slaves/ap-tracks-slave-boats-to-papua-new-guinea.html> [<https://perma.cc/8E2Q-9Z72>] [hereinafter *AP—Papua*].

40. See generally *An AP Investigation Helps Free Slaves in the 21st Century*, ASSOCIATED PRESS, <https://www.ap.org/explore/seafood-from-slaves/> [<https://perma.cc/7JMG-LQ34>] [hereinafter *An AP investigation*] (articles detailing different aspects of modern-day slavery and labor exploitation in various seafood industries around the world).

41. Robin McDowell, Margie Mason & Martha Mendoza, *AP Investigation: Slaves May Have Caught the Fish You Bought*, ASSOCIATED PRESS (Mar. 25, 2015), <https://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html> [<https://perma.cc/D2FL-XXPW>] [hereinafter *AP—Slaves*].

42. *Id.*

43. Esther Htsusan & Margie Mason, *More Than 2,000 Enslaved Fishermen Rescued in 6 Months*, ASSOCIATED PRESS (Sept. 17, 2015), <https://www.ap.org/explore/seafood-from-slaves/more-than-2,000-enslaved-fishermen-rescued-in-6-months.html> [<https://perma.cc/9VU5-J6BZ>] [hereinafter *AP—2000*].

44. *AP—Slaves*, *supra* note 41 (quoting Kendra Krieder, a State Department analyst focusing on supply chains: “These situations would be called modern slavery by any measure.”); *id.*

Human trafficking is a second example of abuse in the seafood industry. According to the International Labor Organization (“ILO”), human trafficking includes three core elements: (1) “action” or “activities” such as recruitment, transfer, harboring, or receipt of persons, (2) “means” of trafficking such as deception, force, coercion, or abuse of power or position of vulnerability, and (3) “purpose” for exploitation.⁴⁵ The fishermen are often kidnapped or transported illegally across national borders, often using falsified documents, threats of violence, actual violence, and exploitation of vulnerabilities.⁴⁶ They are sold to fishing ships and seafood processing factories for the purpose of being exploited for their labor.⁴⁷ Some fishermen become victims of trafficking by way of labor brokers. These brokers promise easy, lucrative employment to lure vulnerable, migrant men to work.⁴⁸ Thus, the fishermen falling prey to these schemes can be considered victims of human trafficking under the accepted international ILO framework.

Forced labor is a third seafood slavery abuse. As the AP reports note, the conditions in which the victims of slavery and human trafficking are forced to work are often squalid.⁴⁹ The blurry line between migrant workers who willingly work for low wages in poor conditions and those who are victims of forced labor hinges on the ILO definition of forced labor.⁵⁰ This definition—“all work or service which is exacted from any person under the menace of any penalty for which the said person has not offered himself voluntarily”⁵¹—analyzes how workers end up in poor conditions. The “menace of penalty” implies subjection to coercion, and “[in]voluntariness” refers to work people would not otherwise accept.⁵² Fishermen report threats and actual abuses, withholding of food, medical and mental health treatments, and protection, and use of “enforcers” to extract faster work from them.

45. See Sylwester, *supra* note 28, at 426 (examining the ILO definition of trafficking).

46. See *An AP Investigation*, *supra* note 40 and accompanying text (outlining multiple examples of slavery, trafficking and forced labor within the global seafood industry).

47. *Id.*

48. See, e.g., Sylwester, *supra* note 28, at 424 (discussing labor brokers who lie to fishermen, promising good work in factories); accord *AP—Slaves*, *supra* note 41 (interviewing a former broker who describes illegal and “ruthless” means used to procure fishermen for vessels).

49. See, e.g., *id.* and accompanying text; see also note 42, and accompanying text; accord Sylwester, *supra* note 28, at 423–24 (introducing the abuses some Myanmarese fishermen faced in Thailand).

50. See *id.* at 425 (distinguishing between poor working conditions and forced labor).

51. *Forced or Compulsory Labour Convention* (No. 29), INTERNATIONAL LABOUR ORGANIZATION (ILO) (Geneva, June 10, 1930), 39 U.N.T.S. 55, adopted on June 28, 1930, available at http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/genericdocument/wcms_346435.pdf [<https://perma.cc/9HDX-3PGS>]; accord Sylwester, *supra* note 28, at 425 (characterizing fishermen coerced into the Thai fishing industry as victims of forced labor and human trafficking).

52. Sylwester, *supra* note 28, at 425 (making the case for the fishing victims to be characterized as forced labor victims).

These “menaces of penalty” and actual penalties,⁵³ in addition to repeated pleas to stop working and be returned to their homes,⁵⁴ make the case that many of these fishermen are indeed forced labor victims and not just migrant fishermen working in poor conditions. Furthermore, after being trafficked, fishermen are often forced to continue to work because of debt-bondage, excessive fees due to brokers, withholding of fees, and other indicators of forced labor. Basically, labor brokers recruit and sell migrants to vessels for a price per individual, promising good employment and withholding travel documents, migrant registration cards, and work permits as collateral.⁵⁵ Fishermen must pay off their purchase price before being paid wages; they will not be paid for several months or years.⁵⁶

The Thai fishing fleet is a “hotbed for labor trafficking” due to “high demand for Thai fish products and labor shortages in the fishing industry.”⁵⁷ In fact, “[p]ervasive human trafficking has helped turn Thailand into one of the world’s biggest shrimp providers.”⁵⁸ Conditions in Thai shrimp-peeling factories are among the worst. There, the AP investigation found “horrific” conditions like “[a] woman eight months pregnant miscarried on the shed floor and was forced to keep peeling for four days while hemorrhaging” and “an unconscious toddler . . . was refused medical care after falling about 12 feet onto a concrete floor.”⁵⁹ The investigation also uncovered men being held captive in cages on a remote island in Indonesia between shifts on Thai fishing boats.⁶⁰ Sadly, “modern-day slavery is often just part of doing business in Thailand’s seafood export capital.”⁶¹ The market demands consistent, cheap seafood, and exploited labor is used to supply it.

Because the same market forces operating in Thailand, like overfishing and demand for cheap labor, exist in most other fisheries, “unfree labour and labour

53. See, e.g., *AP—Slaves*, *supra* note 41, and accompanying text; see also note 42, and accompanying text. *Accord Fisheries Abuses and Related Deaths at Sea in the Pacific Region*, HUMAN RIGHTS AT SEA (Dec. 1, 2017), <https://www.humanrightsatsea.org/wp-content/uploads/2017/12/HRAS-Fisheries-Abuse-Investigative-Report-Dec-2017-SECURED.pdf> [<https://perma.cc/3ZKC-CULX>] (listing case studies of abuses and deaths on commercial fishing vessels).

54. See, e.g., *AP—Slaves*, *supra* note 41 (“All I did was tell my captain I couldn’t take it anymore, that I wanted to go home. . . . The next time we docked . . . I was locked up.”).

55. Sylwester, *supra* note 28, at 435–46.

56. *Id.*

57. *Id.* at 423.

58. Margie Mason, Robin McDowell, Martha Mendoza, & Esther Htusan, *Global Supermarkets Selling Shrimp Peeled by Slaves*, ASSOCIATED PRESS (Dec. 14, 2015), <https://www.ap.org/explore/seafood-from-slaves/global-supermarkets-selling-shrimp-peeled-by-slaves.html> [<https://perma.cc/3PXC-ZQAJ>] [hereinafter *AP—Thai Shrimp*].

59. *Id.*

60. See *AP—Slaves*, *supra* note 41 (telling the story of slaves held in cages on Benjina, Indonesia).

61. *AP—Thai Shrimp*, *supra* note 58.

abuses in fisheries can be found around the world.”⁶² The United States Department of State publishes an annual “Trafficking in Persons” report, analyzing trafficking across all countries. The 2017 report found indications of labor trafficking in the fishing industries of forty-five different countries.⁶³ For instance, “a Cambodian man was recruited to work as a translator on a [Marshallese] ship, but upon boarding the vessel, was subjected to forced labor as a fisherman” and ordered to pay the captain \$4,000 for his freedom.⁶⁴ While he escaped and was repatriated, he never received back payment for his salary.⁶⁵ Similarly, in Papua New Guinea, “Vietnamese, Burmese, Cambodian, and local men and boys are subjected to forced labor on fishing vessels; they face little to no pay, harsh working conditions, and debt bondage, and many are compelled to fish illegally, making them vulnerable to arrest.”⁶⁶ Also, New Zealand’s fisheries have been:

“marred by frequent reports of severe exploitation occurring aboard foreign chartered vessels (FCVs) licensed to fish in its Exclusive Economic Zone . . . The foreign crews, mostly from Indonesia but also Myanmar and Vietnam, cited a range of abuses including: injury, lengthy shifts, non-payment of wages, verbal, physical, and psychological abuse, and even death.”⁶⁷

Out of Sight, Out of Mind—Why the Fishing Industry Has Gotten Away With Exploitation For So Long

Many ask how these abuses can so easily persist in our seafood supply chains. The answer is simple—boats at sea, and the men on them, are hard to keep track of, let alone regulate. This has three main implications for foreign fishermen suffering abusive work conditions: (1) distance from authorities, (2) deceptive documentation, and (3) access to recourse.

62. Marschke & Vandergeest, *supra* note 27, at 41; accord 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*, 7 ASIAN J. OF INT’L L. 94, 96 (2015), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9FE5186E14D0800517331C2E8F0F00AC/S2044251315000235a.pdf/slave_trade_and_the_right_of_visit_under_the_law_of_the_sea_convention_exploitation_in_the_fishing_industry_in_new_zealand_and_thailand.pdf [https://perma.cc/DW4V-6SKH] (“Severe exploitation of vulnerable persons is occurring in fishing industries globally.”); see also, generally, *Trafficking in Persons Report June 2017 (2017)*, U.S. DEPT. OF STATE, at 274, available at <https://www.state.gov/documents/organization/271339.pdf> [https://perma.cc/QP9K-Q5ZQ] (analyzing current trafficking of persons by country and finding labor trafficking present in fishing industries globally).

63. See generally *Id.* Notably, the report does not include the U.S. as a country in which there are fishing-related trafficking indications. *Id.* at 415–20.

64. *Id.* at 274 (analyzing cases of labor trafficking in the Marshall Islands).

65. *Id.*

66. *Id.* at 319–20 (analyzing cases of labor trafficking in Papua New Guinea).

67. MacFarlane, *supra* note 62, at 96 (analyzing the extent of labor exploitation in New Zealand’s fishing industry).

As overfishing pushes boats further out into the seas, these boats are “seldom even glimpsed, let alone governed.”⁶⁸ The nature of the work means that ships rarely return to port, quickly offloading their catch before leaving again for months if not years.⁶⁹ This limited docking time near land leaves “little scope for regulatory oversight or inspection by . . . authorities, decreasing the risk of punishment to traffickers.”⁷⁰ This also means that “boat captains have greater latitude to abuse workers because of the time and distance vessels spend away from shore.”⁷¹

At sea, “[l]aws are few and hardly enforced.”⁷² If authorities can access victims, many are reluctant to do so.⁷³ Worse, an AP investigation showed that “[Thai] immigration officials themselves are involved in labor trafficking, either through aiding labor brokers or by functioning as traffickers themselves.”⁷⁴ The Thai Navy was even accused of transporting detainees from official facilities to fishing vessels without their consent.⁷⁵

To further complicate enforcement attempts, when foreign fishermen are illegally trafficked onto boats, some are given false identities and nationalities. The AP investigation uncovered false identity documents and graves with “fake Thai names given to [the victims] when they were tricked or sold onto their ships, forever covering up evidence of their captors’ abuse.”⁷⁶ This deception hides illegal trafficking and aids in moving the fishermen into waters where they should not be fishing: “[i]llegal workers are given false documents, because Thai boats cannot hire undocumented crew.”⁷⁷ As an additional disguise, boats conduct “disappearing acts” that can “start with a bucket of paint.” Escaped slaves detail how they nail new names and tracking numbers onto their prison-ships, hoisting different country flags depending on where they were fishing.⁷⁸

Finally, in the same way those authorities cannot access the fishermen to help, so too, many fishermen do not have access to resources to help themselves.

68. *AP—Papua*, *supra* note 39 (“Hiding is easy in the world’s broad oceans.”).

69. *See Sylwester*, *supra* note 28, at 440.

70. *Id.* (internal quotation marks omitted).

71. *Id.*

72. *AP—Papua*, *supra* note 39.

73. *See, e.g., AP—Thai Shrimp*, *supra* note 58 (“The [trafficking] problem is fueled by corruption and complicity among police and authorities.”).

74. *See, e.g., Sylwester*, *supra* note 28, at 436; *accord AP—Thai Shrimp*, *supra* note 58 (“Former slaves repeatedly described how police took them into custody and then sold them to agents who trafficked them again into the seafood industry.”).

75. *Id.*

76. *See, e.g., AP—Slaves*, *supra* note 41.

77. *Id.*

78. *AP—Papua*, *supra* note 39 (describing how some captains repaint and renumber their boats and keep as many as four different country flags in their hulls).

Because of this, victims are unaware of and cannot access protective mechanisms and aid because their vessels fish far away from shore.⁷⁹

Slavery on U.S. Dinner Tables – Slipping Through the Loopholes

It is easy for the United States to externalize the issue of seafood slaves as an exotic, foreign harm that does not implicate the clam chowder, shrimp po'boys, and sushi we enjoy in the United States. However, we are not guilt free; the seafood we enjoy is also tainted by environmental harms and forced labor. This section and section 4, *infra*, highlight the legal loopholes that allow slavery to exist in our foreign and domestic seafood supply chains, and explore ways to close those loopholes.

Imported Fish Enter Through the “Consumptive Demand” Loophole

The Smoot-Hawley Tariff Act⁸⁰ was enacted in 1930 as a protectionist trade policy, raising tariffs on over 20,000 imported goods.⁸¹ Section 1307 of the Act bars goods produced or manufactured even in part by convict, forced, or indentured labor from “entry at any of the ports of the United States, and the importation thereof is hereby prohibited. . . .”⁸² As originally written, this seemingly positive prohibition was immediately followed by a loophole that allowed slave-caught fish into the American marketplace despite passage of the tariffs: “but in no case shall such provisions be applicable to goods, wares, articles or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.”⁸³ Essentially, if we wanted something and could not make enough domestically to meet demand, we could then import such goods even if they were made with slave labor. This “consumptive demand loophole” in the Tariff Act nullified the power of the legislation, and was a central reason that the ban on slave-made products was rarely enforced.

Thailand again is perhaps the best example for how the consumptive demand loophole has been used to feed America’s insatiable appetite for cheap seafood.⁸⁴

79. See Sylwester, *supra* note 28, at 440 (analyzing vulnerabilities of trafficking victims on Thai fishing vessels).

80. The Act is also known as the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 852 (1930).

81. See, e.g., *Protectionism in the Interwar Period*, U.S. DEPT. OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/protectionism> [<https://perma.cc/XBQ8-2EZ7>] (last visited Feb. 19, 2018) (discussing the protectionist intent of the Smoot-Hawley Tariff Act).

82. 19 U.S.C. § 1307 (1932) (amended by the Trade Facilitation and Trade Enforcement Act, H.R. 664, 114th Cong. § 910 (2016)).

83. *Id.*

84. Martha Mendoza, *US Lets in Thai Fish Caught by Slaves Despite Law*, ASSOCIATED PRESS (Apr. 22, 2015), <https://www.ap.org/explore/seafood-from-slaves/us->

NOAA estimates that the United States imports over eighty percent of the seafood Americans consume.⁸⁵ For shrimp, that percentage climbs to ninety percent,⁸⁶ with Americans consuming an astronomical 1.3 billion pounds of shrimp every year.⁸⁷ There is no way that domestic shrimp production, last measured to be 300 million pounds in 2004, can keep up with this insatiable demand.⁸⁸ Thus, using the consumptive demand loophole, the United States imported billions of pounds of shrimp annually from places like Thailand despite evidence of human rights abuses in their fishing industries.⁸⁹ Thailand exploits the environment and cheap labor to dominate the global shrimp market, and the United States' taste for shrimp allowed slave-caught, slave-peeled "Thai shrimp [to] slip[] right through [the consumptive demand] loophole."⁹⁰ It is important to note that Thailand is not the only source of slave-caught seafood in the United States, and that shrimp is not the only tainted seafood we eat.⁹¹

Closing the Consumptive Demand Loophole on Foreign Seafood

In February 2016, President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTFA"),⁹² formally closing the consumptive demand loophole. The Act eliminated the exception under the Smoot-Hawley Tariff Act and allowed for stiffer enforcement of Customs and Border Patrol's ("CBP") authority to seize shipments suspected of being tainted with forced labor.⁹³ However, even with this legislative victory, enforcement remains difficult. CBP cannot initiate investigations of suspected imports and must first receive a petition showing "reasonably but not conclusively" that imports were made at least in part

lets-in-thai-fish-caught-by-slaves-despite-law.html [https://perma.cc/LAE9-YEUD]
[hereinafter *AP – Thai Despite Law*].

85. *Global Wild Fisheries*, NOAA FISH WATCH, <https://www.fishwatch.gov/sustainable-seafood/the-global-picture> [https://perma.cc/Z76U-3ACT] (last visited Feb. 19, 2018).

86. See *AP–Thai Shrimp*, *supra* note 58 (estimating that nearly 90% of shrimp in the U.S. is imported).

87. *Id.* (calling shrimp "the most-loved seafood in the U.S. and citing statistics).

88. *Shrimp by The Numbers*, MARVESTA SHRIMP FARMS, <http://marvesta.com/shrimp-by-the-numbers/> [https://perma.cc/Y9BQ-NKPF] (last visited Feb. 19, 2018) ("[T]he U.S. has surpassed Japan as the world's largest shrimp market").

89. See, e.g., discussion *supra* Sections 2(c) and 2(d) of this article.

90. *AP–Thai Shrimp*, *supra* note 58.

91. *Id.* ("The State Department's annual anti-trafficking reports have tied [tainted] seafood to 55 countries on six continents, including major suppliers to the U.S.").

92. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-376, 130 Stat. 122 (2016) [https://perma.cc/7J7P-NC7N].

93. Martha Mendoza, *Obama Bans US Imports of Slave-Produced Goods*, ASSOCIATED PRESS (Feb. 25, 2016), <https://www.ap.org/explore/seafood-from-slaves/Obama-bans-US-imports-of-slave-produced-goods.html> [https://perma.cc/PW95-V7A2] ("This law slams shut an unconscionable and archaic loophole that forced America to accept products made by children or slave labor.") (internal citations omitted).

with forced labor.⁹⁴ Additionally, even when businesses, agencies, and concerned individuals file petitions, it is “hard, if not impossible, to prove fish in a particular container is tainted, because different batches generally mix together at processing plants.”⁹⁵ Nevertheless, the closing of the loophole is an important first step, and has already had some positive impact in non-seafood sectors. In the first four months after the elimination of the loophole, CBP issued three withhold release orders stopping imports of suspected goods.⁹⁶ In contrast, in the eighty-six years the loophole existed, CBP issued only thirty-nine orders.⁹⁷ The TFTFA also requires CBP to submit annual forced labor reports to the U.S. Congress for review, which will “undoubtedly place additional pressure on CBP to display active trade enforcement in the forced labor arena.”⁹⁸ These collective efforts are slowly working to close the consumptive demand loophole in reality instead of just on paper.

Domestic Fisheries – a More Challenging Loophole to Close

A closer look at the domestic Hawaiian longline fishery also uncovers evidence of forced labor. This time, the loophole is less clear-cut, and, therefore, harder to address. This section analyzes how overlapping state and federal loopholes have allowed the waters around the paradise islands to become a prison for some foreign fishermen trapped on American-flagged fishing boats, and explores various solutions on how to close these loopholes.

Citizenship Loopholes in Federal Law: Crew Nationality Loophole

Federal law requires that seventy-five percent of crew on U.S. commercial fishing vessels be citizens of the United States.⁹⁹ Years ago, Hawaiian lawmakers added a loophole for Hawaii’s commercial fishermen, allowing them to crew their

94. *Id.*

95. *AP–Thai Despite Law*, *supra* note 84 (“You can’t expect a Customs guy at the border to know that a can of salmon caught on the high seas was brought in by a slave.”) (*internal citations omitted*); *accord AP–Thai Shrimp*, *supra* note 58 (describing elaborate efforts AP reporters used to trace slave-peeled shrimp to U.S. supply chains and implying that it would be impossible for reporters to research all suspected shipments coming in).

96. U.S. Customs Compliance Group, *Increased Enforcement of U.S. Forced Labor Prohibition Carries High Risks for U.S. Companies (and their International Supply Chains)*, BAKER & MCKENZIE, (July 2016), <http://bakerxchange.com/rv/ff0028c7c7e85c4628756cc3404b9ba31d2a3c6b> [<https://perma.cc/RMZ5-N8YU>] (last visited Feb. 19, 2018).

97. *Id.*

98. *Id.* (describing potential challenges and obstacles for businesses under the TFTFA).

99. 46 U.S.C. § 8103(b)(1). The statute requires “unlicensed seamen” to be citizens of the U.S., permanent residents, or a foreign national enrolled in the U.S. Merchant Marine Academy. There is an exception that was put into the federal code for fishing vessels fishing exclusively for highly migratory species (including swordfish and tuna) from the citizenship requirement for unlicensed seamen.

vessels with cheaper migrant crews.¹⁰⁰ Hawaiian commercial fishing boat owners are exempted from these “federal rules enforced almost everywhere else” if they fish for highly migratory species (such as the swordfish and tuna targeted by the Hawaiian fishing fleets).¹⁰¹ This fleet employs (and potentially exploits) about 700 foreign fishermen, some of whom work for as little as \$.70 per hour/\$5,000 for a full year.¹⁰² By contrast, American deckhands can average \$28,000 for just a few months’ work.¹⁰³ The math is clear: “the [foreign] fishermen are a bargain: bait and ice can cost more than crew salaries.”¹⁰⁴

State Fishing License Without Federal Immigration Status – a Legal Limbo

The federal loophole allows the foreign fishermen to work on American-owned, American-flagged boats without visas, as long as they do not go on shore.¹⁰⁵ CBP agents meet the fishermen at the docks and stamp “refused” on their landing permits, which voids the permits and bars them by law from setting foot on U.S. soil.¹⁰⁶ The situation gets murky because the fishermen also need a state commercial fishing license to start working.¹⁰⁷ To get that license, they must be “lawfully admitted” to the United States.¹⁰⁸ The jurisdictional overlaps and loopholes create a legal limbo for these fishermen. They are allowed to fish under the federal law loophole, but they aren’t allowed in the country. And somehow, they still get their state fishing licenses, which require them to be “lawfully admitted” in the United States, despite having their landing permits refused. This “labor scheme has been in place for approximately two decades,” wherein these fishermen are issued state fishing licenses but rejected landing privileges.¹⁰⁹

100. See, e.g., *AP–Hawaiian Seafood*, *supra* note 2 (“[I]nfluential lawmakers, including the late Hawaii Sen. Dan Inouye, pushed for a loophole to support one of the state’s biggest industries.”).

101. *Id.* (discussing the crew citizenship loophole that Hawaiian fishing vessels take advantage of); see also, 46 U.S.C. § 8103 (b)(1)(B)(2)(B) (listing the exception for “a fishing vessel fishing exclusively for highly migratory species[.]”).

102. *AP–Hawaiian Seafood*, *supra* note 2.

103. *Id.*

104. *Id.*

105. Martha Mendoza, et al., *Hawaiian Lawmakers Promise Reform for Confined Fishermen*, ASSOCIATED PRESS (Sept. 19, 2016), <https://www.apnews.com/4c1f4af89db740cab9798a5fb401430d> [<https://perma.cc/WN7R-3R3N>] [hereinafter *AP – Hawaii Reform*].

106. Margie Mason, et al., *Hawaii May be Breaking Law by Allowing Foreign Men to Fish*, ASSOCIATED PRESS (Feb. 11, 2017), <https://www.ap.org/explore/seafood-from-slaves/hawaii-may-be-breaking-law-by-allowing-foreign-men-to-fish.html> [<https://perma.cc/WW3F-A5WC>] [hereinafter *AP – Hawaii Laws*].

107. *Id.*

108. *Id.*

109. *S.B. 152 Relating to Commercial Marine Licenses: Legislative Testimony on S.B. 152 Before the S. Comm. on Water and Land and International Affairs and the Arts*, 28th

As state and federal agencies attempt to explain the situation from their point of view, the confusion grows. Federal U.S. Customs has commented that a “refused” landing permit means the fishermen “can’t even enter the U.S. temporarily.”¹¹⁰ Nevertheless, the State of Hawaii’s Department of Land and Natural Resources (“DLRN”), which issues the state fishing licenses, accepts the refused landing permits as proof that the fishermen are “lawfully admitted” to the country and “continue[s] issuing fishing licenses to the foreign workers despite the fact that Customs says the men are not lawfully admitted.”¹¹¹

So, the men fish and dock, but are confined to their ships—“floating prisons”¹¹²—or the very immediate, guarded pier area.¹¹³ The foreign fishermen are stuck in this no man’s land—or ocean rather—in a “state of extended deportation.”¹¹⁴ The 1259s are deportation documents CBP issues to foreigners “without legal presence.” Fishermen are prohibited from going beyond a very restricted, guarded section of docks and are required to be “detained on board for the entire duration of their stay at the piers.”¹¹⁵ They remain in this “extended deportation” limbo for the entirety of their fishing contracts.

There is additional confusion surrounding who exercises jurisdiction over these foreign fishermen. While CBP meets fishermen at the docks, they and “other federal and local government agencies and law enforcement claim they lack jurisdiction to further an investigation into wage and labor abuses, human smuggling, and human trafficking.”¹¹⁶ The State of Hawaii Labor Department, by comparison, avoids intervening by claiming that “the workers fall under federal, not state, jurisdiction.”¹¹⁷ Basically, no one wants to claim responsibility over the sticky issue of guaranteeing that these foreign workers are not being exploited or abused. It’s a “black hole of governance,”¹¹⁸ and while everyone enjoys the fish they bring in, no one wants to make sure they are working in livable conditions and being paid adequately to catch that fish. It is a situation ripe for human rights abuses, including, *inter alia*, lack of “access to justice, access to proper medical care, labor representation and protections, and housing, among other basic necessities.”¹¹⁹

Leg., (HI 2017) at 28, available at https://www.capitol.hawaii.gov/session2018/testimony/SB152_TESTIMONY_WTL-IAA_02-22-17.pdf [<https://perma.cc/ZG5Z-K5RW>] [hereinafter *Legislative Testimony*].

110. *Id.*

111. *AP–Hawaii Laws*, *supra* note 106 (internal quotation omitted).

112. *AP–Hawaiian Seafood*, *supra* note 2 (quoting Forest O’Neil, who coordinates boat observers in Honolulu that go out on the longline boats with the foreign fishermen).

113. *Legislative Testimony*, *supra* note 109, at 6 (“Foreign crew members are allowed to move about the confined area at Pier 17-18.”).

114. *Id.* at 28.

115. *Id.* at 29 (internal quotation omitted).

116. *Id.* (internal quotation omitted).

117. *AP–Hawaii Laws*, *supra* note 106.

118. *AP–Papua*, *supra* note 39.

119. *Legislative Testimony*, *supra* note 109, at 29.

Signs of Labor Abuse in the Domestic Fishery

While the fishing industry sponsored a Rapid Assessment survey to explore forced labor or human trafficking and found none,¹²⁰ the AP reported instances of human trafficking as well as slave-like conditions, such as “men living in squalor on some boats, forced to use buckets instead of toilets, suffering running sores from bed bugs and sometimes lacking sufficient food.”¹²¹ Labor brokers recruit most of the migrant fishermen to work on the Hawaii longliners. Vessel owners pay about \$10,000 for one crew person,¹²² who then might be required to sign a contract requiring part of their salary or passport to be withheld until they complete their contract, to promise to replace themselves if they break their contract, or to agree to be fined up to a year’s salary for absconding.¹²³ These instances border very close to debt bondage and trafficking.

As long as the federal loophole exists and the jurisdictional responsibility over the fishermen remains murky, the potential for abuse remains very high. It is clear that the United States is not immune to this form of modern-day slavery.

Closing the Citizenship Loopholes on Domestic Landed Seafood

These loopholes sustain Hawaii’s huge and powerful commercial fishing industry. In fact, many in the industry claim that any regulations limiting foreign crew “would be crippling to the Hawaii longline fishing industry that has not been able to fill crew positions with U.S. citizens for many years.”¹²⁴ However, this is precisely the issue—the wages and work conditions are so bad that others will not do the work. The following section analyzes how to eliminate loopholes and evaluates various other avenues of recourse, their relative successes, and their limitations.

Direct Legislative Action—Close the Loopholes

In trying to close the loopholes, it makes sense to start with the legislation that created them. Unfortunately, even slight modifications to the federal loopholes have been met with strong resistance from the commercial fishing industry.¹²⁵ For example, a bill that would have required fishermen to come in person to the Department of Land and Natural Resources (“DLNR”) to receive

120. *Id.* at 26 (discussing how the commercial fishing industry is trying to self-police).

121. *AP–Hawaiian Seafood*, *supra* note 2 (discussing the findings of the AP investigation).

122. *Id.*

123. *See id.* (quoting a labor broker discussing how much crew members cost to recruit); *AP – Hawaii Laws*, *supra* note 106 (describing potentially exploitive contracts).

124. *Legislative Testimony*, *supra* note 109, at 40 (quoting David Marabella of Garden & Valley Isle Seafood, Inc. going against additional regulation).

125. *See, e.g., id.* at 5–6 (listing reason to deny increased legislative regulation and requirements).

commercial fishing permits died in committee.¹²⁶ Because the bill would have required commercial marine applicants to appear in front of DLNR in person, DLNR essentially would have been prohibited from issuing or renewing commercial marine licenses to alien crewmembers (thereby preventing forced labor situations).¹²⁷ A second bill, called the Sustainable Fishing Workforce Protection Act, aims to authorize temporary entry into the U.S. of alien crewmen working on Hawaii's longliners by issuing them nonimmigrant work visas to promote oversight, enforcement of labor laws, and recourse.¹²⁸ While it is still alive, it is estimated to have a five percent chance of enactment.¹²⁹ U.S. Customs has similarly suggested issuing the fishermen "temporary permits" allowing them to enter the United States, similar to the kind used by cruise ship employees and foreign flight attendants, but concluded that the idea would be "administratively cumbersome."¹³⁰ These suggested actions attempt to bring the foreign fishermen out of the loopholes they have slipped into, into more traditional arenas where oversight, regulation, and enforcement of standards would be easier to manage.

Set Standards for Basic Rights and Conditions on Fishing Vessels

As direct closing of the loophole seems unlikely, the next step would be to guarantee basic labor and human rights protections and decent working conditions to foreign fishermen despite their being in legal limbo. The ILO Work in Fishing Convention addresses forced labor in fishing industries worldwide, setting out baseline fundamental labor and human rights that must be protected in fishing work.¹³¹ It enshrines some of the basic tenants of the ILO Forced Labor Convention: "fishing crew possess the same universal rights as any other to work

126. S.B. 152, 28th Leg. (HI 2017) [<https://perma.cc/YRH9-HTMW>] (died in committee).

127. See, e.g. *Legislative Testimony*, *supra* note 109, at 1 (describing the process by which DLNR would, under the bill, be permitted to issue or renew commercial marine licenses).

128. Overview of *S. 2071: Sustainable Fishing Workforce Protection Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s2071> [<https://perma.cc/52Y4-ANLK>] (last visited Feb. 21, 2018).

129. *Id.* (stating the official status of the bill as introduced and referred to the Committee on the Judiciary, but estimating a low chance of passage); *accord Legislative Testimony*, *supra* note 1109, at 30 (advocating for a new work visa for foreign fishermen recruited to work in the U.S. longline industry).

130. *AP-Hawaii Seafood*, *supra* note 2; *accord Crewmember Visa*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/crewmember-visa.html> [<https://perma.cc/VFE9-XX4S>] (listing pilots, flight attendants, and cruise staff as eligible for Crewmember (D) visas but listing fishing vessel crewmembers as not eligible for such visa).

131. *Work in Fishing Convention*, 2007, INTERNATIONAL LABOR ORGANIZATION (ILO) (Geneva, June 14, 2017) 96th I.L.C Sess., I.L.O. C188 (2017), *entered into force* Nov. 16, 2017, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C188 [<https://perma.cc/6ZQY-5FCS>] (last visited Feb. 21, 2018).

voluntarily, freely and without penalty or menace, and to be paid as agreed.”¹³² It sets minimum requirements for work on board including hours of rest, food, minimum age and repatriation.¹³³ As of the date of this comment, the United States had not ratified the Work in Fishing Convention.¹³⁴ If the United States does so, additional veins of accountability would open up to hold the United States accountable.

Some groups and individuals want to tackle abuse at its source—labor brokers. The Environmental Justice Foundation lists regulation of unregulated brokers as one of its four calls to action to combat seafood slavery and illegal fishing.¹³⁵ Similarly, some have called on the State of Hawaii DLNR to stop selling commercial fishing licenses in bulk to private agents who then provide the licenses to illegal alien crewmembers.¹³⁶

Practitioners have also turned to international law as a potential solution. In July 2017, Turtle Island Restoration Network (“TIRN”) and other concerned organizations filed a complaint with the Inter-American Human Rights Commission (“IAHCR”), asking the panel to determine the responsibility of the United States for human rights abuses against migrant workers in the Hawaii longline fishing fleet.¹³⁷ As of the date of this comment, the IAHCR acknowledged receipt of the petition and listed it as “under study.”¹³⁸ No further communications have been received.

Internationally, we can follow the example of other countries. In March 2017, Jakarta, Indonesia hosted the first International Conference on Human Rights Protection in the Fishing Industry and announced that it intended to banish slavery from its fishing industry.¹³⁹ It plans to do so by creating a human rights

132. See, e.g., *Legislative Testimony*, *supra* note 109, at 19 (discussing the necessity of protecting these basic labor rights in the fishing industry).

133. *ILO Steps Up Moves to Protect Migrant Fishers*, THE MARITIME EXECUTIVE (Sept. 23, 2017), <https://www.maritime-executive.com/article/ilo-steps-up-moves-to-protect-migrant-fishers> [<https://perma.cc/3XBZ-USXH>].

134. See *Ratifications of C188 – Work in Fishing Convention, 2007 (NO. 188)*, ILO (Nov. 16, 2017), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333 [<https://perma.cc/8P8F-BTCF>].

135. *Working to End Illegal Fishing*, ENVIRONMENTAL JUSTICE FOUNDATION, <https://ejfoundation.org/what-we-do/oceans/combating-seafood-slavery> [<https://perma.cc/N39G-T28E>] (last visited Feb. 22, 2018) (describing four calls of action to combat seafood slavery).

136. Malia Zimmerman, *Rise in Human Trafficking Impacts Hawaii*, HAWAII REPORTER (July 11, 2014), <http://www.hawaiireporter.com/rise-in-human-trafficking-impacts-hawaii/> [<https://perma.cc/75RV-9GZR>].

137. See, e.g., Press Release, TIRN, *International Human Rights Complaint Filed on Behalf of Worker’s in Hawaii’s Longline Fishery* (July 21, 2017), available at <https://seaturtles.org/newssection/international-human-rights-complaint-filed-on-behalf-of-workers-in-hawaiiis-longline-fishery/> [<https://perma.cc/5UB3-KKDA>].

138. (Electronic communication on file with TIRN).

139. *Certified to Fish: Jakarta Conference Brings Hope to Fishermen the World Over*, FOUNDATION FOR INTERNATIONAL HUMAN RIGHTS REPORTING STANDARDS, available

certification process wherein corporations will be “certified to fish” if they can prove no slavery exists in their supply chains; without this certification, corporations and vessels cannot obtain a license to operate in the Indonesian fisheries industry.¹⁴⁰ At the conference there was much international discussion surrounding the economic benefits of “certified” slave-free fish. Several other nations, NGOs, and interested groups took the opportunity to discuss how to begin regulating their domestic fishing industries.¹⁴¹

Individual Recourse for Victims

As legislative reform and international recourse appear somewhat stagnant, some are seeking judicial recourse and help for individual victims. In a recent case, two Indonesian fishermen from the Hawaii longline fleet escaped when their boat docked in San Francisco and sued the vessel owner for human rights abuses and labor trafficking.¹⁴² The fishermen eventually settled the case with the vessel owner.¹⁴³ While these two victims received some protections and legal recourse, their settlement “will not impact nearly 800 other foreign fishermen in Hawaii’s fleet who are banned from leaving boats when the vessels reach U.S. shores.”¹⁴⁴ Other victims of trafficking confront this same challenge in bringing individual suits; individual actions “[fail] to deal with the economic, social, and legal conditions that create workers’ vulnerability to exploitation, [making it] ineffective in curbing human trafficking.”¹⁴⁵ In fact, these victim-centered approaches “[leave] the rest of the traffickers and trafficked population unaffected.”¹⁴⁶ Therein lies the main issue with individual judicial recourse—the abuse, for the vast majority, continues unfazed.

Fortunately, some countries are beginning to give aid to individual victims. Thailand established a Fishermen Centre to promote workers’ rights protection and legal assistance, and the United States is considering a similar center, specifically

at <https://business-humanrights.org/sites/default/files/documents/Fisheries%20Conference%20and%20Human%20Rights%20Certification%20%28FIHRRST%29.pdf> [<https://perma.cc/2KJ6-DQVG>].

140. *Id.*

141. *Id.*

142. Sorihin, et al. v. Nguyen, No. 4:16-cv-05422 (N.D. Cal. 2018 settled Jan. 3, 2018) [<https://perma.cc/3FR3-SMZH>].

143. *See Owner of U.S.-Based Fishing Vessel Agrees to Precedent-Setting Settlement Over Allegations of Human Trafficking, Abusive Labor Practices*, COHEN MILSTEIN, https://www.cohenmilstein.com/sites/default/files/Sea%20Queen%20II%20press%20release_1.3.17%20245%20pm.pdf [<https://perma.cc/7N3F-5865>].

144. *Indonesian Fishermen Settle Human Trafficking Suit*, ASSOCIATED PRESS (Jan. 4, 2018), <http://www.nydailynews.com/newswires/news/business/foreign-fishermen-settle-human-trafficking-suit-article-1.3736692> [<https://perma.cc/FW4L-ZSEL>].

145. Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 80 (2012) (discussing failures of victim-centered approaches to human trafficking).

146. *Id.*

for male victims of trafficking, to receive medical, psychological, and legal aid.¹⁴⁷ As mentioned *supra*, victim-centered approaches to enforcement and aid have the limitation of not changing the entire regime and providing recourse only to the individuals represented. Nevertheless, these are important steps in recognizing trafficking, holding guilty brokers and vessel owners responsible, and providing aid and resources to victims.

Corporate Responsibility

Corporate and consumer awareness and responsibility campaigns can also be leveraged to combat seafood slavery. While these avenues are not legally binding, they do provide important and potentially powerful opportunities for change.

Many consumers and smaller distributors recognize that “large corporations are the ones who act like the pope as far as sustainability and human rights, but then they go out and buy from the main culprits.”¹⁴⁸ There are very few corporations looking deep into their supply chains to ensure that they are not guilty of these very practices they openly disavow. Nestle is an exception; in an “unusual” disclosure, the food corporation self-policed, discovered forced labor in its Thai suppliers, and committed publicly to detailed strategies and efforts to rid their products of “forced labor and human rights abuses.”¹⁴⁹ Other companies wishing to do the same can utilize services to build social accountability into their supply chains in order to screen their products and resources for forced labor.¹⁵⁰

In contrast, most corporations are reluctant to exercise their power as customers of tainted supply chains. They “strongly condemn labor abuses and [vow] to take steps to prevent it,”¹⁵¹ but claim that if they stopped buying tainted

147. See Pratch Rujivanarom, *Rights Violations of Migrant Fishermen Focus of New Fishermen’s Centre*, THE NATION (Dec. 18, 2017), <http://www.nationmultimedia.com/detail/national/30334223> [<https://perma.cc/C863-EA ZD>] (reporting on the opening of a Fishermen Centre to provide assistance to fishermen); see also Sylwester, *supra* note 28, at 444 (discussing the U.S. State Department’s advocacy for anti-trafficking programs specifically catered to male victims).

148. Martha Mendoza, *AP Report on Slave-Peeled Shrimp Spurs Calls for Boycott*, ASSOCIATED PRESS (Dec. 14, 2015), <https://www.ap.org/explore/seafood-from-slaves/ap-report-on-slave-peeled-shrimp-spurs-calls-for-boycott.html> [<https://perma.cc/6FR3-LAZ7>] [hereinafter *AP - Boycott*] (quoting Buddy Galetti, president of Southwind Foods, a smaller L.A. importer who rarely buys Thai goods).

149. Martha Mendoza, *Nestle Confirms Labor Abuse Among its Thai Seafood Suppliers*, ASSOCIATED PRESS (Nov. 23, 2015), <https://www.ap.org/explore/seafood-from-slaves/nestle-confirms-labor-abuse-among-its-thai-seafood-suppliers.html> [<https://perma.cc/ZM4V-RL69>].

150. See, e.g. *Assessing Human Rights Risks & Measuring Social Performance: Emergent Tools for Companies*, FISHWISE, https://www.fishwise.org/wp-content/uploads/2017/10/FINAL_2017.09.12_FishWise-blog_Labor-Safe-Screen_Final_AA_CS.pdf [<https://perma.cc/3B4M-2T4X>] (last visited Feb. 22, 2018).

151. Margie Mason, et al., *AP Investigation Prompts New Round of Slave Rescues*, ASSOCIATED PRESS (July 30, 2015), <https://www.ap.org/explore/seafood-from-slaves/ap-investigation-prompts-new-round-of-slave-rescues.html> [<https://perma.cc/5MZE-LLX4>].

seafood, then they would no longer be “in the conversation anymore about labor, [then they would not] have the ability to fix it. [They would not] have the ability to push for change.”¹⁵² Examples of corporate social responsibility and leadership are rare and need to become more common if we are to begin eradicating supply chains of this modern-day slavery.

Consumer Responsibility

Consumer-driven change also begins with awareness. New Jersey Congressman Chris Smith agrees: “All of us may find ourselves eating a slave made product without knowing it, but once we know it, we all have a moral obligation . . . to make a personal decision to boycott it.”¹⁵³ For this reason, TIRN launched a boycott of unsustainably-caught swordfish.¹⁵⁴ TIRN encourages boycott of all swordfish caught using drift-gillnets (which harm the environment through excessive bycatch) and longlines (due to bycatch and human rights abuses). The campaign focuses to educate consumers about the unintended, negative externalities related to the fish they purchase.

In the end, concerned consumers, corporations, countries, and NGOs need to inform themselves and demand better products. Websites for consumers like slaveryfootprint.org or seafoodslaveryrisk.org exist to help individual consumers assess the specific seafood they’re buying. It is important that if we find something ugly lurking, that we don’t buy it.

We may be required to change our consumption patterns and demand. The shrimp peeling industry came about because “[c]onsumers enjoy the convenience of dumping shrimp straight from freezer to skillet, the result of labor-intensive peeling and cleaning. Unable to keep up with demand, exporters get their supply from peeling sheds that are sometimes nothing more than crude garages adjacent to the boss’s house.”¹⁵⁵ Furthermore, because consumers want this peeled shrimp for cheap, forced labor and slave-like conditions are easy ways to keep prices low. It is all supply and demand economics. Thus, American consumers can and should “speak through their wallets and tell companies: ‘We don’t want to buy things made with slavery.’”¹⁵⁶ If we do not buy it, they will not make it. Because we helped bring it about, we can also help end it.

152. *AP–Boycott*, *supra* note 148 (quoting Gavin Gibbons, spokesman for National Fisheries Institute, which represents about 75% of the U.S. seafood industry).

153. *Id.* (discussing the political will for a boycott against Thai shrimp).

154. *Boycott Swordfish*, TIRN, <https://seaturtles.org/take-action/swordfish-boycott/> [<https://perma.cc/9PGA-6J4G>] (last visited Feb. 22, 2018).

155. *AP–Thai Shrimp*, *supra* note 58 (discussing how the U.S. consumer’s desire for convenience and cheap seafood is paving the way for labor abuses).

156. *Id.* (quoting Susan Coppedge, a U.S. State Department anti-trafficking ambassador, on additional ways to put pressure on labor traffickers and seafood suppliers using them); *accord AP – 2000*, *supra* note 43 (“Many experts believe the most effective pressure for change can come from consumers, whose hunger for cheap seafood is helping fuel the massive labor abuses.”).

Conclusion

Over-demand for cheap seafood creates a supply-chain impetus to abuse the system through resource exploitation and illegal manipulation of the labor force. This is the true, high environmental and human cost of cheap seafood: “[s]kyrocketing market demand puts both marine ecosystems and seafood industry workers under pressure, and the resulting environmental and human rights abuses, therefore, must be addressed in tandem.”¹⁵⁷ Thus, “neither the complex causes of labor trafficking nor the regulations addressing it can be isolated from institutional recognition of overfishing. . . .”¹⁵⁸ The resource exploitation of fish and the labor exploitation of fishermen catching them are intertwined, and solutions must address both sides of the issue.

The situation is dire: it “has reached the point . . . today, where if you took away that free or very cheap labour, many of [the fishing] vessels that are operating quite simply wouldn’t be economic anymore.”¹⁵⁹ If these vessels require environmental and human exploitation to remain profitable, perhaps they should not be operating. We should be paying more for our fish and making sure that they are caught sustainably and without use of forced labor. Removing the demand for cheap seafood will reduce incentives for these illegal and harmful operations to continue fishing. It is only then that we can begin to address both the environmental and human rights abuses that have taken place.

Perhaps Hawaii Governor David Ige said it best: “Sometimes people fall in a loophole and they don’t get the full protections of labor laws that most of us enjoy,” but “that loophole doesn’t mean it’s ok to treat them like slaves.”¹⁶⁰

157. Sutton & Siciliano, *supra* note 26.

158. Sylwester, *supra* note 28, at 424 (discussing how causes of labor trafficking and regulations to address it cannot be discussed apart from recognition of the role overfishing plays).

159. See The HRAS Interview, *supra* note 26 (discussing the true economics of commercial fishing today).

160. *AP-Hawaii Reform*, *supra* note 105.
