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Briefing

The Two-Tiered System: Discrimination, Modern Slavery and Environmental Destruction on the High Seas

**Inaugural Plenary Meeting of the ILO SEA Forum for Fishers
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Introduction

Greenpeace welcomes the opportunity to contribute to the Inaugural Plenary Meeting of the ILO SEA Forum for Fishers. The issue of discrimination in the global distant water fishing (DWF) industry and the attendant harm inflicted on migrant fishers and our ocean is not new. Yet, the ASEAN Community, especially the countries of origin of workers aboard the Taiwanese and South Korean DWF fleets, has long allowed unequal treatment and associated human rights violations despite numerous commitments to promoting and protecting the human rights of its people, as well as preserving the marine environment.

The 2018 Global Slavery Index (GSI) identified high levels of vessel and fuel subsidies provided by national governments as one of six risk factors for modern slavery in the global fishing industry.¹ The “two-tiered system” used by Taiwan and South Korea to exclude migrant fishers in their DWF fleets from the scope of protection of national labor or employment laws is a de facto labor subsidy and should be considered a seventh risk factor. According to the GSI, “high subsidies indicate a lack of competitiveness in a country’s fishing industry and suggest likely pressure to cut costs.”² The two-tiered system was developed precisely to cut costs as the Taiwanese and South Korean DWF fleets would find it more challenging to maintain an edge on their competitors – and satisfy the demands of buyers – if their migrant crew were paid the national minimum wage and afforded the same rights and benefits as Taiwanese and South Korean crew. The higher rate of labor abuse in these fleets due to less regulation and weaker enforcement also reduces costs for vessel owners and the industry as a whole. The effect of such manipulation is fourfold damage: exploitation of migrant workers; harm to the marine environment from overfishing; devastation to coastal fishing communities whose

1 Global Slavery Index. 2018. What are the Risk Factors for Modern Slavery in the Fishing Industry?
<https://www.globalslaveryindex.org/2018/findings/importing-risk/fishing/>

2 *Id.*

resources are plundered; and distortion of the global seafood market. ASEAN Members that do not subsidize their fishing industry are disadvantaged by countries such as Taiwan and South Korea that do.

To ensure Southeast Asian migrant fishers are protected from forced labor and human trafficking, the members of the ILO SEA Forum for Fishers must take a strong unified position against the two-tiered system and work towards universal abolition of such policies and practices that are antithetical to the fundamental human rights and dignity of workers in the global fishing industry. Other key stakeholders such as US, EU, and other seafood buyers also have an important role to play in ensuring respect for fundamental rights in their global seafood value chains.

This briefing proceeds by providing background on the issue and laying out the relevant international and national laws that apply to migrant fishers in Taiwan and South Korea's DWF fleets. It then identifies common gaps and adverse impacts resulting from the two-tiered system and concludes with some thoughts and recommendations for the members of the ILO SEA Forum for Fishers and other relevant stakeholders.

I. Background

In 2011, Cambodian authorities and NGOs began receiving complaints from hundreds of Cambodian migrant workers who claimed they were trafficked by Giant Ocean International Fishery, Ltd. into the Taiwanese and Chinese DWF industries.³ Six Taiwanese nationals were later found guilty of trafficking 74 Cambodians and sentenced to 10 years imprisonment.⁴ This case prompted the ILO ASEAN TRIANGLE project to commission a report examining the recruitment and protection of ASEAN migrant fishers in the Taiwanese fishing industry. The report analyzed the recruitment of Cambodian, Filipino, Indonesian and Vietnamese migrant fishers and their working and living conditions onboard Taiwanese-flagged vessels operating both in national and international waters. The report concluded that migrant fishers who worked in national waters received much better treatment than those who worked in international waters and Taiwan needed to reform its two-tiered system if it wished to strengthen protection for migrant fishers in its DWF fleet.⁵

In 2017, following pressure from NGOs and the EU, Taiwan's Council of Agriculture promulgated its Regulations on the Authorization and Management of Overseas Employment of Foreign Crew Members ("Regulations") in an attempt to address the numerous human rights abuses that were documented in its DWF fleet.⁶ While the Regulations do provide greater protection, there remain many gaps and weaknesses that can only be addressed if Taiwan abolishes its two-tiered system and applies its Labor Standards Act to all migrant fishers in its DWF fleet.⁷

While Taiwan's two-tiered system has received a fair amount of attention from Greenpeace and other NGOs, other DWF nations such as South Korea have received less scrutiny even though they utilize a similar system to lower labor costs and limit labor protections. *Tied at Sea*, a 2017 report by IOM and the South Korean NGO, Advocates for Public Interest Law (APIL), is one of the rare studies on this issue and its findings are similar to what Greenpeace, the ILO,

- 3 Greenpeace East Asia. 2016. Made in Taiwan - Government Failure and Illegal, Abusive and Criminal Fisheries. <https://storage.googleapis.com/planet4-international-stateless/2016/04/1f3e47c1-taiwan-tuna-rpt-2016.pdf>; Butth Reaksmeay, Kongkea & Barron, Laignee. The Phnom Penh Post. 2014. Trafficker gets 10 years. <https://www.phnompenhpost.com/national/trafficker-gets-10-years>; Legal Support for Children and Women. 2017. Presentation on the "Giant Ocean Case" at the 3rd International Symposium on FishCRIME. <https://bluejustice.org/fishcrime/wp-content/uploads/2017/11/Vichuta-Ly.pdf>
- 4 Eang, Mengleng & Blomberg, Matt. The Cambodian Daily. 2014. Six Taiwanese Human Traffickers Sentenced to 10 Years Each. <https://english.cambodiadaily.com/news/six-taiwanese-human-traffickers-sentenced-to-10-years-each-57729/>
- 5 Unpublished report on file with the ILO.
- 6 Taiwan Council of Agriculture. Regulations on the Authorization and Management of Overseas Employment of Foreign Crew Members. <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050061>
- 7 United States Department of State. 2018 Country Reports on Human Rights Practices: Taiwan. P. 25. <https://www.state.gov/wp-content/uploads/2019/03/TAIWAN-2018.pdf>; The Maritime Executive. 2018. Call for Taiwan to End Abuse of Migrant Fishermen. <https://www.maritime-executive.com/article/call-for-taiwan-to-end-abuse-of-migrant-fishermen>

and other organizations have found in Taiwan.⁸ As in Taiwan, South Korea continues to largely ignore calls for reform of its discriminatory system that keeps Southeast Asian migrant fishers (Indonesia, Philippines, Myanmar, Vietnam) impoverished and vulnerable to abuse.⁹

II. International Law

As this issue is being brought to the ILO, the following analysis is limited to ILO instruments.

A. ILO Migrant Worker Instruments – C97 and C143

The ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the ILO Migrant Workers (supplementary provisions) Convention, 1975 (No. 143) are the two ILO conventions that specifically deal with migrant worker issues in the world of work. The relevant provisions in these conventions are those that address the problem of unequal treatment of migrant workers in destination countries.

Art. 10 of ILO C143 states, “Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, *equality of opportunity and treatment in respect of employment and occupation*, of social security, of trade union and cultural rights and of individuals and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory (emphasis added).”¹⁰

Art. 11(2) of ILO C143 narrows the application of Art. 10, stating, “This Part of the Convention does not apply to ... (c) seamen.”¹¹

Art. 11(2) of ILO C143 mirrors the same provision in ILO C97. In the 1999 ILO General Survey on the Reports on C97 and C143 and their Recommendations, the ILO Committee of Experts on the Application of Conventions and Recommendations explained the exception for seafarers built into these migrant worker conventions. It stated, “The third exception, seafarers, was included in Conventions Nos. 97 and 143 principally because a body of international and national legislation – including a substantial number of ILO Conventions – had been developed of specific relevance to this group, and it was felt merited distinct protection.”¹² The 2016 ILO General Survey Concerning the Migrant Workers Instruments confirmed the exclusion of seafarers was intended to include fishers.¹³

Sub-section (B) below considers whether the ILO instruments covering fishers on industrial fishing vessels do provide migrant fishers in the DWF fleet distinct protection from unequal treatment.

B. ILO Work in Fishing Instruments – C188 and R199

The ILO Work in Fishing Convention, 2007 (No. 188) and the ILO Work in Fishing Recommendation, 2007 (No. 199) are the two ILO instruments that specifically cover, among others, working and living conditions for all fishers on commercial fishing vessels over 24 meters in length. ILO C188 consolidated and updated previous ILO conventions on work in fishing. As such, it is the modern version of the conventions referenced by the ILO in its 1999 General Survey.

8 Advocates for Public Interest Law. 2017. Tied at Sea - Human Rights Violations against Migrant Fishers on Korean Fishing Vessels. https://issuu.com/apilkorea/docs/tied_at_sea_english

9 Interview with APIL on August 26, 2019.

10 International Labour Organization. C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143

11 *Id.*

12 International Labour Organization. 1999. General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975. Para. 112. [http://ilo.org/public/libdoc/ilo/P/09661/09661\(1999-87_1B\).pdf](http://ilo.org/public/libdoc/ilo/P/09661/09661(1999-87_1B).pdf)

13 International Labour Organization. 2016. Promoting Fair Migration - General Survey Concerning the Migrant Workers Instruments. Para. 122. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_453898.pdf

An examination of C188 and R199 shows that neither instrument has any provisions on equal treatment for migrant workers in the fisheries sector. The only reference to equal treatment is in the preamble to C188 which cites the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). ILO C111, however, is an instrument of general international law neither specific to migrant workers nor fishers and the 1999 General Survey noted that the ILO decided to exclude seafarers because national and international legislation providing strong protections to this group already existed. Therefore, some may conclude that C111 does not override the seafarer exception in C97 and C143.¹⁴ Others may argue that the principle of harmonization in international law requires the interpretation of “several norms that bear on a single issue” to “give rise to a single set of compatible obligations.”¹⁵ Under this principle, C111 is fully applicable to migrant fishers in Taiwan and South Korea’s DWF fleets since their situation is not covered in C188.¹⁶

The lack of clarity or consistency in the ILO legal framework may not necessarily be the reason Taiwan and South Korea have constructed fragmented legal regimes that permit discrimination against migrant fishers in their DWF fleets. But recognizing and addressing this gap in international law is an important step toward ensuring no country can legitimately defend the use of such discriminatory systems to effectively subsidize their fishing industry.

III. National Law

A. Taiwan

Migrant fishers hired overseas to work predominantly in international waters and the waters of other countries are covered by the Regulations on the Authorization and Management of Overseas Employment of Foreign Crew Members promulgated by the Council of Agriculture.¹⁷

The Labor Standards Act, the national labor law administered by the Ministry of Labor, only applies to migrant fishers who are hired domestically to work predominantly in national waters.¹⁸

Migrant fishers hired overseas are not entitled to the same labor rights (freedom of association and collective bargaining), wages, insurance, and pensions as those hired domestically.¹⁹

B. South Korea

Migrant fishers in South Korea’s DWF fleet are primarily covered by the Seafarers’ Act (Guidelines on the Management of Foreign Fishermen) enacted by the Ministry of Oceans and Fisheries.²⁰ The Minimum Wage Act does not apply to migrant fishers in the DWF fleet.²¹ The minimum wage for migrant fishers in the DWF fleet is determined through a labor-management agreement between South Korean vessel owners and the South Korean fishermen’s labor union.²²

The Labor Standards Act, South Korea’s national labor law, only applies in full to coastal water fishing vessels weighing less than 20 tons.²³

14 International Law Commission. 2006. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Para. 251(b)(5). http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

15 *Id.* at para. 251(a)(4).

16 *Id.* at para. 251(b)(9).

17 Taiwan Council of Agriculture. Regulations on the Authorization and Management of Overseas Employment of Foreign Crew Members. <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050061>

18 Taiwan Ministry of Labor. Labor Standards Act. <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=N0030001>

19 United States Department of State. 2018 Country Reports on Human Rights Practices: Taiwan. P. 25. <https://www.state.gov/wp-content/uploads/2019/03/TAIWAN-2018.pdf>; Correspondence with the Yilan Migrant Fishermen Union on September 10, 2019 (confirming migrant fishers in Taiwan’s DWF fleet do not have the right to form or lead their own unions or even join Taiwanese-led unions).

20 Advocates for Public Interest Law. 2017. Tied at Sea - Human Rights Violations against Migrant Fishers on Korean Fishing Vessels. P. 8. https://issuu.com/apilkorea/docs/tied_at_sea_english

21 *Id.*

22 *Id.*

23 *Id.*

IV. Gaps and Impacts

Three common gaps or weaknesses in Taiwan and South Korea’s legal framework for DWF are in minimum wage, labor recruitment, and labor inspection.

A. Minimum Wage

Taiwan

Migrant fishers in Taiwan’s DWF fleet are currently paid USD 450 per month.²⁴ The national minimum wage under the Labor Standards Act is NTD 23,100 or approximately USD 740 per month.²⁵ Because of the two-tiered system, each migrant fisher in Taiwan’s DWF fleet is losing roughly USD 3,480 per year and the combined total loss of all Southeast Asian migrant fishers (Indonesia, Philippines, Vietnam) is approximately USD 71,232,120 per year.²⁶

South Korea

In 2016, migrant fishers in South Korea’s DWF fleet were paid USD 457 per month if they had less than three years’ experience, and USD 614 if they had more than three years’ experience.²⁷ South Korean fishers in the DWF fleet were paid USD 1,437 per month, or more than three times as much as some migrant crew on the same vessel.²⁸

B. Labor Recruitment

Both Taiwan and South Korea do not regulate foreign recruiters of migrant crew in their DWF fleets. This lack of oversight has resulted in debt bondage and other recruitment-related abuses.²⁹

C. Labor Inspection

Both Taiwan and South Korea’s fisheries agencies have little to no capacity or expertise to conduct labor inspections on their DWF fleets. As a result, victims of forced labor are not identified as such and weak inspection regimes do not deter labor abuses in their DWF industries.³⁰

V. Conclusion

The ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (“Consensus”) reiterated ASEAN Member States’s commitment to “pursuing the ASEAN vision of a caring and sharing ASEAN Community that is people-oriented, people-centred, rules-based and socially responsible and where the well-being and livelihoods of the

24 Taiwan Council of Agriculture. Regulations on the Authorization and Management of Overseas Employment of Foreign Crew Members. <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050061>

25 Taiwan Ministry of Labor. Department of Standards and Equal Employment. Minimum Wage to be Adjusted to NT\$23,100 per month and NT\$150 per hour starting January 1, 2019. <https://english.mol.gov.tw/homeinfo/7040/39618/>; USD 740 is the monthly minimum wage as of September 6, 2019 (<https://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=TWD>).

26 The Taiwan Fisheries Agency stated that as of March 2019 there are 13,148 Indonesians, 6,180 Filipinos, and 1,141 Vietnamese migrant fishers in Taiwan’s distant water fishing fleet. The estimated total wage loss for Southeast Asian migrant fishers is based on the minimum monthly wage set by the Council of Agriculture, and the Ministry of Labor, respectively. The actual figure, which could be more or less, requires comprehensive data provided by the migrant fishers.

27 Advocates for Public Interest Law. 2017. Tied at Sea - Human Rights Violations against Migrant Fishers on Korean Fishing Vessels. PP. 21-23. https://issuu.com/apilkorea/docs/tied_at_sea_english

28 *Id.*

29 Financial Times. 2018. Taiwan’s Fishing Industry Faces Claims of “Hell” on the High Seas. <https://www.ft.com/content/de849e6e-b5ae-11e8-b3ef-799c8613f4a1>; Advocates for Public Interest Law. 2017. Tied at Sea - Human Rights Violations against Migrant Fishers on Korean Fishing Vessels. PP. 13-17, 40, 42. https://issuu.com/apilkorea/docs/tied_at_sea_english

30 Environmental Justice Foundation. 2018. Abuse and Illegal Fishing Aboard Taiwanese Vessel Let Slip Through the Net. <https://ejfoundation.org/news-media/2018/first-hand-reports-of-grave-abuse-and-illegal-fishing-aboard-taiwanese-vessel-allowed-to-slip-through-the-net>; Advocates for Public Interest Law. 2017. Tied at Sea - Human Rights Violations against Migrant Fishers on Korean Fishing Vessels. PP. 29, 41. https://issuu.com/apilkorea/docs/tied_at_sea_english

peoples are enhanced.”³¹ Realizing this vision requires caring for the tens of thousands of ASEAN migrant workers who currently face discrimination and exploitation in the Taiwanese and South Korean DWF fleets. The two-tiered system in these countries not only rob migrant fishers of earnings that could help support their families at home, but also income that could help strengthen their countries’ economic development. The system also increases migrant fishers’ risk of forced labor and human trafficking and infringes on their fundamental right to freedom from discrimination.

If the ASEAN Community is serious about enhancing the well-being and livelihoods of its people, it needs to take a strong unified position against the two-tiered system and demand equal treatment of and stronger protection for its workers. The inaugural plenary meeting of the ILO SEA Forum for Fishers presents an excellent opportunity for ASEAN Member States to do so and it is hoped the relevant States will take decisive action on this issue in future dialogues with Taiwan and South Korea.

VI. Recommendations

To the Members of the ILO SEA Forum for Fishers

- Adopt a strong resolution on flag State responsibility that reiterates fundamental principles and rights at work and decent work applies to all fishing vessels, including those operating on the high seas, and the primary responsibility to ensure compliance with these standards lies with the flag State; condemns the two-tiered system as a clear violation of the fundamental right to freedom from discrimination as enshrined in ILO C111; recognizes the two-tiered system as a risk factor for modern slavery in the fishing industry; commits ASEAN Member States to providing equal treatment to migrant fishers in their DWF fleet, including applying national labor law to all fishers regardless of national origin; and calls for the immediate abolition of all two-tiered systems around the world, with particular attention to improving labor inspection, regulation of foreign recruitment agencies, protecting trade union rights, and ensuring non-discrimination in wage, insurance, pension, and other entitlements.
- Adopt a strong MOU on labor recruitment, including recruitment of sea-based fishers, that addresses the gaps and weaknesses in Taiwan and South Korea’s current system of overseas recruitment. Acknowledge such gaps or weaknesses are directly related to the two-tiered system and incorporate the requirements under ILO C111 in the MOU.
- Establish a formal mechanism to engage East Asian flag States on issues such as the two-tiered system.

To ASEAN Member States

- Adopt a formal ASEAN Declaration or Consensus on flag State responsibility and labor recruitment that includes the elements recommended above.
- Ensure any ASEAN Convention on Work in Fishing contains the elements on the two-tiered system and labor recruitment recommended above.
- Commence formal dialogues with East Asian States such as Taiwan and South Korea on the two-tiered system and insist they apply their national labor or employment laws to all migrant fishers and comply with the ILO core Conventions (forced labor; child labor; discrimination; freedom of association and collective bargaining) and ILO C188. Ensure civil society participation in the dialogues as observers with speaking rights.
- Amend or enact relevant laws relating to labor migration, forced labor and human trafficking, and work in fishing to address the two-tiered system and incorporate the elements recommended above.

31 ASEAN Secretariat. 2018. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers. PP. 3-4. <https://asean.org/storage/2019/01/3.-March-2018-ASEAN-Consensus-on-the-Protection-and-Promotion-of-the-Rights-of-Migrant-Workers.pdf>

To the ILO

- Promote fundamental principles and rights at work and decent work in the DWF industry.
- Use the ILO supervisory system to provide clarity on the application of fundamental principles and rights at work to migrant fishers working in DWF fleets, including determining the two-tiered system as used by DWF nations is a violation of ILO C111.
- Consider amending ILO C143 or ILO C188, or adopting a protocol to these Conventions, to close the gap or loophole highlighted in this paper.
- Establish technical assistance projects in the ASEAN States affected by the two-tiered system and ensure abolition of the system is a principal goal from the outset.

To US, EU, and other seafood buyers

- Ensure all DWF vessel suppliers comply with the ILO core Conventions and ILO C188 and pay the cost of this compliance.
- Call on Taiwan and South Korea to abolish the two-tiered system.

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