Blue Trade and Forced Labour: Breaking the Resounding Silence of International Economic Law

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Abstract:

On 5 December 2017, the United Nations (UN) declared a 'Decade of Ocean Science for Sustainable Development' to be observed from 2021 to 2030. Beyond the rhetoric of sustainability, the absence of a rights-based approach that places human beings at the core of ocean policy and governance is striking. The ocean indeed remains the scene of major human rights violations. From seafarers to ship breaking sites or fisheries, the ocean is not only the place where 90% of trade in goods happens, but also the territory where grave human rights violations, often related to the labour recruited for ocean trade and investments, occur. In this context and based on a series of case studies involving seafarers, ship breaking and fisheries, in various countries, this article interrogates the silence of international economic law instruments and dispute settlement mechanisms and suggests pathways for reform in better integrating the International Labour Organization approach.

Key words:

blue economy – blue trade – fisheries – forced labour – foreign direct investment – international economic law – labour – seafarers – ship breaking – World Trade Organization

'Ainsi, de quelque sens qu'on envisage les choses, le droit d'esclavage est nul, non seulement parce qu'il est illégitime, mais parce qu'il est absurde et ne signifie rien. Ces mots, esclavage, et droit, sont contradictoires ; ils s'excluent mutuellement. Soit d'un homme à un homme, soit d'un homme à un peuple, ce discours sera toujours également insensé : Je fais avec toi une convention toute à ta charge et toute à mon profit, que j'observerai tant qu'il me plaira, et que tu observeras tant qu'il me plaira.' [1]

Rousseau, *Du Contrat Social* (1762)

[1] 'So, whatever way you look at it, the right to slavery is void, not only because it is illegitimate, but because it is absurd and means nothing. These words, slavery and law are contradictory; they are mutually exclusive. Either from a man to a man, or from a man to a people, this speech will always be equally foolish: I am making an agreement with you entirely at your expense and entirely for my benefit, which I will observe as much as I will please, and that you will observe as long as I please.' Translation from the French by the authors. Rousseau's work on slavery has sometimes been seen in a controversial light for it apparently did not denounce the Atlantic trade and the 'Code Noir' (France's codification), but it has also been revisited against a historical and philosophical background, see, for example, Jimmy Casas Klausen, Fugitive Rousseau: Slavery, Primitivism and Political Freedom (Fordham UP 2014) 356p.

'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'.

Universal Declaration of Human Rights (1948) Article 4

1. Introduction: Blue Trade and Rights

On 5 December 2017, the United Nations (UN) declared a 'Decade of Ocean Science for Sustainable Development' starting from 2021 and ending in 2030.[2] The Decade's main objective is to provide a common framework for ocean science to support the realisation of the 2030 Agenda for Sustainable Development. It is centred around six key 'societal outcomes': a clean, healthy and resilient, predictable, safe, sustainably harvested and productive, and transparent and accessible ocean. Along the same lines, 'ocean literacy' is promoted to understand the 'human influence on the ocean and the ocean's influence on people.'[3] Beyond this consensual rhetoric of sustainability, the absence of a rights-based approach (RBA) that places human beings at the core of ocean policy is striking. As a matter of fact, a 'safe ocean' is seen as one 'whereby human communities are protected from ocean hazards and where the safety of operations at sea and on the coast is ensured'[4], and hence adopting an environmentalist perspective which is balanced with health and safety considerations.

The ocean will never be 'safe' if it remains a territory of major human rights violations. From seafarers to ship breaking sites or fisheries, the ocean is not only the place where 90% of trade in goods happens, but also the scene of grave human rights abuses often related to the labour recruited for ocean trade and investments. Forced labour, modern slavery and human trafficking still characterise 'blue trade', which encompasses international trade and investment in the 'blue economy'. These repeated violations have been largely documented by independent civil society organisations and governments alike.[5] Real life stories of persecution have inspired political creation with remarkable films such as the 2019 *Buoyancy*, tackling the issue of slavery in the seafood industry through the eyes of a fourteen-year-old Cambodian boy

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[2] United Nations Decade of Ocean Science for Sustainable Development (5 December 2017) <https://www.oceandecade.org> accessed 12 June 2021.

[3] Intergovernmental Oceanographic Commission of UNESCO 'Ocean Literacy for the UN Decade of Ocean Science for Sustainable Development' (*UN Decade of Ocean Science for Sustainable Development*, 1 January 2020) <https://oceandecade.org/resource/76/OCEAN-LITERACY-DRAFT-STRATEGIC-PLAN----Ocean-Literacy-for-the-UN-Decade-of-Ocean-Science-for-Sustainable-Development > accessed 12 June 2021.

[4] See United Nations Decade of Ocean Science for Sustainable Development, 'Our Vision' <www.oceandecade.org> accessed 16 December 2021.

[5] ILO, 'Forced Labour and Human Trafficking in Fisheries' <www.ilo.org/global/topics/forced-labour/policy-areas/fisheries/lang--en/index.htm>; 'ILO Governing Body calls for Urgent action on Seafarer COVID-19 crisis' (ILO, 8 December 2020) <www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_763542/lang--en/index.htm>; Erdrem Vradar and others, 'End of Life Ships: the Human Cost of Breaking Ships' (Greenpeace, FIDH, YPSA, 2004) <www.fidh.org/IMG/pdf/shipbreaking2005a.pdf>; Bureau of International Labour Affairs, 'List of Goods Produces by Forced Labor' (US Department of Labor, 2020) <*www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods?tid=5524&field_exp_good_target_id=5789&field_exp_exploitation_type_target_id_1=All&items_per_page=10>*; Bonny Ling, 'Watershed for Human Rights in Taiwan's Fishery Sector' (*Human Rights at Sea*, 2021) <**www.humanrightsatsea.org/2021/05/11/watershed-for-human-rights-in-taiwans-fishery-sector/>** all accessed 16 December 2021.

sold to a Thai ship captain – a film that won a series of international awards.[6] Popular documentaries by *The Guardian*, as well as the recent controversial yet highly successful *Seaspiracy*, have highlighted major human rights violations at sea.[7] While 'naming and shaming' produces salutary popular awareness, it does not necessarily contribute to effective change that is embedded in legal obligations. In this regard, a few recent initiatives, as timid as they seem, point towards the direction of possible normative evolutions. Let us refer to only a few at this stage for our demonstration, while we will elaborate further on the same in the developments outlined below. On the soft law front to start with, on 21 May 2019, the City of Geneva formally signed and endorsed the 'Geneva Declaration on Human Rights at Sea'. The Declaration was supported by the UK-based charity Human Rights at Sea (HRAS), which has campaigned for the creation of a soft law instrument to ensure that human rights for all are respected at sea, including in the 'high seas', which is beyond territorial jurisdiction.[8] From a potentially more binding perspective, in May 2021, the Office of the United States Trade Representative (USTR) submitted a proposal to the World Trade Organisation (WTO) on the 'use of forced labour on fishing vessels'. This proposal was formulated in the context of the WTO fisheries subsidies negotiations and followed a domestic initiative, the 'Illegal Fishing and Forced Labour Prevention Act', a bill to end illegal, unreported, and unregulated fishing.[9] Although limited by their legal nature or their very ambitions, these recent initiatives indicate an unprecedented interest in providing normative solutions to a major issue now discussed, if not directly tackled, in broader fora than the International Labour Organization (ILO).

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[6] Steve Dow, 'Such Brutality: Tricked into Slavery in the Thai Fishing Industry' (*The Guardian*, 21 September 2019) <www.theguardian.com/world/2019/sep/21/such-brutality-tricked-into-slavery-in-the-thai-fishing-industry>; Rodd Rathjen, 'Buoyancy' (*IMDb*, 2019) <www.imdb.com/title/tt5045746/> both accessed 16 December 2021.

[7] 'Slavery at Sea: Thai Fishing Industry Turns to Trafficking – Guardian Investigations' (*The Guardian*, 1 July 2015) <www.youtube.com/watch?v=qNwoqLB_wKs>; Karen McVeigh, 'Seaspiracy: Netflix Documentary Accused of Misrepresentation by Participants' (*The Guardian*, 31 March 2021) <www.theguardian.com/environment/2021/mar/31/seaspiracy-netflix-documentary-accused-of-misrepresentation-by-participants> both accessed 16 December 2021.

[8] The Geneva Declaration on Human Rights at Sea (Human Rights at Sea) (March 2019) <https://gdhras.com> accessed 16 December 2021. The high seas were defined by the 1958 Convention on the High Seas and later the United Nations Convention on The Law of the Sea (UNCLOS), that is the 1982 Montego Bay Convention in its Part VII, Article 87 'Freedom of the High Seas' as follow:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

[9] 'Factsheet: Negotiations on fisheries Subsidies' (WTO) <https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm>; WTO, 'Fisheries Subsidies Draft Consolidated Chair Text' (11 May 2021) TN/RL/W/276 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276.pdf&Open=True>; 'United States Urges WTO Members to Address Forced Labor on Fishing Vessels in Ongoing Fisheries Subsidies Negotiations' (Office of the United States Trade Representative, 26 May 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-urges-wto-members-address-forced-labor-fishing-vessels-ongoing-fisheries-subsidies>; A Bill to Address Seafood Slavery and Combat Illegal, Unreported, or Unregulated Fishing, and for Other Purposes (introduced 10 May 2021) H.R.3075 <https://huffman.house.gov/imo/media/doc/SEAFOODLABOR_01_xml_final%20v2.pdf> accessed 13 June 2021.

This article does not discuss general businesses and human rights issues, nor does it focus on a given country's supply chain or domestic legislation to tackle the same. Blue trade is unique in that it takes place at sea, a legally complex area where the determination of national and international responsibilities and applicable laws remains difficult. Our approach is based on the most relevant available legal tools designed specifically by the ILO for what was not yet called the 'blue economy' or 'blue trade' but de facto relate to it. Forced Labour is indeed a violation of human rights.[10] We have then chosen to focus our attention on 'forced labour' understood as a broad category encompassing forms of 'human trafficking' and 'modern slavery' in blue trade. Forced labour is defined by several ILO Conventions and understood as involuntary work performed under coercion through violence and threats, either through obvious means (physical violence) or more subtle forms (debt, retention of identity papers, denunciation to the immigration police, psychological manipulation, etc.). According to the ILO Forced Labour Convention, 1930 (N°29), forced or compulsory labour is defined as 'all work or service which is exacted from any person under threat of a penalty and for which the person has not offered himself or herself voluntarily'.[11] In addition, in 1957, the ILO Abolition of Forced Labour Convention (N°105) banned forced labour imposed by the State as a mean of punishment. Both Conventions now enjoy quasi-universal ratification (179 ratifications out of the 187 ILO members as of 2021), with two notable exceptions: China and the United States. In addition, in 2014, the International Labour Conference (ILC) adopted a Protocol to the 1930 Forced Labour Convention and the Forced Labour (Supplementary Measures) Recommendation (N°203). The Protocol provides additional measures for prevention, protection, and remedy to attain the elimination of forced labour. Human trafficking is often associated with forced labour in that it is a way to coerce people into work. In 2000, the UN adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.[12] It is the first legally binding instrument with an internationally recognized definition of human trafficking and is part of the United Nations Convention Against Transnational Organised Crime.[13] Article 3 of the Convention titled, 'Use of Terms', defines trafficking as follows:

[10] While the literature on civil and political human rights is extremely rich, labour rights – as socio-economic rights – have long been neglected by academic legal research. For a reference work, Philip Alston, *Labour Rights as Human Rights* (OUP 2005) 264; Carlos Miguel Herrera, *Les Droits Sociaux* (PUF 2009); Katherine G Young and Amartya Sen, *The Future of Economic and Social Rights* (CUP 2019) 706.

[11] Forced Labour Convention (ILO 1930) C029 <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029> accessed 16 December 2021. Article 1(3) of the Protocol of 2014 to the Forced Labour Convention reaffirms this language and provides three elements to the definition of forced labour: 'work or service' referring to all types of work occurring in any activity, industry or sector, formal or informal of the economy; 'menace of any penalty' in reference to a large variety of tools to force someone into work; 'involuntariness' in reference to a form of work accepted without consent and implying the absence of freedom to leave at any time.

[12] Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (UNHRC) (adopted 15 November 2000) <www.unodc.org/res/human-trafficking/2021the-protocol-tip_html/TIP.pdf> accessed 16 December 2021.

[13] United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UN Office on Drugs and Crime, 2000) <www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf > accessed 16 December 2021.

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

It is important to bear in mind that this definition applies to all human beings including children. As to 'modern slavery', a term now often used by the media and other civil society organisations, it refers to contemporary forms of forced labour, some of which being close to slavery.[14] The ambiguity of the expression, as we will see below, does not always serve its purpose. While slavery is not a thing of the past, with an estimate by the ILO of more than 40 million people victims of slavery worldwide, there is nothing modern to it.[15] It is precisely not a rupture from a given pre-existing order suggesting a sense of progress as indeed with the term 'modernity'. Slavery entails ownership. It revolves around the violent relation between a dominating master and a subjugated slave deprived of the rights entitled to all. This very element of property signifies that one human being is acquired by another. Ownership is key to understand the conceptual and legal implications of the problem and how capitalism has used and uses slavery today.[16] Low castes, tribal minorities and indigenous peoples are particularly vulnerable to slavery for traditional and cultural reasons and form a large part of those subjugated and exploited in the globalised economy. Slavery has tainted the entire history of humanity from Spartacus' revolt against the Roman Republic to the Atlantic slave trade and, more recently, to contemporary forms of slavery. The legal fight against slavery is also nothing new. In the late 18th century, societies were formed in France and the United Kingdom for the abolition of the slave trade. The Convention, that is the first elected Assembly of the First Republic (1792-1804) after the French Revolution of 1798, legally abolished slavery in France and its colonies, although it was restored by Napoleon in 1802. At the international level, the 1926 slavery Convention defined slavery as follow:

> Article 1
>
> For the purpose of the present Convention, the following definitions are agreed upon:
>
> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

[14] The Modern Slavery Act 2015 (UK) <www.legislation.gov.uk/ukpga/2015/30/contents/enacted>; UK Home Office and Victoria Atkins MP, 'New Tough Measures to Tackle Modern Slavery in Supply Chains' (22 September 2020) <www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains> both accessed 16 December 2021. For the first time in the world, UK public bodies with a budget of GBP 36 million or more will be required to regularly report on the steps taken to prevent modern slavery in their supply chains.

[15] ILO, 'Facts and Figures' (September 2017) <www.ilo.org/global/topics/forced-labour/lang--en/index.htm> accessed 16 December 2021.

[16] Critical studies have explored the intrinsic link between slavery and capitalism from The Industrial Revolution to the plantation economy and the Atlantic slave trade to more contemporary forms of subjugation. Eric Williams, *Capitalism and Slavery* (University of North Carolina Press 2021) 272; Edward E Baptist, *The Half Has Never Been Told* (Basic Books 2016) 560.

> (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

It was amended by the Protocol of 7 December 1953.[17]

These issues concerning slavery are still very much prevalent in today's globalisation, trade, and supply chains. There are acute problems in the 'blue trade', or what we define as international trade and investments related to the ocean. A true 'blue economy' understood as the sustainable use of the ocean will never be achieved if major human rights abuses are perpetrated against those who make a living out of the ocean. As often in international law, specialism is used to produce and justify a piecemeal approach to global questions. This fragmentation ritualistically denounced by the International Law Commission (ILC) and scholars alike has de facto acted as a powerful barrier and capitalistic management tool to artificially separate economic realities and authorise certain bodies (the ILO mainly) to address labour issues while others (the World Trade Organisation (WTO) or investment instruments) are largely circumscribed to trade and investment technicalities[18].

In this backdrop and based on a series of case studies involving seafarers, ship breaking yards and fisheries in various countries (Section 2), this article interrogates the silence of international economic law instruments and dispute settlement mechanisms (Section 3) to later conclude with suggestions for pathways for reforms (Section 4).

2. The Dire Case of the Blue Trade Labour

The massive and repeated human rights abuse in 'blue trade' would require a dedicated study to unveil their factual realities as much as the cultural, political, and economic backgrounds against which they exist. The below mentioned developments only provide a patchwork approach to the complex issues with a view to sensitizing an international economic law readership that is often too little inclined to dig into the socio-economic aspects of trade and investment. The very fact that most international economic law scholars still consider these issues as forgotten or minor certainly calls for more specific research, but, importantly, this topic first requires a general perspective. Seafarers, ship breakers as well as those engaged in fisheries labour have made the headlines, but their fates have paradoxically not been addressed by potentially relevant new international economic law instruments as we will demonstrate in the following discussion.

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[17] Slavery Convention (UNHRC) (signed 25 September 1926) <www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx> accessed 16 December 2021.

[18] ICJ, 'Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations' (27 October 2000) <www.icj-cij.org/public/files/press-releases/1/_3001.pdf> accessed 16 December 2021; Martti Koskenniemi, 'ILC Analytical Study 2006: ILC Study Group on the Fragmentation of International Law; Fragmentation of International Law – Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (ILC, 13 April 2006) UN Doc A/CN.4/L.682 and Add.1 and Corr. 1; 'ILC Conclusions 2006: Report of the Study Group, Fragmentation of International Law – Difficulties Arising from the Diversification and Expansion of International Law, Conclusions' (ILC, 2006) UN Doc. A/CN.4/L.702.

2.1. Caught at Sea

The Covid-19 Pandemic has shed some light on seafarers stranded at sea. Their destinies have unfortunately not waited for this global crisis to be shaken by long months, if not often years, in an ocean of apparent lawlessness, abandoned at the mercy of their bosses. Seafarers' abandonment covers a wide variety of situations from the abandonment of the ship on which they work to the neglect of their person in terms of pay, food, accommodation, sanitation, etc. In all these cases, the seafarers are deprived of their fundamental human rights and notably the right to life (including family life), food, health, and freedom of movement. The complexities of these scenarios and the multiplicity of potential legal environments (flagged ship, nationality of the seafarer, country of the port where the ship might have been left, etc.) has long precluded the adoption of harmonised norms. This apparent legal vacuum is particularly shocking while 90% of world trade happens via maritime or river transportation and the seafarers operating these ships are essential to our daily lives.

The ILO has adopted 70 international instruments (including 41 conventions and the related recommendations) to protect seafarers' status. The ILO instruments address all aspects of their work from working hours to health, pay, leave, social protection, pension, safety, repatriation, identity documents, and border control.[19] Importantly, in 2006, the Maritime Labour Convention (MLC) was adopted by the General Conference of the ILO with a view to revising and consolidating ILO's 37 existing conventions and recommendations and create a single coherent instrument stressing the global nature of the shipping industry.[20] It is now the reference instrument for seafarers. According to the Convention (Article II(f)), a 'seafarer means any person who is employed or engaged or works in any capacity on board a ship' and he/she is entitled to a series of fundamental rights expressly listed in Article III (Fundamental Rights and Principles):

> Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
>
> (b) the elimination of all forms of forced or compulsory labour;
>
> (c) the effective abolition of child labour; and
>
> (d) the elimination of discrimination in respect of employment and occupation.'

[19] 'International Labour Standards on Seafarers' (*ILO)* <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm> accessed 14 June 2021.

[20] Maritime Labour Convention (ILO) (MLC, 2006) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C186> accessed 17 June 2021; Maritime Labour Convention: Updated Documents (MLC, 2006) <https://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> accessed 17 June 2021; Compendium of Maritime Labour Instruments (3rd edition, ILO, 2021) <https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_770091/lang--en/index.htm> accessed 17 June 2021.

'Abandonment' is defined by the Convention's 2014 Amendments (Standard A2.5.2 – Financial security) as follows:

> 1. In implementation of Regulation 2.5, paragraph 2, this Standard establishes requirements to ensure the provision of an expeditious and effective financial security system to assist seafarers in the event of their abandonment.
>
> 2. For the purposes of this Standard, a seafarer shall be deemed to have been abandoned where, in violation of the requirements of this Convention or the terms of the seafarers' employment agreement, the shipowner:
>
> (a) fails to cover the cost of the seafarer's repatriation; or
>
> (b) has left the seafarer without the necessary maintenance and support; or
>
> (c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months. [21]

It remains extremely challenging for seafarers to implement their rights as the question of the 'competent authority' still reveals complex issues (for example, owner of the ship, management, flag, territorial waters, port, labour contract, and nationality of the seafarer).[22]

In May 2021, against the backdrop of the Covid-19 global pandemic, the ILO launched Voluntary Guidelines to protect seafarers' human rights. The 'Human Rights Due Diligence Tool' is a joint initiative of the UN Global Compact (UNGC), the Office of the High Commissioner for Human Rights, the ILO, and the International Maritime Organisation (IMO) based on very alarming reports of the labour conditions endured by seafarers.[23] According to the UN, in May 2021, over 300,000 forgotten seafarers were stranded at sea because they had been prevented from returning home due to government restrictions prohibiting them from going ashore. Some of seafarers have been working at sea for over 17 months, despite the MLC rule capping the work time limit at 11 months.[24] While this new tool remains voluntary, it reminds us of the urgency of the issues at stake and also of the remaining legal gaps to be filled by major actors who are almost absent from this debate, including trade law institutions or the United Nations Conference on Trade and Development (UNCTAD) notably.

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[21] Amendments of 2014 to the Maritime Labour Convention 2006 (ILO) (11 June 2014) <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248905.pdf> accessed 16 December 2021.

[22] 'Abandonment of Seafarers, Background, Legal Remedies and Practical Advice' (*Human Rights at Sea,* April 2021) <www.humanrightsatsea.org/wp-content/uploads/2021/04/HRAS_Abandonment_of-Seafarers_REPORT_APRIL21_SP_LOCKED.pdf> accessed 16 December 2021.

[23] 'Maritime Human Rights Risks and the Covid 19 Crew Change Crisis: A Tool to Support Human Rights Due Diligence' (IMO, ILO, UNHRC, UN Global Compact, 2020) <https://ungc-communications-assets.s3.amazonaws.com/docs/publications/Maritime-Human-Rights-Risks-and-the-COVID-19-Crew-Change-Crisis.pdf>; Committee of Experts on the Application of Conventions and Recommendations, 'General Observation on Matters Arising from the Application of the Maritime Labour Convention, 2006, as Amended During the COVID-19 Pandemic' (12 December 2020) <www.ilo.org/global/standards/maritime-labour-convention/WCMS_764384/lang--en/index.htm> both accessed 16 Decmeber 2021.

[24] See 'Maritime Human Rights Risks and the Covid 19 Crew Change Crisis' (n 23).

2.2. Broken Ships, Broken Lives

In direct relation to seafarers and global trade, the issue of the ship breaking industry has made the headlines for decades for its violent and inhumane treatment of workers. From the early 2000s, a number of civil society organisations have published investigative reports detailing the environmental and human costs of the dangerous and hazardous dismantlement of the world's ship fleet.[25] Two decades later, not much has been achieved. As shocking as it may seem, the vast majority of the ships which are used to transport our goods all over the world are broken by hand on the beaches of South Asia, a practice referred to as 'beaching'. A few countries are leading this lucrative industry: Bangladesh, India, Pakistan, and to a lesser extent, Turkey and China, for larger ships, as well as Indonesia and the Philippines for smaller ships. The issues at stake are endless ranging from environmental pollution to labour laws violations. Let us name a few and start with ship owners and the ship breaking transaction, which initiates the process. Ship owners usually sell their vessels to cash buyers who will dismantle their ship and take care of all operations, including of possibly renaming and reflagging the vessel to avoid legal scrutiny. Ship owners then become unaccountable and evade liability. The environmental damages related to ship breaking are abysmal with millions of tons of hazardous wastes (asbestos, polychlorinated biphenyl (PCBs), oil residues and heavy metals, for example) exported to the ship breaking yards, thereby deeply harming the local ecosystem and communities as much as the health of the workers involved in the industry. According to the ILO, ship breaking is one of the most dangerous occupations, 'with unacceptably high levels of fatalities, injuries and work-related diseases.'[26] In most cases, unskilled migrant workers as well as a significant number of child labourers are asked to break ships manually without any protective gears and with no access to sanitation and healthcare in case of injuries.[27] Workers are often recruited informally on a daily wage basis within a very limited legal framework and with not much, if any, possibility to organise, collectively bargain or unionise. Their ability to get access to legal recourses locally in the Special Economic Zones (SEZs) or specially demarcated coastal zones where the ship breaking industry often operates is quasi-non-

[25] Christoph Engel, 'Ship Breaking at Alang Scrap Yard in India' (Greenpeace, 1 October 1998) <https://media.greenpeace.org/C.aspx?VP3=SearchResult_VPage&STID=27MZIFB9GM2>; Vradar and others (n 5); 'Child-Breaking Yards, Child Labour in the Ship Recycling Industry in Bangladesh' (FIDH, YPSA, NGO Shipbreaking Platform, 2008) <www.fidh.org/IMG/pdf/bgukreport.pdf>; See, also, Linnea Wikström and others, 'Shipbreaking Stakeholders, Labour Needs and Intervention Areas in South Asia: An Analysis at the Regional Level of the Shipbreaking Value Chain' (Profundo, 2017) <www.industriall-union.org/sites/default/files/uploads/documents/2017/Netherlands/Shipbuilding/section_6_profundo.pdf>; 'Shipbreaking: A Dirty and Dangerous Industry' (NGO Shipbreaking Platform) <https://shipbreakingplatform.org> accessed 16 December 2021.

[26] ILO, 'Ship-breaking: A Hazardous Work' (23 March 2015) <www.ilo.org/safework/areasofwork/hazardous-work/WCMS_356543/lang--en/index.htm> accessed 16 December 2021.

[27] Wikström and others (n 25).

existent.[28] Interestingly, the ship breaking industry in such special economic enclaves are offered tax breaks and waivers from enforcement of labour or environmental rights.[29]

Local and national authorities have, however, tried to address these major labour rights violations in relation to hazardous waste, for example, through the 2003 Indian Supreme Court's landmark judgement and the adoption of the 2013 Ship Recycling Code.[30,31] This Code was later revised in 2019. The new bill ratified the Hong Kong Convention (discussed below) and was seen as part of India's effort to boost its ship recycling capacity by 40% by 2024. But the international framework on which these reforms have been made is relatively thin. It consists mostly of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention) adopted in 1989 and entered into force in 1992.[32] The objective of the Basel Convention is to control the movement and disposal of hazardous waste from developed countries to developing nations, but the Convention does prohibit this practice. It is based on a system of 'prior informed consent'. In addition, the ILO, the IMO and the Basel Convention have produced guidelines and established a joint working group to co-ordinate their activities and cooperation. The Basel Ban Amendment, adopted in 1995 and entered into force on December 2019, prohibits the export of hazardous wastes from member states of the EU, the Organization for Economic Cooperation and Development (OECD) and Liechtenstein to all other countries.[33] In 2009, the diplomatic conference of the IMO has adopted a new international convention for the safe and environmentally sound recycling of ships, namely, the Hong Kong Convention. It will enter into force 24 months after the date on which 15 States, representing 40% of the world merchant shipping by gross tonnage, have either signed it without reservation as to ratification or have deposited their instruments of ratification. Several industry leaders in India, China and Turkey have already developed their infrastructures in line with the Hong Kong Convention to obtain Statements of Compliance awarded by the International Association of Classification Societies

[28] Julien Chaisse and Georgious Dimitropolous, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law' (2021) 24(2) JIEL 229 <https://academic.oup.com/jiel/issue/24/2> accessed 16 December 2021; Lorenzo Cotula and Liliane Mouan, 'Labour Righst in Special Economic Zones: Between Unilateralism and Transnational Law Diffusion' (2021) 24(2) JIEL 341; James J Nedumpara, Manya Gupta, and Leïla Choukroune, 'WTO Litigation and SEZs: Determining the Scope of Exceptional Trade Unilateralism' (2021) 24(2) JIEL 403.

[29] See for example, 'Adani's Ship Recycling Project Faces Opposition from Villagers' (*Business Standard*, 4 August 2013) <www.business-standard.com/article/companies/adani-s-ship-recycling-project-faces-opposition-from-villagers-1130802006731.html> accessed 16 December 2021.

[30] *India – Research Foundation v Union of India and Others*, Supreme Court of India, WP 657/1995, Order (14 October 2003) (Hazardous Wastes) <https://www.elaw.org/content/india-research-foundation-v-union-india-others-wp-6571995-20031014-hazardous-wastes>. Later Supreme Court judgements have been interpreted as more favourable to the ship breaking industry. Florent Pelsy, 'The Blue Lady Case and the International Issue of Ship Dismantling' (2008) 4(2) Law, Environment and Development Journal 135 <http://www.lead-journal.org/content/08135.pdf> accessed 16 December 2021; and on 30 July 2012, India's Supreme Court allowed a notorious 213,000-tonne tanker, once called the Exxon Valdez, into the country for dismantling at the Alang (Gujarat) ship-breaking yard.

[31] Ship Breaking Code (Revised) (2013) (India) <http://shipmin.gov.in/content/ship-breaking-code-revised-2013> accessed 16 December 2021. The bill ratifies the Hong Kong Convention.

[32] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (UNEP) (adopted 22 March 1989) <www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx> accessed 16 December 2021.

[33] The Basel Convention Ban Amendment (UNEP) (adopted March 1994) <www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx> accessed 16 December 2021.

(IACS).[34] These statements are, however, very much criticized for being issued on a friendly business basis while the Hong Kong Convention is not yet in force.[35] The Convention itself can be seen as problematic as it does ban the practice of beaching, relies on flag State jurisdiction, hence encouraging flag shopping, and does not set higher standards than the national ones.

2.3. *Nothing Modern in Slavery*

Forced labour and contemporary forms of slavery are certainly present if not widespread on ship breaking sites, but it is the fisheries industry, which has recently made the headlines with the publication of a series of reports, the blacklisting of a number of countries by the US government, and the recent US WTO proposal to include forced labour in fisheries subsidies negotiations.[36] This discussion has gained momentum and translated into timid yet interesting developments in the WTO fisheries subsidies negotiations. The latest iteration of Article 8 (notification and transparency) of the draft text of 24 November 2021 submitted for consideration to the ministers for the 12th WTO Ministerial Conference includes, in a bracketed text under Article 8.2(b), the following language: 'Each Member shall notify the (Committee) in writing on an annual basis of (…) "any vessels and operators for which the Member has information that reasonably indicates the use of forced labour, along with relevant information to the extent possible."' However, as explained by the Chair of the negotiating group 'some other Members have expressed opposition on the basis that this issue is outside of the WTO's competence. Given these different views, the change is reflected in square brackets for further consideration.' [37]

As alluded to in our introduction, a large audience is now well-aware of these grave human rights violations thanks to a series of films, documentaries based on investigative

[34] International Association of Classification Societies, 'Members' <www.iacs.org.uk/about/members/> accessed 16 December 2021.
[35] 'HKC Statements of Compliance' (NGO Shipbreaking Platform) <https://shipbreakingplatform.org/issues-of-interest/the-law/hkc-soc/> 16 December 2021.
[36] Bureau of International Labour Affairs, 'List of Goods Produces by Forced Labor' *(*US Department of Labor, 2020) <www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods> accessed 16 December 2021.

[37] See WTO, 'Negotiating Group on Rules, Fisheries Subsidies: Revised Draft Text' (24 November 2021) WT/MN(21)/W/5. See also the explanation by the Chair of the negotiating group, 'Fisheries Subsidies Revised Draft Text, Chair's Explanatory Note Accompanying TN/RL/W/276/REV.2' (8 November 2021) TN/RL/W/276/Rev.2/Add.1:

> 127. In this revision, Article 8.2(b) is new, and it would require notification of any vessels or operators for which a Member has information that reasonably indicates the use of forced labour.
>
> 128. As you recall, this proposal was first raised I May this year in TN/RL/GEN/205, which we have discussed on several occasions, along with the language in Article 3.1 that I have already noted. In those discussions, various Members shared the particular concern over the use of forced labour in illegal fishing activities and supported enhanced transparency on it. Some others said they were not proponents of this initiative but found it acceptable.
>
> 129. However, some other Members have expressed opposition on the basis that this issue is outside of the WTO's competence. Given these different views, the change is reflected in square brackets for further consideration.'

journalism and well documented civil society organisations' reports.[38] Isolated at sea for months, if not years with the dire consequences of the Covid-19 pandemic, fishers cannot escape their fate and have been victims of repeated abuses – some of a very grave nature (torture, disappearance, murder, etc), whilst others much more frequent and yet of a very severe nature (deception based on vulnerability, absence of freedom of movement, threats, withdrawal of wages, extremely long working hours and overtime, sleep deprivation, very poor living conditions including access to food and health, retention of identity documents, debt bondage, physical and sexual violence, etc.). These inhumane and degrading treatments often amount to modern slavery. According to the ILO, in 2016, an estimated 40.3 million people were kept in forms of modern slavery including 24.9 million in forced labour and 15.4 million in forced marriage.[39] The vast majority of the forced labour victims is employed in agriculture and fisheries. The Global Slavery Index reported that, in 2018, seven countries with the highest slavery risk generated 39% of global catch.[40] The study demonstrated that not only poor countries were at risk. China, Japan, Russia, Spain, South Korea, Taiwan, and Thailand were found at high risk of modern slavery for their fishing activities rely on a high proportion of catch taken outside of their own waters and by higher-than-average harmful subsidies (see the below developments on subsidies). The exact figures are difficult to be verified, but evidence seems to show that the situation has not improved and probably could have further deteriorated with the global pandemic.[41]

The ILO has adopted seven recommendations, conventions and guidelines in direct relation to the fisheries situation: the ILO Working in Fishing Convention 2007 (No. C188), the ILO Working in Fishing Recommendation 2007 (No. R199), the ILO Forced Labour Convention (No. C029), the ILO Protocol of 2014 to the Forced Labour Convention (No. P029), the Guidelines on Flag State Inspection of Working and Living Conditions on Board Fishing Vessels, the Guidelines for Port State Control Officers (No. C188), the ILO Working Paper on the Flexibility Clauses (No. 315) of the Work in Fishing Convention 2007 (No. 188).[42] The

[38] See the references mentioned in our introduction, as well as notably Greenpeace Southeast Asia, 'Seabound: The Journey to Modern Slavery on the High Seas' (GreenPeace, 2 December 2019) <www.greenpeace.org/southeastasia/publication/3428/seabound-the-journey-to-modern-slavery-on-the-high-seas/>; Greenpeace Southeast Asia, 'Forced Labour at Sea: the Case of Indonesian Migrant Fisher' (GreenPeace, 31 May 2021) <www.greenpeace.org/southeastasia/publication/44492/forced-labour-at-sea-the-case-of-indonesian-migrant-fisher/>. Daniel Murphy, 'Hidden Chains – Rights Abuses and Forced Labor in Thailand's Fishing Industry' (Human Rights Watch, 23 January 2018) <www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>; Gavin G McDonald and others, 'Satellites Can Reveal Global Extent of Forced Labour in the World's Fishing Fleet' (2021) 118(3) PNAS <https://www.pnas.org/content/118/3/e2016238117> accessed 16 December 2021.

[39] ILO (n 15).

[40] 'Global Slavery Index – Fishing' (Walk Free, 2018) <www.globalslaveryindex.org/2018/findings/importing-risk/fishing/> 16 December 2021.

[41] Mark Townsend, 'Lockdown Brings Alarming Rise in Modern Slavery' (*The Guardian*, 4 April 2021) <www.theguardian.com/uk-news/2021/apr/04/lockdown-brings-alarming-rise-in-modern-slavery>; Walk Free and Common Health Rights Initiative, 'Eradicating Modern Slavery: An Assessment of Commonwealth Government Progress on Achieving SDG Target 8.7' (Walk Free, 2020) <www.walkfree.org/reports/eradicating-modern-slavery/>; Anti-Slavery International, 'What Is Modern Slavery?' <www.antislavery.org/slavery-today/modern-slavery/> all accessed 16 December 2021.

[42] ILO Sea Fisheries Project, 'International Conventions and Guidelines' <https://seafisheriesproject.org/international-conventions-and-guidelines/>; Walk Free & Commonwealth Human Rights Initiative (CHRI), 'Modern Slavery, An assessment of Commonwealth Government Progress on Achieving SDG Target 8.7' (CHRI, 30 July 2020) <www.humanrightsinitiative.org/publication/eradicating-modern-slavery-an-assessment-of-commonwealth-government-progress-on-achieving-sdg-target-87>; 'All at Sea, an Evaluation of Company Efforts to Address Modern Slavery in Pacific Supply Chains of Canned Tuna' (Business and Human Rights Resource Centre, March 2021) <www.business-

issue of implementation naturally remains. Taiwan's recent example is revealing of the need for countries to better enforce their international obligations. In October 2020, the US Labour Department placed Taiwan on its 2020 list of Goods Produced by Child or Forced Labour. In response to this naming and shaming policy, Taiwan's Fisheries Agency had ordered the Department of Transport to ensure that all vessels more than 24 meters in length comply with the 2007 International Labour Organisation Work in Fishing Convention. In addition, the Taiwanese authorities have added forced labour to their requirements for reporting of cases of human trafficking aboard Taiwanese ships.[43]

Lastly, the absence of sufficient normative interactions and institutional coordination is striking. The United Nations Convention on the Law of the Sea (UNCLOS) has long served as the main instrument for regulating blue trade. While discussions on possible amendments of the 1982 Montego Bay regime are taking place, not much progress has been made to address forced labour within this framework. UNCLOS Article 99 however deals directly with the transport of slaves:

> Prohibition of the transport of slaves
>
> Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.[44]

A universal right to visit is also provided for by the UNCLOS Article 110:

> Right of visit
>
> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag
> State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.'
>
> 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may

humanrights.org/en/from-us/briefings/all-at-sea-an-evaluation-of-company-efforts-to-address-modern-slavery-in-pacific-supply-chains-of-canned-tuna/ > all accessed 16 December 2021.

[43] See Ling (n 5) Introduction.

[44] Douglas MacFarlane, 'The Slave Trade and the Right of Visit Under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand' (2017) 7(1) Asian Journal of International Law 94.

proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

Whilst the definition of 'slave trade' remains problematic to address modern slavery practices, the activation of the UNCLOS Article 110 could help effectively tackle modern slavery in fisheries.

As we will see in our next section, in the international trade law arena, the World Trade Organisation (WTO) has been at the forefront of the fisheries subsides debate. The proactive – and still controversial – rulings by the Appellate Body in the original proceedings in *US – Tuna (II)* and *US – Shrimp* made a mark on environmental protection. In addition, the WTO Members are actively negotiating disciplines on fisheries subsidies to regulate illegal, unreported and unregulated fishing. But here again, not much, if anything, helps address the issue of forced labour.

3. The Resounding Silence of IEL

The above developments have shown the breadth and depth of human rights abuses in the blue trade. But what about international economic law, the very discipline which regulates international trade and investment? Its silence is resounding. As we will see below, we hardly find any relevant provisions in international trade and investment instruments. This does not come as a surprise, but rather as a confirmation of the little interest of the discipline for approaches stepping back from the technicalities of the field and embracing a reconciled vision of international law.[45] The schizophrenic nature of States' approaches to international law is still abysmal.[46] The WTO fisheries subsidies negotiations, with its overt and limited focus on the prohibition or elimination of subsidies, and the new trade and investment treaty initiatives, with the focus on market access gains and investor/investment protections, fail alike to capture the concerns of the human rights problems in blue trade and do not provide much room for improvement and redress.

3.1. The WTO Fisheries Subsidies Negotiations: A Missed Opportunity

The May 2021 WTO US proposal on the 'use of forced labour on fishing vessels', contentious as it is, could have come as a turning point in fisheries subsidies negotiations. But despite the most recent developments and the progress the US proposal has made, it is unlikely to result

[45] Leïla Choukroune and James J Nedumpara, *International Economic Law, Text, Cases and Materials* (1st edn, CUP 2021).
[46] Philippa Web and Rosana Garcianda, 'State Responsibility for Modern Slavery: Uncovering and Bridging the Gap' (2019) 68(3) International and Comparative Law Quarterly <www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/state-responsibility-for-modern-slavery-uncovering-and-bridging-the-gap/D34AB3E965CE0EFF0D8625ABE4425FC3> accessed 16 December 2021.

in a change of perspective or in the adoption of cutting-edge measures with real consequences. Fisheries subsidies negotiations have been extremely sensitive since the start of the Doha Round in widening the scope of negotiations beyond addressing the role of subsidies in promoting illegal and unregulated fishing or leading to overcapacity in certain fishing activities, especially of overfished stocks. Addressing concerns such as forced labour was always an outlier agenda. The prospective WTO Agreement, in its current draft, does not leave much room for labour, and the fisheries subsidies regime is not the best suited to genuinely address human rights abuses.

To provide some context, the issue of fisheries subsidies was introduced in 2001 in the Doha Development Agenda, which led to the creation of a dedicated Negotiating Group on Rules (NGR) to oversee disciplines on fisheries subsidies (as well as anti-dumping and regional trade agreements, amongst other matters). In December 2017, in Buenos Aires, the WTO Ministerial Conference agreed to constructively engage in negotiations with a view to reaching a comprehensive and effective disciplines subsidies framework that contributes to overfishing and overcapacity and eliminates subsidies that contribute 'illegal, unreported and unregulated' (IUU) fishing.[47] The focus of the negotiations is to prohibit the ability of Members to grant or maintain subsidies specifically in relation IUU fishing or in relation to overfished stocks. In order to determine IUU fishing, the Draft Chairman's text of May 2021 refers to the 'activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the UN Food and Agriculture Organization (FAO) in 2001.'[48] The disciplines relating IUU fishing could have potentially integrated fishing based on forced labour, but the focus of negotiations is mainly on subsidies. It is very unlikely that the future disciplines will bring any progress as far as labour is concerned. The complete absence of ILO instruments under the WTO website fisheries pages 'international instruments related to fisheries' is clearly indicative of the lack of interest and ambition in this matter.

3.2.Treaty Making: At Best a CSR Approach

Recent years have seen a sharp increase in trade and investment treaty negotiations, including mega-regional deals. According to the UNCTAD, there are today 2,844 bilateral investment treaties (BITs), with a total of 2,290 in force, and 420 treaties with investment provisions (TIPs), including 324 in force.[49] In this vast repertoire of international economic norms, one does not find very many daring instruments interconnecting labour, human rights and trade and investment.

The best approaches which could include some human rights and labour issues are essentially inspired by a discourse and some practice on corporate social responsibility (CSR).[50] The merits and limitations of CSR have been long documented in international

[47] WTO, 'Fisheries Subsidies, Ministerial Decision of 13 December 2017' (18 December 2017) WT/MIN(17)/64. See the work of the Food and Agriculture Organization (FAO) on the same at <www.fao.org/iuu-fishing/en/> accessed 16 December 2021.

[48] WTO, Negotiating Group on Rules, 'Fisheries Subsidies: Draft Consolidated Chair Text' (11 May 2021) TN/RL/W/276.

[49] See UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 16 December 2021.

[50] Leïla Choukroune, 'Corporate Social Responsibility and Foreign Direct Investment, The Indian Investment Treaty Approach and Beyond' in Leïla Choukroune and Rahul Donde (eds), *Adjudicating Global Business in and with India International Commercial and Investment Disputes Settlement* (Routledge 2021).

economic law literature.[51] International organisations and other influential think tanks came up with policy guidelines and recommendations to integrate CSR in treaty drafting and progressively 'legalize' their content. The United Nations Conference on Trade and Development (UNCTAD) first published some recommendations in 2004 on how to integrate CSR in international investment agreements considering that:[52]

> The challenge is to balance the promotion and protection of liberalized market conditions for investors with the need to pursue development policies; social responsibility obligations are one way to move towards such a balance.' (…) In this light, the policy options discussed range from an absence of any reference to social responsibility in IIAs to the inclusion of non-binding standards through the reservation of regulatory powers in relation to social responsibility to the use of a no lowering of standard clause, home country promotional measures and, lastly, the inclusion of generally binding social responsibility provisions.[53]

In April 2016, the ILO published a landmark research paper on CSR in international trade and investment agreements and the implications for States, businesses and workers. Following the classic tripartite approach of the Organisation, the ILO interrogated the progressive 'legalization' of CSR as well as the vagueness of CSR treaty-related provisions, which *de facto* limit the effectiveness of their implementation.[54] The ILO hence formulated the following hypothesis: 'one way to address these concerns and to assure that trade and investment go hand-in-hand with decent work is through the promotion of Corporate Social Responsibility (CSR)'[55]. In line with the UNCTAD analysis and its recent investment policy reform papers, the ILO is of the opinion that 'CSR would be better placed addressing only investors' behaviour in Bilateral Investment Treaties (BITs) as a means to rebalance the investors' rights conferred in these treaties (for example, access to investor-state dispute settlement) with the rights of States to regulate in the public interest, and to ensure the promotion of responsible investments.'[56,57] The tension between voluntarism and legalization has largely been debated.[58] While certain CSR-related voluntary principles could indeed foster some form of change, it is more likely

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[51] Peter Muchlinski, 'Corporate Social Responsibility' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 638; Peter T. Muchlinski, 'Multinational Enterprises and the Law' (2nd edn, OUP 2007) 100-104.

[52] Karl P Sauvant and Jorg Weber, *International Investment Agreements - Key Issues*, vol II (UNCTAD 2004) 129-51.

[53] ibid 130.

[54] Rafael Peels and others, 'Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Businesses and Workers' (2016) ILO Research Paper 13 <www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf> accessed 16 December 2021.

[55] ibid 1.

[56] 'Investment Policy Framework for Sustainable Development' (UNCTAD, 2015) <http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf> accessed 14 June 2021.

[57] ibid 2.

[58] Jean-Pascal Gond, Nahee Kang & Jeremy Moon, 'The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility' (2011) 40(4) Economy and Society 640 <https://doi.org/10.1080/03085147.2011.607364> accessed 16 December 2021; Adelle Blackett, 'Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries' in John J Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (1st edn, Routledge 2016) 121; Surya Deva and David Bilchitz (ed), *Human Rights Obligations of Businesses: Beyond the Responsibility to Respect?* (CUP 2013).

that other basic requirements in terms of working hours, child labour, forced labour or even the right to go on strike or collectively bargain are better enforced if clearly 'legalized'.[59]

The following examples provide an illustration of CSR related provisions one can find, in IIAs, since the mid-2000. The 2007 Norwegian model BIT testifies the 'first generation' of international agreements including some sort of CSR provisions. It was actually quite daring in its combined references to international law, labour and human rights. The Preamble reads as follows:

> Emphasising the importance of corporate social responsibility;
>
> Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights;
>
> Reaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights;
>
> Recognising that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments; [60]

This Preamble needs to be read in conjunction with the Article 32 (Corporate Social Responsibility): 'The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.'

Canadian treaties of the late 2000s offered a good overview of a sort of 'second generation' of CSR provisions in IIAs or foreign trade agreements (FTAs). As a matter of fact, the 2009 Canada-Peru Free Trade Agreement and its Chapter 16 on Labour (Article 1601 and 1603) is of particular relevance as it goes much further than simple CSR incantation:

> The Parties affirm their obligations as members of the International Labour Organization (ILO) and their commitments to the *ILO Declaration on Fundamental Principles and Rights at Work* (1998) and its Follow-Up as well as their continuing respect for each other's Constitution and laws…
>
> In order to further the foregoing objectives, the Parties´ mutual obligations are set out in the *Labour Cooperation Agreement between Canada and the Republic of Peru* (LCA) that addresses, *inter alia*:

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[59] Kenneth W Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalisation', (2000) 54(3) International Organization 401 <https://www.princeton.edu/~amoravcs/library/concept.pdf> accessed 18 June 2021.

[60] Norway Model Bilateral Investment Treaty (UNCTAD, 2007) < https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2873/download> accessed 10 June 2021.

(a) general obligations concerning the internationally recognized labour principles and rights that are to be embodied in each Party's labour laws;

(b) derogation from domestic labour laws in order to encourage trade or investment;

(c) effective enforcement of labour laws through appropriate government action, private rights of action, procedural guarantees, public information and awareness;

(d) institutional mechanisms to oversee the implementation of the LCA, such as a Ministerial Council and National Administration Offices to receive and review public communications on specified labour law matters and to enable cooperative activities to further the objectives of the LCA;

(e) general and ministerial consultations regarding the implementation of the LCA and its obligations; and

(f) independent review panels to hold hearings and make determinations regarding alleged non-compliance with the terms of the LCA and, if requested, monetary assessments. [61]

Even more daring, Article 21 of the Canada Burkina-Faso BIT (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) does not exclude CSR of the list of possible claims in an Investor State Dispute Settlement (ISDS) procedure. Although a quite unlikely situation from a pure cynical business perspective, one could imagine that the investor could claim against the State (Burkina Faso) for having not 'encouraged' the incorporation of CSR in its internal practices and policies.

Often referred to as the most advanced BIT in terms of protection on human rights, the 2016 Morocco-Nigeria treaty, although not yet in force, has integrated a number of provisions with regard to environment and labour. Article 15 of the BIT under the caption 'Investment, Labour and Human Rights Protection' is particularly interesting as it refers directly to the Parties' ILO obligations and the need not to weaken or relax domestic labour law, but also public health or safety, to encourage or attract foreign investment.[62]

The latest positive developments come from the Canada – United States – Mexico Agreement (CUSMA), which has replaced the North American Free Trade Agreement (NAFTA) – a long-term reference on the international investment agreement scene – and came into force on 1 July 2020.[63] An entire chapter (Chapter 23) is dedicated to the issue of labour. It clearly refers to the ILO Declaration on Fundamental Principles and Rights at Work and

[61] Canada-Peru Free Trade Agreement (in force 1 August 2009) ch 16 'Labour' <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/16.aspx?lang=eng> accessed 16 December 2021.

[62] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) (Morocco-Nigeria BIT) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed 16 December 2021.

[63] Canada – United States – Mexico Agreement (entered into force 1 July 2020) (CUSMA) <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> accessed 16 December 2021.

condemned derogations and the lowering of labour standards.[64] It sets the elimination of force or compulsory labour as a goal (Article 23.6). It addresses the questions of violence against workers (Article 23.7), migrant workers (Article 23.8) and discrimination at the workplace (Article 23.9). Lastly, it provides a number of elements for public awareness and procedural guarantees.

These positive developments are unfortunately not constant nor consistent. They are certainly not tailor-made for blue trade. The recently concluded Regional Comprehensive Economic Partnership Agreement (RCEP) provides a perfect counter example to more progressive mega-deals.[65] Nothing in its legal text, not even its Preamble, reflects current labour, or even CSR, discussions. It is less advanced than the vast majority of regional agreements, including the new generation of Chinese BITs. This is particularly regrettable as a very large share of global trade (and indeed blue trade) takes place in the Asian region.

A more detailed study of CSR provisions in recent IIAs would naturally require a dedicated contribution, but one can conclude on this brief overview in observing the following: that very few parties have chosen to legalise CSR and still prefer to relate to its voluntary character; the language adopted hence remains soft and rather vague despite certain 'non lowering of domestic law provisions' clauses; direct CSR claims are generally excluded from the treaty; and there are limited mechanisms of implementation such as, for example, committees or contact points. A better proposal is however put forward in FTAs that contain a labour chapter which *de facto* renders a number of CSR labour-related obligations binding in conjunction with existing domestic legalization efforts themselves integrating international norms.

4. Conclusion: Pathways for Action

The contrast between human rights violations in the blue trade and the quasi absence of international economic law related regulation is striking. Naturally, we may argue that international law is 'one' and that its interpretation cannot take place in isolation. Yet dispute settlement has not proven a tool to reunite all the branches of a discipline and suffers, more than ever before, from a form of dislocation. The UN initiatives and the 'Ocean Decade' are as commendable as schizophrenic. Our initial interrogations stressed this very question: how can the ocean be safe if it is a place for major human right violations? How can the regulation of blue trade be efficient if relying only on a set of technical trade norms artificially separated from the ILO framework or UNCLOS? Human rights considerations, as demonstrated above, are themselves rather absent from the UNCLOS. It is not an instrument directed at human beings' protection but rather at States' rights. There are no tangible signs of reform or daring interpretation of the UNCLOS.

[64] The ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 and commits Members of the Organisation to respect and promote rights and principles in matters of collective bargaining, elimination of forced or compulsory labour, abolition of child labour, and discrimination in terms of employment and occupation, whether these Members have ratified, or not, the relevant ILO Conventions. This is a particular clever approach to circumvent possible difficulties with ILO Members which have ratified only a few ILO Conventions. ILO Declaration on Fundamental Principles and Rights at Work (ILO, June 1998) <www.ilo.org/declaration/lang--en/index.htm> accessed 16 December 2021.

[65] Regional Comprehensive Economic Partnership Agreement (ASEAN countries) (adopted 20 November 2012) <https://rcepsec.org/legal-text/> accessed 16 December 2021.

On the other hand, the last two decades of debates on businesses and human rights and the reactivation of the idea of the possible adoption of a universal treaty on the same do not bring much more support. The 'Guiding Principles on Businesses and Human Rights' implementation of the UN 'Protect, Respect, and Remedy' Framework, the UNESCO initiatives in favour of a culture of lawfulness, or the latest controversies on investor-State dispute settlement, all urge for a profound change of mind-set.[66,67] 16 June 2021 indeed marked the 10th anniversary of the UN Guiding Principles on Business and Human Rights (UNGPs)[68]. But the 'National Action Plans' to translate the 'Guiding Principles on Businesses and Human Rights' into domestic law – whenever they have been adopted – do not change much if anything for blue trade and human rights.[69] Even when relatively ambitious, they follow the three pillars' approach and relate to existing or sometimes newly created legislation (for example, the UK's Modern Slavery Act). As demonstrated above, the continuing reality of human rights abuses does not testify to a real improvement on the ground since the adoption the UN Guiding Principles. As to the much-debated idea of a binding treaty on businesses and human rights, discussed originally more than two decades ago and again since June 2014 when the UN Human Rights Council stepped in on its elaboration, it is very unlikely to take shape soon and still bears a large number of problematic challenges.[70] The 'Zero Draft' of 2018 and the revised drafts of 2019 and 2020 are not showing much legal strength, and the interest and participation of the developed nations in the negotiations is very relative.

Then what are the pathways for reform? Scholars and civil society organisations have repeatedly asked the same questions. A few avenues for improvement in blue trade have been put forward: (1) governments should systematically ratify ILO conventions related to blue trade and integrate the same in their IIAs and mega-deal negotiations; (2) businesses should systematically engage in human rights due diligence in accordance with UN and ILO principles and OECD guidelines; (3) Right to access should be guaranteed on the basis of a liberal interpretation of UNCLOS, and (4) access to dispute settlement and redress mechanisms should be provided to the victims to simplify access.[71] These simple steps appear however difficult to take while a number of countries fear that an increase in human rights protection will lower their competitive advantage. Perhaps the best argument to put forward is that exploitation, however widespread it is, has never provided a sustainable and durable path to development and political stability.

Biographical Note

[66] See the United Nations Global Compact website <https://www.unglobalcompact.org/library/2> and UN, 'Guiding Principles on Human Rights' (2011) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf accessed 16 December 2021.
[67] To approach the past 30 years of tentative integration of human rights in international investment treaty drafting, see Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh, *Handbook of International Investment Law and Policy* (Springer 2020) 1733.
[68] See the related UN celebration <www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/un-guiding-principles-at-10/> accessed 16 December 2021.
[69] See for example the UK Action plan <https://bit.ly/3EgaK4t> accessed 16 December 2021.
[70] See Business and Human Rights Resource Center 'Binding Treaty' <www.business-humanrights.org/en/big-issues/binding-treaty/> accessed 16 December 2021.
[71] Elise Edson and Alex Marcopoulos, 'A New Initiative for the Arbitration of Human Rights Abuses at Sea' (Human Rights at Sea, 17 June 2021) <www.humanrightsatsea.org/2021/06/17/a-new-initiative-for-the-arbitration-of-human-rights-abuses-at-sea/> accessed 16 December 2021.

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