A CRITICAL APPRAISAL OF INITIATIVES OF ASIA-PACIFIC ECONOMIC COOPERATION (APEC) FOR THE BLUE ECONOMY: DEADLOCKS AND ANY POSSIBLE WAY OUT?

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ABSTRACT

The article will critically evaluate Asia-Pacific Economic Cooperation's (hereinafter "APEC") Blue Economy implementations as well as ocean governance of the Comprehensive and Progressive Trans-Pacific Partnership (hereinafter "CPTPP") Agreement. APEC's Xiamen Declaration on the Blue Economy pledges to advance sustainable ocean and coastal governance for purposes of fostering economic growth, including scaling up marine protected areas, tackling illegal fishing and facilitating sustainable regional trade in fish. However, the effectiveness of APEC's initiatives for the Blue Economy and its implementation are doubtful due to its talk-shop nature.

APEC has performed a reform of disciplining fisheries subsidies which have been a principal factor leading to depleted fishery stocks. By contrast, APEC has been criticized with regard to its inability to complete sensitive or complex goals, such as achieving sustainable development of the Blue Economy. This inability might arise from APEC's de facto institutional character, which shows a lack of an establishing treaty conferring on APEC an international

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legal personality. Nevertheless, APEC can develop a binding agreement following the example of the Information Technology Agreement (ITA) which was initiated by APEC and adopted at the WTO's 1996 Singapore Ministerial Conference with support from APEC member economies. A recent mega-regional trade agreement in the Asia-Pacific region—CPTPP—would be another possible option for advancing the Blue Economy in the Asia-Pacific region. It is widely recognized that CPTPP has a series of novel and enforceable regulations concerning fishery sustainability. One of the CPTPP's priorities is to combat illegal, unreported and unregulated (IUU) fishing by placing a restriction on trade. In addition, CPTPP's environmental chapter contains a binding dispute settlement mechanism. The final section is to refer to the European Union (hereinafter "EU") model. The EU is a supranational and regional body with enforceable power. EU fishery regulations could be a model for the Asia-Pacific region in the sense of the substance of its rules. The EU has a more complex rule of regulating fishing and fisheries subsidies, such as the Regulation No. 508/2014 directing EU member states to use European Maritime and Fisheries Fund. This article concludes that the CPTPP turns out to be a better policy choice for advancing the Blue Economy, in comparison with the APEC. With regard to improving CPTPP's ocean governance, this article suggests to refer to the EU fishery regulations.

KEYWORDS: *APEC, CPTPP, the Blue Economy, soft-law, EU regional integration*

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I. INTRODUCTION

Asia-Pacific Economic Cooperation (hereinafter "APEC") is the most significant and progressive milestone in Asian regionalism after the creation of the Association of Southeast Asian Nations (ASEAN). APEC, as an institution based on soft-law, has primarily invigorated economic cooperation and liberalization by way of non-binding decisions and rules. Regardless of its soft-law operation, it is argued that APEC's two core principles—"open regionalism"[1] and "concerted unilateral liberalization"—have yielded salient yet oft-ignored effects on trade liberalization in selected areas.[2] APEC plays a role in supporting global efforts, particularly in the World Trade Organization (hereinafter "WTO"). Moreover, APEC is likely to have an incubator role for the Free Trade Area of the Asia-Pacific (hereinafter "FTAAP"), which reinvigorates the forum's identity and gravity.[3]

APEC, as an inter-governmental forum with a focus on trade liberalization and sustainable development, is composed of twenty-one member economies in the Asia-Pacific region. These twenty-one member economies account for more than 48% of international trade and 60% of global gross domestic product (GDP).[4] Additionally, APEC is located in a region where there are abundant ocean and coastal resources, fishery production along with increased economic growth in the Pacific Ocean. APEC is, therefore, a significant regional forum for ocean governance and the Blue Economy.

Since the WTO Doha Round, several international organizations commenced negotiations on the regulation of fisheries subsidies. In addition to other intergovernmental discussions and their suspended efforts of regulating fisheries subsidies, APEC is believed to be a favorable forum to deal with fisheries subsidies. Firstly, in the setting of APEC, subsidies can be considered in the context of far-reaching trade liberalization without the fear of trade sanctions that inevitably accompany the subject in the WTO. Moreover, APEC is one of the intergovernmental organizations that significantly discusses the regulations of fisheries in the context of trade liberalization of fish and fishery products. The Blue Economy has become an important aim of APEC since the APEC's Xiamen Declaration in 2014 pledged to advance sustainable ocean and coastal governance for purposes of fostering economic growth, including scaling-up marine protected areas,

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[1] SUN-TAIK HAN, EUROPEAN INTEGRATION: THE IMPACT ON ASIAN NEWLY INDUSTRIALIZING ECONOMIES 30 (1992).

[2] PASHA L. HSIEH, NEW ASIAN REGIONALISM IN INTERNATIONAL ECONOMIC LAW 197 (2022).

[3] *Id*. at 199.

[4] Asia-Pacific Economic Cooperation Policy Support Unit, *APEC in Charts 2019*, ASIA-PAC. ECON. COOP. [hereinafter APEC] 2 (2019), https://www.apec.org/docs/default-source/publications/2019/12/apec-in-charts-2019/219_psu_apec-in-charts-2019.pdf?sfvrsn=9f2e19d9_1.

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tackling illegal fishing and facilitating sustainable regional trade in fish. APEC is committed to integrating environmental considerations in all sectors and at all levels of its work, which moves forward against the backdrop and aims of the Osaka Action Agenda [5] towards trade liberalization and facilitation.

One policy report indicates that APEC could lead efforts to address these issues in multilateral fora and could initiate the exploration of a suitable balance between exploitation and long-term sustainability of the fishery resources.[6] Recognizing the important role of the ocean in food security and food-related trade, APEC leaders called for the elimination of fisheries subsidies that contribute to overfishing at the 2014 APEC ocean-related ministerial meeting.[7] By contrast, APEC has had criticism with regard to its inability to complete sensitive or complex goals, such as achieving sustainable development of the Blue Economy during trade liberalization. This inability arises from APEC's de facto institutional character and its *sui generis* status, which shows a lack of an establishing treaty conferring on APEC an international legal personality. Another factor undermining APEC's role is the identity crisis faced by APEC since the world's Third Regionalism began in the 2000s.[8] Mega-Free Trade Agreements (Mega-FTAs) have additionally crippled APEC's relevance and implications.[9]

As opposed to the non-binding issue faced by APEC, another approach is to follow the model of the Information Technology Agreement (hereinafter "ITA"). ITA was adopted at the WTO's 1996 Singapore Ministerial Conference with support from APEC member economies, in particular, the US, Japan, and Canada which led efforts to garner support for the agreement.[10] The initial version of the ITA was a Ministerial Declaration on Trade in Information Technology Products at the WTO. APEC member

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[5] *How APEC Operates*, APEC, https://www.apec.org/About-Us/How-APEC-Operates/Action-Plans (last visited Mar. 11, 2022).

[6] Since fish stocks and vessels have a transboundary movement, solutions for fisheries issues do not merely fall in one single legal regime and are expected to be implemented on a global or regional level. *See generally* Huani Zhu & Carlos Kuriyama, *Trade of Fishery Products and Fisheries Subsidies in APEC* (APEC Pol'y Support Unit, Policy Brief No. 16, 2017), https://www.apec.org/docs/default-source/publications/2017/10/trade-of-fishery-products-and-fisheries-subsidies-in-apec/policy-brief-16-trade-of-fishery-products-and-fisheries-subsidies-in-apec-final-13jan2017.pdf?sfvrsn=4cced289_1.

[7] *Xiamen Declaration, Fourth APEC Ocean-Related Ministerial Meeting-AOMM4 Towards New Partnership Through Ocean Cooperation in the Asia Pacific Region*, APEC 4 (Aug. 28, 2014), http://mddb.apec.org/Documents/2014/MM/AOMM/14_aomm_jms.pdf [hereinafter *Xiamen Declaration*]. In September 2016, thirteen economies, including eight from the APEC region, issued a joint statement in the WTO to eliminate harmful fishing subsidies. *See Joint Statement Regarding Fisheries Subsidies*, U.S. TRADE REPRESENTATIVE (Sept. 14, 2016), https://ustr.gov/sites/default/files/09142016_STATEMENT_joint_statement_fisheries_partners_FINAL.pdf.

[8] HSIEH, *supra* note 2, at 197.

[9] *Id.* at 198.

[10] Jiro Okamoto, *The Development of EVSL Consultations and Setting the Research Questions*, *in* TRADE LIBERALIZATION AND APEC 33, 34-36 (Jiro Okamoto ed., 2004).

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economies have recognized that it is necessary to extend and update the ITA of the WTO.

Meanwhile, in 1996, developed APEC member economies initiated early voluntary sectoral liberalization (hereinafter "EVSL") program that aims to lower tariffs and non-tariff barriers for fifteen sectors.[11] The creation of the ITA enables APEC's developed economies to implement more of EVSL. Multi-sector coverage was more complex than the ITA. The failure of EVSL, which previously had domestic resistance from member economies to include, in particular, fisheries and forest sectors, arose from APEC's inability to assist member economies during the Asian financial crisis in the 1990s. Thus, given the progress of implementing more of EVSL, which was resulted from the establishment of the ITA, this article suggests that APEC can consider the ITA model to develop a binding agreement for the implementation of the Blue Economy. In addition to the ITA, Comprehensive and Progressive Trans-Pacific Partnership (hereinafter "CPTPP") would be another possible option for advancing the Blue Economy.[12] Moreover, the CPTPP—an unprecedented mega regional trade agreement—regulates fisheries subsidies, which is an innovation that deserves a legal analysis. Outside APEC, the European Union (hereinafter "EU") has a series of fishery regulations. The EU fishery regulations could be a model for the Asia-Pacific region in the sense of the substance of its rules in the EU which is a supranational regional body with enforceable power. Moreover, EU has a more complex rule of regulating fishing and fisheries subsidies, such as the Regulation No. 508/2014 directing EU member states to use European Maritime and Fisheries Fund (hereinafter "EMFF").

This article will be structured as follows. Section II evaluates APEC's initiatives of the Blue Economy with a focus on APEC's reform on fisheries subsidies, followed by a critical appraisal of the initiatives in Section III. Section IV evaluates CPTPP's fisheries-related provisions and explores their role of resolving issues related to APEC ocean governance. Section V assesses EU regulations on regulating fishing and fisheries subsidies and explores implications of these EU fishery regulations on the ocean governance and the Blue Economy in APEC. This article will conclude that CPTPP turns out to be a better policy choice for advancing the Blue Economy, in comparison with the APEC. With regard to improving CPTPP's

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[11] Ippei Yamazawa, *APEC's Achievements and Tasks*, *in* APEC IN THE 21ST CENTURY 1, 8 (Riyana Miranti & Denis Hew eds., 2004).

[12] Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) is a revision of the Trans-Pacific Partnership (TPP) after the US's withdrawal in January 2017. *See Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, U.S. MISSION TO INT'L ORG. IN GENEVA (Jan. 24, 2017), https://geneva.usmission.gov/2017/01/24/presidential-memorandum-regarding-withdrawal-of-the-united-states-from-the-trans-pacific-partnership-negotiations-and-agreement/.

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ocean governance, this article suggests to refer to the EU fishery regulations.

II. APEC'S INITIATIVES FOR THE BLUE ECONOMY

APEC is one of the intergovernmental organizations that significantly discusses the regulation of fisheries in the context of trade liberalization of fish and fishery products. APEC's leaders collectively embraced and championed the environmental causes. Additionally, several leaders of member economies of APEC expressed their concern over the regional environmental matters.[13] APEC launched a meeting in 1994, and the ministers produced an APEC Environmental Vision Statement and a framework of principles for integrating economy and environment in APEC. The vision statement declares that sustainable development and trade and investment in the region should be promoted "by integrating environmental considerations into relevant policy development and economic decisions throughout the region."[14] This declaration has translated into efforts to integrate environmental concerns into the programs of each of APEC's working groups.[15] In July 1996, APEC held a meeting in Manila to agree that APEC and its member economies should focus on three environmental issues, including "sustainable cities and urban management, clean technology and clean production, and sustainability of the marine environment."[16]

The Blue Economy has, therefore, become an important aim of APEC since the APEC's Xiamen Declaration in 2014 pledged to advance sustainable ocean and coastal governance for purposes of fostering economic growth, including scaling up marine protected areas, tackling illegal fishing and facilitating sustainable regional trade in fish. Additionally, the Chair of the fourth APEC Ocean-Related Ministerial Meeting reaffirmed that "[w]e are facing many challenges, including damage of the marine coastal environment and depletion of fishing stocks."[17] In the fourth APEC Ministerial Meeting on Food Security in September 2016, APEC leaders reinforced their determination to prevent, deter, and eliminate illegal, unreported and unregulated (hereinafter "IUU") fishing.[18] APEC has also had a reform of disciplining fisheries subsidies which have been a principal factor leading to depleted fishery stocks.

Ministers from the twenty-one economies' APEC alliance meeting in

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[13] André Dua & Daniel C. Esty, *APEC's Existing Environmental Efforts*, *in* SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION 135, 136 (1997).
[14] *Id.* at 137.
[15] *Id.*
[16] *Id.*
[17] *APEC Ministers Outline New Partnership Framework on Oceans*, APEC (Aug. 29, 2014), https://www.apec.org/Press/News-Releases/2014/0829_xiamen [hereinafter APEC Ministers Outline].
[18] Zhu & Kuriyama, *supra* note 6, at 5.

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Xiamen, China in August 2014 outlined a new partnership framework that would establish closer regional collaboration around ocean-related challenges and policies.[19] This Xiamen Declaration establishes an integrated and sustainable joint oceans strategy for APEC member economies with a particular focus on four key priority areas: coastal and marine ecosystem conservation and disaster resilience; food security and food-related trade; marine science, technology, and innovation; and the Blue Economy. The Blue Economy, including trade in both wild and farmed fish stocks, is a key sector for APEC that counts nine of the world's top ten fishing nations in its ranks. Essential measures identified by the declaration include scaling-up marine protected areas, collaboration on navigating the effects of climate change, tackling illegal fishing activities, and facilitating sustainable regional trade in fish and fisheries products.[20]

APEC's Working Groups have an objective to respond to fast-changing challenges faced by the Asia-Pacific region. In particular, the Ocean and Fisheries Working Group (hereinafter "OFWG") of the APEC formed in 2011 specifically addresses marine issues. It also allows economies to respond to these market access challenges by supporting the regional and developmental implementation of global fisheries and aquaculture practices across the seafood sector and its value chain. The OFWG has set its goals during 2016 to 2018.[21] Indicatively, objectives include promoting the conservation of the marine environment and the sustainable use of fisheries, aquaculture, and ocean ecosystems in APEC. Setting up these goals is to ensure long-term economic benefits; enhancing the understanding of the role of oceans, sustainable fisheries, responsible development of aquaculture and sustainable use and management of marine resources to regional food security. The vision of the OFWG is well-managed and sustainably used fisheries and aquaculture that yield optimal economic value to APEC economies. It actively looks for regional capacity building projects and other activities in relation to issues such as: destructive fishing practices; IUU fishing; impacts of marine pollution on coastal habitat; coral reef conservation; sustainable development of aquaculture. Overall, any major initiative or project to address fisheries issues would start at the OFWG level in the APEC. The strength of APEC is its focus on regional collaboration and consensus about problems and their solutions, particularly as they relate to the promotion of economic growth through a commitment to opening economic reform, including trade and investment revolution. A reform of APEC institutional issues is imperative. This reform includes making

[19] APEC Ministers Outline, *supra* note 17.
[20] *Xiamen Declaration*, *supra* note 7, at 2.
[21] *See generally Ocean and Fisheries Working Group: Strategic Plan 2016-2018*, APEC (2016), https://www.apec.org/docs/default-source/Groups/OFWG/OFWG-2016-2018-Strategic-Plan.pdf.

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changes in the fisheries sector.[22]

Economies in the OFWG will conduct this by working to facilitate free and open trade in the region and promoting the sustainable use of fisheries, aquaculture, and marine ecosystem resources and associated goods and services. The OFWG will promote cooperation amongst its members, academia, governments, private industry, and regional and international organizations to advance this process. The OFWG pledges to continue to implement the directives of the Seoul Oceans Declaration (2002), the Bali Plan of Action (2005), the Paracas Declaration and Action Agenda (2010), and the Xiamen Declaration (2014) through research, capacity building, information and best practices sharing and dissemination as well as cooperation with other APEC fora. Apart from the OFWG, the Economic Committee is the institution that appears to be most appropriate to handle the issue of fisheries subsidies in the context of both economic and environmental policies in the APEC. The Economic Committee acts as a forum for facilitating dialogues on trade liberalization and sustainable development in APEC member economies. Subsidies are certain to intrigue political sensitivities in the APEC Economic Committee, as they do in every other international forum. Nevertheless, due to its wide and cross-sectoral mandate, the Economic Committee could consider the subject of fisheries subsidies with no need to put the term on its work program.[23]

Three advantages arise from the adoption by the Economic Committee. First of all, it would locate the discourse in the general context of fisheries management and sustainable development, rather than in the arena of trade liberalization. In other words, it would deal with the problem in the context of economic instruments rather than as an issue of trade policy, thus, steering clear of the controversial problem of trade sanctions. The economic instruments approach should lend itself well to cooperation among fisheries management specialists and economists, thus, depoliticizing the issue. Secondly, the concept of using economic instruments to manage fisheries and the environment is one with which APEC member economies have already become comfortable. Economic instruments utilize market signals rather than direct regulations to manage environmental problems, modifying relative prices through taxes, charges, or other economic incentive measures, including removal of subsidies. It would be more difficult for representatives of member economies in the Economic Committee to refuse an economic-instrument approach compared to a directly trade-related approach to

[22] *Harvesting Currency: The Importance of Fisheries and Aquaculture for APEC Economies*, APEC 4, https://www.apec.org/docs/default-source/Publications/2009/11/Harvesting-Currency-Theimportance-of-fisheries-and-aquaculture-for-APEC-economies-November2009/09_fwg_HarvestingCurrency.pdf.

[23] Gareth Porter, *Natural Resource Subsidies, Trade and Environment: The Cases of Forests and Fisheries*, CTR. INT'L ENV'T L. 22 (1996), https://www.ciel.org/wp-content/uploads/2015/02/NaturalResourceSubsidies.pdf.

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fisheries subsidies. Thirdly, the economic instruments approach could take as a point of departure basic principles on natural resource, pricing that have been agreed to over the past decade in APEC Agenda 21 and within the Organization for Economic Co-operation and Development (hereinafter "OECD").

OECD ministers have endorsed the "User-Pays Principle" as part of national pricing policies aimed at economizing on the use of the natural resource. In addition, they have also adopted a pricing rule for renewable resources stipulating that the price should cover both the resource itself and the externalities associated with its production and use, as well as the depletion cost of short-run consumption. It is clear that the Agenda 21 committed to integrating environmental costs in the decisions made by both consumers and producers. The Agenda 21 also committed to overturning the tendency to consider the environment as "free food" and to passing these costs on to other countries, other parts of society, or even future generations. Furthermore, it showed ambition and committed to moving more extensively towards integration of social and environmental costs into social and economic activities. Hence, it is highly likely that prices will reasonably reflect the correlative scarcity and whole value of resources, and then contribute towards the prevention of environmental degradation.[24]

III. A CRITICAL APPRAISAL OF THE INITIATIVES OF APEC FOR THE BLUE ECONOMY

The aforementioned economic instrument approach in Section II is likely to raise the issue of implicit types of subsidies. By way of concentrating on the pricing of natural resources, non-governmental organizations (NGOs) and government officials would be able to broaden the discussion of subsidies well beyond the official definition that will be utilized by the OFWG for its data collection work.[25] As a result, the most urgently needed fishery subsidy reform is to eliminate the system under which fishers must compete against each other for shares of the catch.[26] In order to mitigate this issue, a number of international fora have considered the importance of reforming natural resource management policies and practices that directly or indirectly subsidise extraction or harvesting of the resource and contribute to resource depletion as well as distorting trade. Considering the APEC region's reform on fisheries subsidies, there are several member economies that have expressed continuous support for subsidies disciplines in the WTO and other fora. Nevertheless, there was also an equivalent group of major Asian fishing countries who opposed to broad fisheries subsidies

[24] *Id.* at 23.
[25] *Id.*
[26] *Id.* at 18.

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disciplines at the WTO.

Given the differences among members in relation to how fisheries subsidies should be addressed, it has been unlikely to have a unilateral declaration and/or trade agreement until the 12th Ministerial Conference at the WTO. A more realistic outcome would be for the OFWG to continue highlighting the impacts of negative fisheries subsidies, which will encourage all APEC members to consider fisheries subsidies reforms and the necessity. The OFWG can produce technical papers and declarations to inform APEC member economies and drive overall strategy of fisheries subsidies reforms. More importantly, the OFWG appears to have the capacity to support a reform process, both at national and regional levels.[27] However, a critical opinion points out these activities are restricted to gathering and disseminating small-scale information which does not exceed capacity building.[28] The current program of the working group does not address the main capacity deadlocks visible across APEC.[29] The integration efforts to solve environmental matters have been less effective. It is advised to increase pledges to environmental progress within each working group in APEC in order to construct and bridge meaningful environmental and economic policy together. It also helps to develop interdisciplinary approaches to fill in gaps across and among APEC working groups and committees.[30]

APEC made an attempt in August 2014. During the fourth APEC Ocean-Related Ministerial Meeting, the ministers outlined a new non-binding framework for closer collaboration on ocean-related challenges. The declaration calls for improved transparency and the reporting of existing fisheries support programs to the WTO, the ultimate elimination of programs that contribute to overcapacity and overfishing, and an abstention from introducing new subsidy programs. This new framework was endorsed by APEC leaders in Beijing in November 2014.[31] Nevertheless, APEC's initiatives for the Blue Economy and its implementation are doubtful due to APEC's talk-shop nature. APEC's summit gatherings of twenty-one member economies are criticized for being more of "vacuous talk-shop"[32] instead of a result-oriented regional institution to enforce economic or security interests. Despite this talk-shop criticism, APEC pursues open regionalism and pertains to unique features that make it economically and geopolitically

[27] *Id.*
[28] Dua & Esty, *supra* note 13, at 139.
[29] *Id.*
[30] *Id.*
[31] Andrew Rubin et al., *Paths to Fisheries Subsidies Reform: Creating Sustainable Fisheries Through Trade and Economics*, OCEANA 41 (Apr. 30, 2015), https://oceana.org/wp-content/uploads/sites/18/rockefeller_report_final_web-version_lowerrez.pdf.
[32] Jeffrey A. Frankel et al., *APEC and Regional Trading Arrangements in the Pacific* 1 (Peterson Inst. for Int'l Econ., Working Paper No. 94-1, 1994).

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important.[33] APEC further evolves to strengthen its institutional structure and ability. It has transformed from a loosely structured forum into a goal-oriented institution with specific and agreed-upon agendas.[34] The 1995 Osaka summit is a turning point that institutionalized APEC to further extents since more inter-summit ministerial-level meetings and advisory committees have been introduced.[35]

Concerning how to improve the institutional framework of APEC, the following action plans are recommended. First is to put forward a proposal containing the EU associated regulations to the OFWG and Pacific Economic Co-operation Committee (hereinafter "PECC"). Second plan is strengthening capacity building and the credibility of APEC towards a solid regional economic integration. To improve APEC's initiatives and implementations for the Blue Economy, the following are activities that APEC could undertake to reform the use of fisheries subsidies. APEC could produce non-binding declarations, commitments, or joint statements that make recommendations on state policies and activities involving their respective fisheries and fisheries subsidies. APEC could additionally conduct data-gathering surveys and research on its member countries concerning economic subjects, including fisheries subsidies. APEC, through the OFWG, could produce guidelines to incentivize and help countries implement their plans to reform or reduce harmful subsidies to their domestic fisheries.[36]

IV. CPTPP'S NOVEL REGULATIONS OF FISHERIES SUBSIDIES: SOLVE ISSUES IN APEC?

Following five years of negotiations, the text of the Trans-Pacific Partnership (hereinafter "TPP"; the former version of the CPTPP) was concluded on 5 October 2015. During the complex TPP negotiations, at the beginning, the TPP was anticipated to be an opportunity to reflect on and address several of the issues that would soon become evident and significant as countries shifted from the everyday technical work in resolving differences amongst all member states to the higher-level politically and economically sensitive issues.[37] The TPP, at the time, represented the most comprehensive regional Free Trade Agreement (hereinafter "FTA") signed to date, excluding the EU.[38]

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[33] I-Ju Chen, *An Analysis of Establishing Regional Environmental Governance Through a Mega Regional Trade Agreement: The Asia-Pacific Practice*, 20(1) VT. J. ENV'T L. 1, 13 (2019).
[34] Tun-jen Cheng, *APEC and the Asian Financial Crisis: A Lost Opportunity for Institution-Building?*, 6(2) ASIAN J. POL. SCI. 21, 26 (1998).
[35] *Id.*
[36] APEC, *supra* note 21.
[37] Deborah Kay Elms, *The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 371, 372 (2013).
[38] *Id.* at 375.

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The CPTPP has been touted as a high quality and 21st Century preferential trade agreement from the earliest days of its negotiations,[39] and part of this commitment has included the basic statement of "no exclusions." This was especially true for market access in goods, which was supposed to achieve a 100% coverage.[40] Moreover, the CPTPP, as mega-regional trade agreement in the APEC region established provisions regulating fisheries subsidies in the region for the first time.

The CPTPP consisted of thirty chapters, including traditional areas such as goods, services, investment and intellectual property, and its much-anticipated environmental chapter. More importantly in the context of the discussion on fisheries subsidies, the CPTPP parties accounted for eight of the top twenty fishing nations globally.[41] Accordingly, positive and optimistic discussions in academia[42] asserted that the CPTPP would be an opportunity to address the issue of fisheries subsidies, which is exactly what has happened—the environmental chapter of the CPTPP included several provisions relating to fisheries management and fisheries subsidies, including a prohibition on the granting of certain types of subsidies.[43]

Compared to many of the US FTAs, the environmental chapter of the CPTPP may not appear to contain significant improvement.[44] However, compared to many Asian FTAs, the CPTPP represents a drastic difference in level of ambition and commitment required by signatories. After the US withdrew in January 2017, the environmental chapter of the CPTPP has not undergone any amendments. Hence, the regulation of fisheries subsidies is still an important case for fishery sustainability. The CPTPP consists of eleven countries: Australia, Brunei, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, and Vietnam. These eleven participants represent nearly USD 13.5 trillion of the global economy.[45] The CPTPP is

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[39] C.L. Lim et al., *What Is "High-quality, Twenty-first Century" Anyway?*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A 21ST CENTURY TRADE AGREEMENT 3 (C.L. Lim et al. eds., 2012).

[40] Elms, *supra* note 37, at 383.

[41] *Environment in the Trans-Pacific Partnership: A Legal Analysis*, INT'L CTR. TRADE & SUSTAINABLE DEV. 7 (Dec., 2016), https://ictsd.iisd.org/sites/default/files/research/environment_in_the_trans-pacific_partnership_a_legal_analysis_0.pdf.

[42] *See generally* Rémi Parmentier, *Harmful Incentives: The Case of Fisheries Subsidies*, *in* TRADE AND ENVIRONMENT REVIEW 2016: FISH TRADE 63 (U.N. Conf. Trade & Dev. ed. 2016); Amanda Rologas Tsangalis, *Fisheries Subsidies Under the* Trans-Pacific Partnership*: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction Under International Law*, 17(2) MELB. J. INT'L L. 445 (2016).

[43] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* [hereinafter CPTPP], GOV'T CAN., art. 20.16, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/20.aspx?lang=eng (last visited Mar. 9, 2022).

[44] Deborah also addressed other chapters of the Trans-Pacific Partnership (TPP, the precedent of the CPTPP) are not a significant improvement compared to the US preferential trade agreements (PTAs). *See* Elms, *supra* note 37, at 383.

[45] *Overview and Benefits of the CPTPP*, GOV'T CAN., https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/overview-apercu.aspx?lang=eng (last visited Nov. 28, 2021).

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the updated agreement after the US' withdrawal. The legally verified text of the CPTPP was released on 21 February 2018. The CPTPP text indicates the provisions in the Agreement's chapters that have been suspended and therefore will not apply between the signing parties. In addition, schedules and annexes specific to the United States have not been listed in the CPTPP, as the United States is not part of the CPTPP. Some references to the US may appear throughout the rest of the chapters, but they will have no practical application. While there is a divided view of opinion amongst conservation groups with regard to the potential effectiveness of the regulations of fisheries subsidies and the chapter of the environment in general,[46] these regulations undoubtedly have the potential to make a significant contribution to WTO's ongoing negotiations to reform fisheries subsidies disciplines and reduce overfishing.[47]

Particularly, the CPTPP has six parties' domestic ratification, which means its provisions on fisheries subsidies are a breakthrough, in comparison with the draft proposal of fisheries subsidies being negotiated in the WTO. With such innovation of the CPTPP environmental chapter, the provisions preserving the oceans are able to restrict fisheries subsidies with compliance to the relevant provisions of international instruments[48] and promote sound management of fisheries.[49] As a result, the CPTPP is a valuable example to examine environmental features of free trade that reflects and supports fisheries sustainability.

A. An Analysis of the CPTPP's Fisheries and Fisheries Subsidies Clauses

Article 20.16(5), dealing with the issue of fisheries subsidies, is the significant provision of the CPTPP's environmental chapter.[50] It further

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[46] Ben Beachy & Ilana Solomon, *A Dirty Deal: How the Trans-Pacific Partnership Threatens Our Climate*, SIERRA CLUB 4 (Dec. 2, 2015), https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creativearchive/files/pdfs/1197%20Dirty%20Deals%20Report%20Web_03_low.pdf; World Wildlife Fund, *WWF Statement on the Close of the Trans-Pacific Partnership Negotiations*, PRESS RELEASE POINT (Oct. 5, 2015), https://www.pressreleasepoint.com/wwf-statement-close-trans-pacific-partnership-negotiations.

[47] Tsangalis, *supra* note 42, at 447.

[48] These instruments include United Nations Convention on the Law of the Sea in 1982 (UNCLOS), the UN Fish Stocks Agreement and Food and Agriculture Organization [hereinafter FAO] Code of Conduct, FAO Compliance Agreement and the Illegal, Unreported and Unregulated (IUU) Fishing Plan of Action in 2001.

[49] Jeffrey Schott, *TPP and the Environment*, *in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP VOLUME 2: INNOVATIONS IN TRADING RULES 33, 34 (Jeffrey J. Schott & Cathleen Cimino-Isaacs eds., 2016).

[50] CPTPP, *supra* note 43, art. 20.16(5) ("[T]he implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity.").

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prohibits parties from granting the following subsidies to fishing industries:

> (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition;[51] and
> (b) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organization or Arrangement for IUU fishing in accordance with the rules and procedures of that that organisation or arrangement . . . .[52]

Below is an analysis of Article 20.16(5) of the CPTPP.[53] The definition of subsidies in Article 20.16(5) references Article 1.1 of the Agreement on Subsidies and Countervailing Measures (hereinafter "the SCM Agreement") and requires that the subsidies under this provision have to satisfy the specificity requirements established in Article 2 of the Agreement.[54] It also provides "the best scientific evidence available" to be used and determined for adverse effects on the fish stocks as referred to in paragraph (a).[55] The application of the SCM Agreement's definition allows a very wide use of this term; hence, the CPTPP is likely to cover most fisheries subsidies. Moreover, in implementing its prohibitions on fisheries subsidies, the prohibition of the CPTPP is based on the nature of the subsidised fishing activity instead of the type of subsidy, which has a specified scope. In other words, Article 20.16(5) has very specifically identified conditions for the prohibition of fisheries subsidies.

The CPTPP's approach reflects the general consensus of WTO members that has recently come out in the seven proposals at the WTO Buenos Aires Conference in December 2017 as well as the Nairobi Ministerial Conference in December 2015.[56] Despite the reference of the definition subject to the SCM Agreement, the CPTPP failed to prohibit those specified subsidies that

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[51] *Id.* art. 20.16(5)(a).
[52] *Id.* art. 20.16(5)(b).
[53] *See* Tsangalis, *supra* note 42, at 463-75.
[54] CPTPP, *supra* note 43, art. 20.16(5); Agreement on Subsidies and Countervailing Measures art. 2, Apr. 15, 1994, 1869 U.N.T.S. 14.
[55] CPTPP, *supra* note 43, art. 20.16(5)(a).
[56] World Trade Organization, *Nairobi Ministerial Declaration of 15 December 2015*, WTO Doc. WT/MIN(15)/DEC (Dec. 21, 2015). See also the following recent submissions: World Trade Organization, *Draft Decision on Fisheries Subsidies: Communication from Peru*, WTO Doc. TN/RL/W/264 (Oct. 21, 2015); World Trade Organization, *Elements for Effective Disciplines on Fisheries Subsidies in the Post-Bali Work Programme: Communication from Argentina; Iceland; New Zealand; Norway; Peru; and Uruguay*, ¶ 3.1, WTO Doc. TN/RL/W/258 (June 19, 2015); World Trade Organization, *Fisheries Subsidies: ACP Proposal*, WTO Doc. TN/RL/W/267 (Nov. 13, 2015); World Trade Organization, *Draft Decision on the Developmental and Food Security Aspects on Fisheries Subsidies Disciplines: Communication from the ACP and Peru*, WTO Doc. WT/MIN(15)/W/40 (Dec. 17, 2015).

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contribute to overcapacity and overfishing, such as fuel subsidies[57] and those provided for vessel construction and facilities maintenance.[58] Against the CPTPP's prohibition, the proposals for the Buenos Aries Conference have demonstrated more rigour to include the specific subsidies that lead to vessels modernization and operation costs, like fuel. It is also interesting to address that parties of the CPTPP have some overlapping with those involved in the seven proposals at the Buenos Aries Conference: for example, New Zealand and Peru.

Parties of the CPTPP are required to endeavour and make their best efforts to refrain from introducing or adopting any new type of subsidies (or from extending or improving current subsidies).[59] This reference to overcapacity and overfishing would clearly include fuel subsidies and a number of other fisheries subsidies that are recognized as harmful.[60] However, it is worth noting that there is no definite obligation imposed on the CPTPP parties to refrain from introducing or utilising such subsidies. However, an obligation exists, and that parties of the CPTPP should use their "best efforts." Tsangalis thinks that "this provision nonetheless acknowledges the existence of further subsidies which contribute to overfishing and overcapacity beyond those set out in Article 20.16(5) and could perhaps be used as a base from which to eventually provide an outright prohibition on these types of subsidies."[61]

The CPTPP prohibits subsidies to fish in an "overfished condition" in Article 20.16(5)(a). How to assess a state of stocks is regulated in a footnote to the provision. A stock is overfished "if the stock is at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield (MSY) or alternative reference points based on the best scientific evidence available."[62] The text further explains that a location of a fish stock will also be considered overfished if the nation in which the relevant fishing activity is occurring or a relevant Regional Fisheries Management Organization (hereinafter "RFMO") recognizes it as such.[63]

In its formulation of Article 20.16(5)(a), the CPTPP attempts to find a balance between these two views.[64] The CPTPP has adopted and applied the general language, which was proposed by the EU although with the omission

[57] Of the estimated 60% of global fisheries subsidies found to be capacity-enhancing, 23% constitute fuel subsidies. *See* U. Rashid Sumaila et al., *A Bottom-Up Re-Estimation of Global Fishing Subsidies*, 12 J. BIOECONOMICS 201, 215 (2010).

[58] GARETH PORTER, ANALYSING THE RESOURCE IMPACT OF FISHERIES SUBSIDIES: A MATRIX APPROACH 47 (2004).

[59] CPTPP, *supra* note 43, art. 20.16(7).

[60] Tsangalis, *supra* note 42, at 465.

[61] *Id.*

[62] CPTPP, *supra* note 43, art. 20.16(5)(a) n.16.

[63] *Id.*

[64] Tsangalis, *supra* note 42, at 465.

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of the word "unequivocally." Nevertheless, the CPTPP has eliminated much of the ambiguity of the language by including an accurate definition of what the meaning of an overfished fish stock shall be.[65]

Although the CPTPP did not use "the best scientific evidence available" as the appropriate reference point established in United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") and Food and Agriculture Organization (hereinafter "FAO"),[66] it does reference the use of scientific evidence, which implies the conformity with both UNCLOS and the FAO. The CPTPP has also recognized the significant role that RFMOs and member states themselves can play in the process of determining the state of fish stocks within their specific jurisdiction. Nevertheless, it is not clear from the CPTPP's formulation what kind of standards have to be adopted by an RFMO for the purposes of evaluating whether stocks are "overfished," and further how incoherencies between RFMOs in the application of the standards might be addressed. It is noteworthy that although a majority of RFMOs have clear and detailed scientific assessment procedures in practice,[67] member states still disagree over scientific advice, which unfortunately turned out to be another important factor impairing efforts of RFMOs to combat overfishing to date.[68]

Regardless of a sort of compromise, some argue that Article 20.16(5)(a) could have progressed further in conserving fish stocks.[69] This is because the CPTPP currently prohibits subsidies only to those fish stocks already in an "overfished condition." This regulation would, thus, not apply to those stocks that are deemed to be "fully fished" as well as the minor portion of fish stocks considered to be underfished.[70] Wold comments that, by adopting this restriction instead of simply prohibiting those subsidies that lead to overexploitation and overcapacity, the CPTPP "has missed an extraordinary opportunity" and its fisheries subsidies provisions "must be viewed as inadequate to meet the challenges of fisheries management."[71] On the contrary, it might be argued that the prohibition targeting the most weak, vulnerable, and already overfished stocks was a good place for the CPTPP to

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[65] CPTPP, *supra* note 43, art. 20.16(5)(a) n.16.

[66] Both of which mandate a role for proper scientific evidence and assessment in their approach to fisheries management.

[67] For example, Northwest Atlantic Fisheries Organization [hereinafter NAFO] forms a "Scientific Council" which operates for providing information in relation to stock management. The advice from which forms the basis of NAFO's conservation and management measures. *See* OECD, STRENGTHENING REGIONAL FISHERIES MANAGEMENT ORGANISATIONS 99 (2009).

[68] *Id.* at 56-57, 99-100.

[69] Tsangalis, *supra* note 42, at 466.

[70] FAO Report estimated in 2013, 31.4% of fish stocks were overfished. 58.1% were fully fished and 10.5% were underfished. *See* FAO, THE STATE OF THE WORLD FISHERIES AND AQUACULTURE 2016: CONTRIBUTING TO FOOD SECURITY AND NUTRITION FOR ALL 38 (2016).

[71] CHRIS WOLD, EMPTY PROMISE AND MISSED OPPORTUNITIES: AN ASSESSMENT OF THE ENVIRONMENT CHAPTER OF THE TPP 16 (2016).

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start. Therefore, the CPTPP has not failed to recognise the significance of working towards eliminating all kinds of subsidies contributing to overfishing and overcapacity.

B. Summary

One of the CPTPP's priorities is to counter IUU fishing by placing a restriction on trade of unlawfully reaped fish and hindering the trans-shipment at sea of such products. According to the environmental chapter, although CPTPP members "endeavor to improve cooperation internationally,"[72] the CPTPP does not require its parties to adopt and implement the FAO. This article claims that such a legal reform of fisheries subsidies amplifies implications to both national and regional levels.

As requested by multilateral environmental agreements (hereinafter "MEAs"), other committed content consists of adopting cooperation more closely to strengthen environmental management of these natural resources, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES").[73] The most severe and significant obligations in the environmental chapter might pertain to the wide subject of conservation and trade. According to Article 20.17.2, each CPTPP country shall adopt, maintain, and implement laws, regulations, and any other measures to achieve its legal obligations under the CITES.

Concerning CPTPP's environmental protection, the last covered area in the CPTPP environmental chapter regards biodiversity conservation. The CPTPP countries have important objectives but differing priorities concerning the use and protection of biological diversity. This can also be augmented with a few of the provisions existing in the bilateral FTAs between some of the CPTPP countries. Article 20.13.2 in the CPTPP requires that each member "shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy." The CPTPP's environmental chapter also requires transparency of government programs and activities "related to the conservation and sustainable use of biological diversity" and establishes commitments to cooperate on "the protection and maintenance of ecosystems" and "access to genetic resources and the sharing of benefits arising from their utilization."[74] It further recognizes the importance of "respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles."[75]

Apparently, the CPTPP is considered to be the unprecedented single

[72] CPTPP, *supra* note 43, art. 20.12.
[73] *Id.* art. 20.17.
[74] *Id.* art. 20.13(6).
[75] *Id.* art. 20.13(3).

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"greenest" trade agreement, as it pertains to a wide scope of law that discourages abusive environmental practices. Nevertheless, the environmental chapter still faces criticism. First of all, during its negotiation, environmental groups in the US had protested the CPTPP as a fast track without any transparency and environmental consideration.[76] One of the criticisms focuses on the weaker legal texts. For example, the Sierra Club suggested the adoption of the regulations to be followed by the regional fishing management organisation in the TPP. However, the CPTPP fails to do so, and it also fails to mention the regulations arising from the fishing: that is, the 2009 FAO Agreement. One more concern that has drawn a lot of attention to the CPTPP is the absence of the climate change legal regime. The CPTPP did not adequately address the challenges to economic growth and trade caused by global warming. In conclusion, the CPTPP as a regional-level trade agreement is expected to do a lot more as opposed to the existing FTAs.

Concerning current impacts that the CPTPP's fishery provisions have on fishery sustainability in the Asia-Pacific region, observers point out that impact of the CPTPP could contribute to cutting down the provision of subsidies that lead to fishing capacity enhancement.[77] Moreover, globally, large fishing countries and essential fishery subsidization countries are the signing parties of the CPTPP. Hence, the CPTPP's successful outcome would be a vivid model that sustains fisheries resources in the APEC region and beyond.[78]

Other opinions point out that CPTPP's fisheries subsidies provisions are ambitious texts compared to the WTO Chair Text in 2007, and the texts in the CPTPP are also much more specific than the UN Sustainable Development Goals (SDGs). The CPTPP attempts to establish the fisheries subsidies apply discipline when fishery stocks face "overfished condition". In particular, the CPTPP's environmental chapter provides a specified definition of overfished stocks and further offers respect to definitions of the fishery stocks developed by national fishery management bodies and RFMOs.[79] The CPTPP's environmental chapter makes the request that signing countries should report any type of subsidy within one year of the CPTPP's entry into force and every two years thereafter. That chapter further establishes an environmental committee which reviews prohibited fisheries subsidies on a regular basis in light of "the objective of eliminating subsidies

[76] *TPP Text Analysis: Environment Chapter Fails to Protect the Environment*, SIERRA CLUB 1 (Nov. 10, 2015), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf.
[77] U. RASHID SUMAILA, SUBSIDIES WEAKEN THE SUSTAINABILITY OF GLOBAL FISHERIES WHILE INCREASING INEQUALITY AMONG FISHERS 6 (2015), https://unctad.org/system/files/non-official-document/ditc-ted-ahem-28092015-contribution-UBC.pdf.
[78] CPTPP, *supra* note 43, art. 20.16(5)(a) n.16.
[79] *Id.* art. 20.16(8).

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that contribute to overfishing and overcapacity."[80] Furthermore, dispute settlement in the CPTPP's environmental chapter is subject to hard-law. This dispute settlement mechanism shows some extent of enforcement power that the CPTPP carries to eliminate harmful fisheries subsidies. For instance, several steps are required before a member can make use of the dispute settlement body, including consultation mechanisms.[81]

In summary, CPTPP is the first mega-regional FTA that establishes provisions regulating fisheries subsidies in the Asia-Pacific region. The CPTPP is seen as an incubator towards the FTAAP in the region. As a result, the fisheries regulations in the CPTPP are helpful for APEC to advance its ocean governance. To a further extent, APEC member economies can consider the ITA experience to transplant the fisheries regulations of CPTPP into APEC.

V. REFERENCE TO EU STATE AID LAW THAT REGULATES FISHERIES SUBSIDIES

A. Approaches that Provide Support to the Fisheries Sector in the EU

The first support is state aid in the EU, which falls under EU competition law and regulations. EU member states have more flexibility and freedom in providing state aid to the fisheries and aquaculture sectors in the structure of grants, interest subsidies, loans, capital injections, risk finance measures, or guarantees. Hence, EU member states do not have to notify the EU if such aid is within *de minimis* levels. During 2014-2010, the maximum accumulating amount of *de minimis* aid to the fishery and aquaculture that may be granted by all EU member states is EUR 271 million per year (that is, this amount can be provided by EU member states without notifying the European Commission).[82] Therefore, for the fisheries subsidies that have been reported, merely a few disagreements have been raised to the European Commission. Among the few cases that the European Commission further looked into, the outcome showed a less optimistic decision with no recovery (that is: the EU member state does not have to redeem the offered state aid from the beneficiary).[83] This indicates that there has been no single case

[80] *Id.*

[81] CPTPP, *supra* note 43, ch. 28 § A.

[82] Commission Regulation (EU) No. 717/2014 of June 2014 on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis Aid in the Fishery and Aquaculture Sector, June 28, 2014, 2014 O.J. (L190) 45.

[83] The South Centre also summarized the seven proposals into an analytical list. *See* SOUTH CENTRE'S TRADE FOR DEV. PROGRAMME, *The WTO's Fisheries Subsidies Negotiations*, at 29, SC/AN/TDP/2017/5 (July, 2017) [hereinafter *The WTO's Fisheries Subsidies Negotiations*]. See also EU database of competition cases, available at: *Competition Policy*, EUR. COMM'N, https://ec.europa.eu/competition/elojade/isef/index.cfm (last visited Mar. 19, 2022).

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where informed state aid in the fisheries sector has been penalized. After the Council Regulation No. 744/2008, between the period of 2008-2010, public aid to the fisheries sector was exempted from EU competition rules, which serves as an interim specific action with an aim to promote the restructuring of EU fishing fleets that are affected by the financial crisis.[84]

Other support consists of three types of approaches.[85] First of all, through subsidies provided through the EMFF during 2014-2020, the European Parliament has already approved new spending rules for a fund which is dedicated to help support the regional bloc's fisheries sector.[86] The EMFF supports implementation of the EU's Common Fisheries Policy (hereinafter "CFP") and supersedes the European Fisheries Fund for the years 2007-2013. Accordingly, the entire amount allocated under EMFF is EUR 6.4 billion during 2014-2020, which is EUR 800 million per year.[87]

Second, during the period between 2014 and 2020, Horizon 2020 is the EU Research and Innovation Program (with a total available grant of EUR 80 billion). Within the Horizon Work Program 2016-2017, "Blue Growth: Demonstrating an ocean of opportunities" is one focal area which carries the objective of more job creation and growth in the EU's fisheries sector. For 2016-2017, this "Blue Growth program" under Horizon 2020 has a total budget of EUR 130.40 million (EUR 82 million for 2016 and EUR 42.40 million for 2017 separately).[88]

Third, pursuant to Article 14 of Council Directive 2003/96/EC,[89] fuel subsidies for fishers within the EU are mainly composed of nationally defined fuel tax exemptions with regard to the excise taxes directed at

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[84] Council Regulation (EC) No. 744/2008 of 24 July 2008 Instituting a Temporary Specific Action Aiming to Promote the Restructuring of the European Community Fishing Fleets Affected by the Economic Crisis arts. 12-13, July 31, 2008, 2008 O.J. (L202) 1.

[85] The South Centre also summarized the seven proposals into an analytical list. *See The WTO's Fisheries Subsidies Negotiations*, *supra* note 83, at 18-19.

[86] *European Maritime and Fisheries Fund (EMFF)*, EUR. COMM'N, https://ec.europa.eu/fisheries/cfp/emff_en (last visited Mar. 12, 2022).

[87] EU Commission, The European Maritime and Fisheries Fund 2014-2020, https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/2015-cfp-funding_en.pdf (last visited Mar. 12, 2022).

[88] KIM STOBBERUP ET AL., RESEARCH FOR PECH COMMITTEE: SMALL-SCALE FISHERIES AND 'BLUE GROWTH' IN THE EU, STUDY FOR THE EUROPEAN PARLIAMENT'S COMMITTEE ON FISHERIES 55 (2017).

[89] Council Directive 2003/96 of 27 October 2003 Restructuring the Community Framework for the Taxation of Energy Products and Electricity, art. 14, Oct. 31, 2003, 2003 O.J. (L283) 51.

> Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:
>
> . . . .
>
> (c) energy products supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than private pleasure craft, and electricity produced on board a craft.

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specific fuels. In addition, based on a study for the European Parliament, the overall annual foregone revenues as a result of the fuel tax exemptions and reductions for fishers during 2002-2011 are estimated at between EUR 1.05 and 1.3 billion.[90]

B. An Overview of EU State Aid Law: Focusing on Fisheries Subsidies Rules

Despite these various approaches, the European Parliament addressed that the measures that had been in place from 1992 to 2002 Regulation (EEC) No. 3760/92 "were not sufficiently effective to halt overfishing, and the depletion of many fish stocks continued at an even faster rate."[91] The Parliament further affirmed that the essential objective of the 2002 reform was to ensure a sustainable fishery by guaranteeing stable jobs along with incomes for fishers, and supplying healthy fisheries sources to consumers, while conserving the vulnerable equilibrium of the ocean environment and marine ecosystems. Therefore, a long-term sustainable approach to fisheries management was successfully introduced by the 2002 reform. This sustainable fisheries management approach consists of the preparation of urgent measures and involves multiannual recovery plans for fishery stocks outside safe biological limits. It also develops multiannual fishery management plans for other stocks.[92]

The critical situation of fishery stocks led to a reform consisting of three regulations. The first regulation regards framework. Regulation (EC) No. 2371/2002 focuses on the conservation and sustainable exploitation of fisheries resources, which repeals Regulation (EEC) No. 3760/92 and (EEC) No. 101/76. The second regulation is Regulation (EC) No. 2369/2002, which states the detailed rules and arrangements regarding structural assistance in the fisheries sector in the European Community. The final regulation is Regulation (EC) No. 2370/2002 establishing an emergency Community measure for scrapping fishing vessels.[93]

Whilst construction fisheries subsidies were originally prohibited in 2002 over concerns that Europe's fishing fleet was already over capacity, a proposal to reintroduce construction subsidies scraped through the Parliament's Fisheries Committee. Prohibition on subsidies on new fishing boats is another new movement introduced by the European Parliament and

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[90] Alessandra Borrello et al., *Fuel Subsidies in the EU Fisheries Sector*, EUR. PARL. 25 (July, 2013), https://www.europarl.europa.eu/RegData/etudes/note/join/2013/513963/IPOL-PECH_NT(2013)513963_EN.pdf.

[91] European Union, *The Common Fisheries Policy: Origins and Development*, EUR. PARL. 3, https://www.europarl.europa.eu/ftu/pdf/en/FTU_3.3.1.pdf.

[92] *Id.*

[93] *Id.* The South Centre also summarized the proposal into an analytical list. *See The WTO's Fisheries Subsidies Negotiations*, *supra* note 83, at 23.

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Commission in October 2013 to improve its CFP. Parliamentarians voted on 23 October 2013 to allow the EUR 6.5 billion EMFF to be invested in the modernization of engines along with selective fishing equipment.[94] However, parliamentarians remarkably rejected a controversial proposal for a reintroduction of fishing vessel construction subsidies.[95] Critics, including Oceans2012, countered that vessel modernization and construction subsidies maintained or even generated overfishing.[96] Regardless of the debate, several other fisheries subsidies were approved by the European Parliament.

C. Implications of EU State Aid Law on Fisheries for Establishing Regulations of Fisheries Subsidies in APEC

EU state aid law on the fisheries sector works as a reference for the regulations of fisheries subsidies in the APEC for two main reasons. One is EU is a long-standing and supranational regional body. While APEC functions based on soft-law approach and faces criticism in its solution of fishery problems, the EU's institutional structure and its regulations and associate implementation can be a reference for the regulation of fisheries subsidies in APEC. The other factor is that the regulations in EU state aid law on the fisheries sector are binding and advanced regional rules.

The EU has various new approaches to support the fisheries sector through EMFF and state aid of member states. The Regulation No. 508/2014 of the Parliament[97] directed EU Member States regarding how to use EMFF and repealed a series of regulations. Article 11 of the Regulation can be a helpful reference to the regulation of fisheries subsidies in the APEC region. The provision restricts six fishing activities in the EMFF.[98] These prohibited operations can apply to the APEC region since several major fishing

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[94] Press Release, PEW, European Parliament Votes to Improve Fisheries Data Collection, Control and Enforcement (Oct. 23, 2013), https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2013/10/23/european-parliament-votes-to-improve-fisheries-data-collection-control-and-enforcement.

[95] *Parliament Rejects Subsidies for New Fishing Boats*, EURACTIV (Oct. 24, 2013), https://www.euractiv.com/section/agriculture-food/news/parliament-rejects-subsidies-for-new-fishing-boats/.

[96] Saroja Coelho, *Overfishing Is a Problem Across the EU*, DW (Oct. 24, 2013), https://www.dw.com/en/overfishing-is-a-problem-across-the-eu/a-17181163.

[97] Regulation (EU) No. 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and Repealing Council Regulations (EC) No. 2328/2003, (EC) No. 861/2006, (EC) No. 1198/2006 and (EC) No. 791/2007 and Regulation (EU) No. 1255/2011 of the European Parliament and of the Council, May, 20, 2014, 2014 O.J. (L149) 1.

[98] These activities include: operations increasing the fishing capacity of a vessel or equipment increasing the ability of a vessel to find fish; the construction of new fishing vessels or the importation of fishing vessels; the temporary or permanent cessation of fishing activities, unless otherwise provided for in this Regulation; exploratory fishing; the transfer of ownership of a business; direct restocking, unless explicitly provided for as a conservation measure by a Union legal act or in the case of experimental restocking.

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countries adopt these behaviours and face similar ecosystem problems.

VI. CONCLUSION

This article has outlined regulations in relation to fisheries in the trade regimes in the APEC region. Specifically, it has analyzed the APEC policy declaration on the Blue Economy and fishery governance, which is in response to the identified causes of fish depletion, such as fisheries subsidies as well as increased fishery trade and production.

This article argues that Article 20.16(5) of the CPTPP is a regulatory standard of fishery subsidies in APEC. Given that the CPTPP is ratified and has entered into force in six of eleven parties to the Agreement, the fishery subsidies discipline can be expected to be implemented in the near future. The CPTPP is seen as an incubator towards the FTAAP in the region. As a result, the fisheries regulations in the CPTPP are helpful for APEC to advance its ocean governance. To a further extent, APEC member economies can consider the ITA experience to transplant the fisheries regulations of CPTPP into APEC.

Since the CPTPP prohibits subsidies to fish stocks that are in an "overfished condition," only specific fishery subsidies, relying on the definition of the FAO and RFMOs, will be subject to this provision. Despite that the CPTPP does not seem to be as ambitious as the WTO negotiations on the fisheries subsidies discipline, due to—most importantly—commitments in the environmental chapter of the CPTPP being subject to the "hard law" of environmental dispute settlement, this article argues that the CPTPP is not only a novel regime of the fisheries subsidies discipline, but that it also provides a workable discipline of fishery subsidies in the APEC.

The CPTPP has important fishery subsidies regulations. Given the signed legal texts in the CPTPP and other legal reform efforts made to refine the fisheries discipline, the CPTPP's regulations of fishery subsidies could be effective for sustaining the fisheries sector. The reasons underlying this effectiveness, according to Young, is the development of inter-regime and the open and transparent deliberation by influenced stakeholders in WTO negotiations and in the current prohibitions in institutions, such as the FAO. This development requires outreach between international trade and other regimes, which shows less reliance on uniform membership by entire States in international regimes.[99] Moreover, this regime interaction stimulates innovative changes to the convention of sovereign underpinnings of international law since the inter-regime concept leads to legitimacy that

[99] Margaret Young, *Energy Transition and Trade Law: Lessons from the Reform of Fisheries Subsidies* 3 (Melb. L. Sch., Melb. Legal Stud. Rsch. Paper No. 746, 2017).

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arises from transparency, open negotiation, and deliberation.[100] In addition, the EU fishery regulations could be a model for the Asia-Pacific region in the sense of the substance of its rules in the EU which is a supranational regional body with enforceable power. EU has the Regulation No. 508/2014 directing EU member states to use EMFF.

It can be concluded that APEC can first develop a single and binding agreement implementing the Blue Economy. Secondly, APEC member economies can put forward a proposal containing the EU fishery regulations to its OFWG and PECC. What follows is strengthening capacity building and the credibility of APEC towards a solid regional economic integration.

[100] *Id.*

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