

What Changes Should be Made by China under Article 20.16 of CPTPP

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Abstract: *For the first time, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) presents the series of environmental provisions as a separate chapter in a multilateral economic and trade agreement. This chapter deals with specific areas of environmental protection. Article 20.16 of the CPTPP is about marine capture. This article contains requirements for fisheries management systems of the contracting Parties, restrictions on illegal, unreported and unregulated Fishing (IUU fishing), and prohibitions and modifications of fishery subsidies granted by the contracting Parties. China is the largest fishing nation in the world, so Article 20.16 of the CPTPP will have a significant impact on China if China successfully joins the CPTPP after its application in September 2021. The issue of legal convergence is particularly important currently. WTO has passed the Agreement on Fisheries Subsidies, reaching an agreement on the issues such as the identification of IUU fishing and fishery subsidies based on Special and Differential Treatment. However, there are still several additional provisions waited to be negotiated, which China needs to keep working hard on.^[1] In addition, although China has relatively domestic legislation in this area and has actively signed and participated in relevant international documents, it still lacks legal provisions on fishery subsidies and has not signed The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (Compliance Agreement). All of these will limit China's voice and basis for environmental provisions in bilateral free trade agreement negotiations. China should clarify the relevant concepts, improve its domestic legislation, accelerate its accession to relevant international documents and treaties, and upgrade its bilateral investment agreements in a timely manner.*

Keywords: *CPTPP, Bilateral Free Trade Agreement, Marine Capture, IUU, Agreement on Fishery subsidies*

The structure of this article is divided into six parts. Part I introduces the basis of CPTPP environmental protection chapter, illustrating the necessity of the marine capture fisheries protection and showing the current situation of Chinese fisheries and aquaculture. In part II, there is a brief introduction of Article 20.16 of CPTPP. In part III, we are going to analyze the currently global problems in marine capture restriction and the position of China. Part IV mainly discusses about the state of Chinese marine capture fisheries (i.e., fisheries management system, IUU, subsidies given to marine capture fisheries), the legislative status of marine capture fisheries, and Chinese situation in international documents related to Article 20.16 of CPTPP. Then this paper will analyze the bilateral trade agreements of China (Chapter V) and then give some advice to China (Chapter VI)

1. Background

1.1 The Necessity of the Marine Capture Fisheries Protection

One of the 23 clauses in Chapter 20 of CPTPP is Article 20.16 Marine Capture Fisheries. According to FAO's analysis of assessed stocks, an estimated 31.4% of fish species stocks in 2013 were biologically unsustainable, i.e., overfished, in addition to 58.1% in a state of full exploitation.^[2] Except for the direct capture actions, some indirect motivations of marine capture fisheries are also doing an essential role. Fisheries subsidies are one typical example of them. According to the report given by European Parliament, a reduction in fishing capacity and effort would contribute to the recovery of stocks, yet many governments of fishing countries continue to support the sector with harmful fisheries subsidies. Subsidies that directly increase fishing capacity and may lead to overfishing are estimated at about US\$22 billion worldwide.^[3]

In this sense, this clause is designed according to the real situation of the global marine fisheries and the protection of marine capture fisheries is quite important.

1.2 The Current Situation of Chinese Fisheries and Aquaculture

China is the major producer of global fish product. In 2018, China accounted for 35 percent of global fish production.^[4] China has also been the main exporter since 2002, and, since 2011, the third major importing country in terms of value.^[1] In 2018, China also ranked at the top in marine water captures.^[1] With portrait comparison, the marine capture production of China ranked to the top and then kept stable from 1980s to 2017, taking up 15% of total production in 2018.^[1] Therefore, the marine capture fishery of China is quite important for itself and its trading partners.

1.3 The Environmental Protection chapter of CPTPP and US Mode

United States is the first country that includes the environmental protection clause in its free trade agreements with others.^[5] Due to its early development and strong power in negotiations, the design of environmental protection clause has become a trend in making FTAs, which is shown by CPTPP. Chapter 20 of CPTPP contains 23 clauses, including both general principles and detailed provisions in different field of environmental protection. CPTPP is the first multiple trade agreement (MTA) which separates environmental protection chapter in order to balance the tension relationship between trade flows and environmental protection. However, although there is a beautiful blue print in CPTPP, all countries must take their own profit into consideration if they join CPTPP. The member of CPTPP must ensure that trade and environment policies are mutually supportive and seek to protect and preserve the environment and enhance international means of doing so while also optimizing the use of the world's resources; must seek provisions that require contracting Parties to ensure that they do not weaken or reduce the protections afforded in domestic environmental laws as a means of encouraging trade; must strengthen its trading partners' capacity to protect the environment through sustainable development.^[6] In September, 2021, China formally applied to join CPTPP. And at present, in accordance with the CPTPP accession procedure, it is in contact, communication and consultation with current Parties of CPTPP. China should consider whether the environmental protection chapter matches for the profit of China, all in all, it is designed according to American model at the very beginning and the environment chapter has not been designed in Chinese free trade agreements widely.

1.4 The New Development: Agreement on Fisheries Subsidies

According to subsection (a), section 1, Article 1.2 of CPTPP, recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms: (a) in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to the other Parties. All Parties of CPTPP are the Parties of WTO Agreement. Therefore, it means that the rights and obligations under WTO Agreement should be followed by the Parties of CPTPP, including SCM Agreement that is listed in Annex 1A of WTO Agreement.

In June, 2022, the Agreement of Fisheries Subsidies has been passed. In this agreement, it points that "Annex 1A to the WTO Agreement shall, upon entry into force of this Protocol pursuant to paragraph 4, be amended by the insertion of the Agreement on Fisheries Subsidies, as set out in the Annex to this Protocol, to be placed after the Agreement on Subsidies and Countervailing Measures."^[1] Upon this new provision, the Agreement on Fisheries Subsidies becomes part of Annex 1A of WTO agreement.

Therefore, it can be concluded that SCM Agreement and Agreement on Fisheries Subsidies are coexist with CPTPP, and the rights and obligations should be followed by the Parties.

1.5 Introduction to Article 20.16 of CPTPP

This provision emphasizes the management of overfishing and the elimination of fishery subsidies in specific circumstances.

It provides that each Party shall seek to operate a fisheries management system that regulates marine wild capture fishing. The intention is to prevent overfishing and overcapacity, reduce the bycatch of non-target species and juveniles, and promote the recovery of overfished stocks for all

marine fisheries in which that Parties' persons conduct fishing activities. Several international instruments are the basis of the fisheries management systems, including United Nations Convention on the Law of the Sea (UNCLOS), the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done at New York, 4, December, 1995 (UN Fish Stocks Agreement), the FAO Code of Conduct for Responsible Fisheries (CCRF),^[20] the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) done at Rome, 24, November, 1993 and the 2001 IUU Fishing Plan of Action (IPOA-IUU).^[7] Except for the fisheries management system that regulates marine wild capture fishing, this article also provides that each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures.^[7]

Apart from direct capture actions, this provision points that the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity also play an essential role in the implementation of a fisheries management system. It provides that no Party shall grant or maintain any of the following subsidies within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of the SCM Agreement: (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; 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 organization or arrangement and in conformity with international law. Besides, it also requires that the subsidies given by the Party should be complied with Article 5 (a) of SCM Agreement. And if the subsidies are not prohibited by paragraph 5(a) or 5(b)¹, each Party shall make best efforts to refrain from introducing new, or extending or enhancing existing, subsidies within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement, that contribute to overfishing or overcapacity.

Besides, each Party is required (any subsidy within the meaning of Article 1.1 of the SCM Agreement that is specific within the meaning of Article 2 of the SCM Agreement) or encouraged (the fishery subsidies that the Party grants or maintains that are not covered by paragraph 5, particularly in fuel subsidies) to inform their subsidies to other Parties of CPTPP. Cooperations among the Parties are also encouraged in combating IUU fishing practices.

In order to predict its effect on Chinese bilateral free trade agreements, we should first analyze whether there is any problem contained in Article 20.16 CPTPP itself and whether there are any conflicted positions held by the Parties of other international agreements. These are the basis and the evidence of the international position of each current Party or potential Party of CPTPP in negotiations.

2. Common Problems and China's Position

2.1 IUU Fishing

Although both CPTPP and Agreement of Fisheries Subsidies apply the definition of IUU fishing provided in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate IUU fishing adopted by FAO, there are still several problems that put difficulties in recognizing IUU fishing.

The first problem is the speciality of fishery resources. The whole name of IUU is "Illegal, Unreported, and Unregulated Fishing". It is most difficult to define whether the fishing practice is IUU when it belongs to unregulated fishing because it is related to the national developments, the change of fishery resources, the burden of cost to acquisition of data and information shouldered by some developing countries or least developed countries, and the high migratory characteristics of fishery resources and seasonal flows.^[8]

The second problem that puts difficulties in the recognition of IUU fishing practices is the territorial and maritime jurisdiction disputes. If fishing activities occur in disputed waters or areas of territorial or

¹No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.: (a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;

maritime jurisdiction directly, it will lead to disputes over the determination of IUU fishing and the triggering of subsidy bans, especially for illegal fishing because the first step to determine the legality of fishing is to determine which State's law applies in the waters in which the activity is located, which in turn affects the jurisdiction of the coastal State to determine IUU fishing.^[9]

The method given by subsection (b), section 5 of Article 20.16 CPTPP to prohibit the subsidies given to the listed fishing vessels is quite smart, because at that time there was still a dispute among the fishery subsidies negotiations of the Parties of WTO. Due to the limitation of the rules of subsidies, the recognition of IUU fishing practices may be difficult. Therefore, two methods are advised to use to deal with the difficulty in recognizing IUU fishing practices, which is the list of countries and Regional Fisheries Management Organization (RFMO)'s list of vessels.^[8] Now, with the success of the Agreement on Fisheries Subsidies, these two methods are shown in this Agreement.^[1] However, for the latter one, most of rules of RFMO are soft law without enough legal restraint, some Parties are not the member of RFMO, and some RFMOs do not have the list of vessels.

Besides, another problem is that whether the methods taken by different countries to recognize IUU fishing are not united. We can find several disputes about IUU fishing recognition, and what China is facing to is a typical one. In recent years, there is a great dispute in China's IUU fishing. According to the report given by IUU Fishing Index², China got the highest IUU score in 2021, ranking at the highest from 2019 to 2021 in the world.^[10] Another example is that, on 3, December, 2020, on the regular press conference of Foreign Ministry, a journalist asked for China's response on the comment given by America that Chinese fishing teams are the main culprits in the serious IUU problem in the Pacific, the so-called "illegal, unreported, unregulated distant-water fishing problem." To give a response, the Spokesperson for the Ministry of Foreign Affairs denied this comment with an evidence of White Paper on Compliance with China's Distant-Water Fisheries (2020).^[11] In this document, it clarifies that China supports the launching of high-seas landing inspections aimed at combating illegal fishing activities within the framework of relevant international law;^[12] China supports strengthening the fight against IUU fishing activities through port regulation;^[12] China and Russia signed an intergovernmental agreement on combating illegal fishing;^[12] China firmly supports and actively cooperates with the international community in cracking down on all kinds of illegal fishing activities.^[12] It also clarifies that China has joined a total of eight regional fisheries management organizations, all of which rank high in terms of compliance. At the same time, China is actively working with the international community to crack down on IUU fishing activities, and will also implement a system of high seas retransmission reports and high seas retransmission observers in 2021, making active efforts to conserve high seas fisheries resources.^[13]

2.2 Overcapacity and Overfishing

Article 5(a) of CPTPP provides the necessity of the elimination of all subsidies that contribute to overfishing and overcapacity.

Both the national jurisdiction where the fishing is taking place and the relevant RFMOs can recognize the fish stocks are overfished. However, different jurisdictions and RFMOs usually have different standards to assess whether the fish stocks are overfished or not.^[9] Once there is a dispute upon fishery subsidies for overfishing, there may be a further dispute on the recognition of overfishing claimed by the Party. In fact, this kind of dispute is more likely to happen in the special sea areas like the Exclusive Economic Zone, because of its location in close proximity to the high seas and its involvement in high seas fisheries resources such as straddling and highly migratory species, the measures adopted by coastal States within the area will inevitably affect high seas fishing practices and therefore the management of high seas fisheries resources, and when domestic management measures conflict with the management provisions of other regional fisheries organizations, there is the problem of coordination between the provisions of coastal States and regional fisheries management organizations.^[14]

² The Index has been developed by Poseidon Aquatic Resource Management Ltd., a fisheries and aquaculture consultancy company working globally, and the Global Initiative Against Transnational Organized Crime, a Geneva-based NGO network of experts working on human rights, democracy, governance, and development issues where organized crime has become increasingly pertinent. < <https://www.iuufishingindex.net/about> >

2.3 Fisheries Subsidies

Irrelevant to China, the provision of CPTPP has its own confusing descriptions. These confusing descriptions is in the provision of subsidies. Section 5 of Article 20.16 CPTPP prohibits two kinds of subsidies. In its footnotes, the definitions of fishing, negative effect, overfishing, and fishing vessel are also provided.

In general, there is no dispute on what is fishing and fishing vessel because they have been given clear definitions. However, other definitions given by this paragraph may be conflict with other international instruments or may generate inherent conflicts. For the definition of “negative effect”, Section 5 of Article 20.16 CPTPP provides that it shall be determined based on the best scientific evidence available. However, there is no clear guidance about the standard of scientific evidence and the institution who has the power to recognize the scientific evidence. “Overfishing” may also be confusing in practices due to the unclear description of “best scientific evidence”. In the Agreement on Fisheries Subsidies, “best scientific evidence” is also cited to judge whether a fish stock is overfished.^[1] However, further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing are still waited for Parties’ negotiations in WTO.^[1] This is the problem faced by all countries.

CPTPP also uses the words “fishery subsidy”. However, different organizations make different definitions. FAO and WTO are two organizations whose international instruments or agreements are cited by Article 20.16 of CPTPP. According to the provisions of the SCM Agreement, subsidies must have the characteristics of financial support and must be specialized.^[1] Article 1 of the Agreement on Fisheries Subsidies also provides that the “subsidies” here is within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of that Agreement. However, according to the FAO Draft Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector, the guide proposes a broad definition of fishery subsidies by defining a subsidy as something that is out of the ordinary, i.e., something that is done differently from what is customary: fishery subsidies are government actions or inactions outside of normal practices that modify - by increasing or decreasing - the potential profits by the fisheries industry in the short-, medium- or long-term.^[15] Therefore, as major institutions, FAO and WTO still give fisheries subsidies different definitions, which makes it harder for CPTPP to make clear definition because it is designed according to SCM Agreement, the Agreement on Fisheries Subsidies and international instruments of FAO to define fishery subsidies in practices.

Besides, another problem of CPTPP is that Article 20.16 lacks of a ban on ongoing subsidies for the construction and renewal of fishing vessels that would directly increase fishing capacity and support overfishing operations.^[16] Except for this, non-exclusive fuel subsidies, subsidies for fishing outside the jurisdictional area and Special and Differential Treatment Rules (SDT Rules) are not clear enough in both CPTPP and Agreement of Fisheries Subsidies. We can take SDT Rules as an example. The WTO Agreement contains the provisions which give developing countries special rights.^[17] And according to the Ministerial Decision of 13 December 2017, the Ministerial Conference recognizes that appropriate and effective Special and Differential Treatment for the developing country Members and least developed country Members should be an integral part of these negotiations. China is a developing country and it supports the benefit of developing countries in the negotiations in Special and Differential Treatment. One typical example is that China calls for exemptions from small-scale fisheries and manual fishing and considers it feasible to define these fisheries.^[18] However, China is a major producer and exporter of fishing products. The fishery subsidies given by China takes up 20.7% of the global fishery subsidies, which is only lower than EU and Japan.^[18] Therefore, China is facing to a dispute that whether it is fair for others to allow China to gain great profit and give large amount of fishery subsidies at the same time. These belong to the subsidies that contribute to overcapacity and overfishing, going to be negotiated by the Parties of the Agreement of Fisheries Subsidies in the next.^[1]

2.4 Lack of Domestic and Transparent Information of Fishery Subsidies

At a Chatham Institute webinar, Wells said the opacity of subsidy data and the low compatibility of subsidy reporting standards from different intergovernmental bodies. This is not the problem of China but the global Parties. Therefore, it is hard for general public to assess whether the fishery subsidies given by China or other Parties fall within the prohibition of Article 20.16 CPTPP.^[19]

3. The Status of China's Signing of International Instruments, Domestic Legislation and Fishery Subsidies

3.1 International Instruments and the Situation of China's Acceptance

To guide the Party of CPTPP to design a fisheries management system, Article 20.16 CPTPP cites the international instruments, including UNLOSC, UN Fish Stocks Agreement, Compliance Agreement, CCRF, and IPOA-IUU. These four international instruments are part of the international framework of IUU fishing.^[20] Except for them, The 2005 Rome Declaration on IUU fishing, The Agreement on Port State Measures (PSMA), The Voluntary Guidelines for Flag State Performance, The FAO Voluntary Guidelines for Catch Documentation Schemes, the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, and Regional Mechanisms build the international framework together. For the four international instruments, China has signed the UN Fish Stocks Agreement and two declarations are made by China for Article 21(7) and Article 22(1) (f).^[21] However, China has not accepted the Compliance Agreement.^[22] As a member of FAO, China states that after the 28th General Assembly of FAO deliberated and adopted the CCRF and related resolutions in 1995, the Chinese government adhered to the spirit of responsibility and embarked on a path of responsible fisheries and aquaculture development with Chinese characteristics.^[23] The IPOA-IUU was elaborated within the frame work of the CCRF,^[20] which is a voluntary instrument that applies to all States and entities and to all fishers,^[24] calling upon States to develop and adopt their own National Plans of Actions, addressing flag State responsibilities, coastal, port and market State measures and the role of RFMOs in the implementation of the NPOA.^[20]

Chinese performance can be shown by its international actions and domestic laws. In the international level, China actively researches to join PSMA. The evidence is that China cooperated with Commission for the Conservation of Antarctic Marine Living Resources to successfully seize and dispose of a case of illegally reproduced by a foreign fishing vessel in a domestic port in 2016, and since 2018, the list of IUU fishing vessels published by the relevant regional fisheries management organizations of which China has joined has been notified to each port.^[12] In the aspect of IUU vessels, with a comparison of marine capture production, China has become the biggest producer and its production has been more than two times of United States of America. However, China has 1529 records of IUU vessels,^[25] which is much lower than that of Europe (4116 records) and that of United States of America (3491 records).^[25]

Therefore, it can be concluded that in the international level, China performs actively and well under the voluntary instruments. But it has not accepted all the four international instrument particularly listed in Article 20.16 CPTPP.

3.2 Domestic Laws of China

The domestic law of China is also a method to see the situation of Chinese performance in international instruments, which shows the level of Chinese fisheries management system. Compared with the shortage of clear definition and range of "environmental law" shown by the precedents, Article 20.1 of CPTPP clearly defines what "environmental law" is.^[26] The relevant provision to our scenario is that "environmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through: (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas".

Article 2 (4) of the Law of People's Republic of China on the Protection of Wildlife provides that as regards the protection of the species of aquatic wildlife other than those which are rare or near extinction, the provisions of the Fisheries Law shall apply. Linked with this article, Article 37 of Fisheries Law of People's Republic of China provides that the State carries out key protection on aquatic wild animals which are valuable or in severe danger such as white-flag dolphins, etc. in order to prevent them from dying out. It is also prohibited to fish and kill, or hurt the aquatic wild animals under the State's key protection. Sharks are listed as the national second-level protected animals, marine turtles become the national first-level protected animals in 2021, and the protection of seabirds has been upgraded as well.^[27] For the marine mammals, there are more than 30 species of whales common in Chinese waters and 40 kinds of Cetacea are listed in List of Wild Animals under National Key Protection (14 national first-level protected animals and 26 national second-level protected animals), 12

kinds of whales are upgraded to the national first-level protected animals in 2021.^[28] Therefore, according to the provisions and the data, sharks, marine turtles, seabirds and marine mammals can be protected from fisheries to a great extent, which means that the extent of Chinese protection is even stronger than the fisheries bycatch mitigation measures and catch limits provided in Article 20.16.4 (a) of CPTPP.

For the overfishing and overcapacity of fisheries, Fisheries Law of the People's Republic of China gives detailed regulation. In Article 22 of Chapter 3, it provides "the principle of catches being lower than the growth of fishery resources", which leads the "catch quota system". Chapter 4 provides some guidance or restrictions on fisheries plans, aquatic germplasm resources conservation areas, fishing methods and tools, fishing species, fishing ban period, and fishing ban area. Further detailed guidance is given by Article 19 of Detailed Rules for the Implementation of the Fisheries Law of the People's Republic of China. Therefore, it is obvious that China is using its legislations to create a complete regime to regulate overfishing and overcapacity of fisheries.

China also keeps up with the development of IPOA-IUU. Article 23 of Fisheries Law of the People's Republic of China and Article 17 of Detailed Rules for the Implementation of the Fisheries Law of the People's Republic of China are about Chinese fishing licensing system. Different kinds of marine captures must be issued with fishing licenses with the approval of the corresponding administrative departments. It is emphasized particularly that fishing operations on jurisdictional seas of other countries shall be abide by relevant treaties and agreements concluded or acceded to by the People's Republic of China and the laws of relevant countries. For the fishing methods, fishing vessels, and documents that do not meet the requirements, the fishing licenses shall not be issued. These provisions contain the characteristics of the IUU fishing with domestic regulations, the laws of relevant countries, and international agreements. More recently, Article 33 of the newest version of the Regulations on the Management of Distant-Water Fisheries provides that distant-water fishing enterprises and distant-water fishing vessels are prohibited from engaging in, supporting or cooperating in IUU fishing activities. There is a trend that IUU fishing is going to be melted into Chinese domestic laws.

3.3 Situation of Chinese Bilateral Free Trade Agreements

This paper explores the environmental protection provisions of China's bilateral free trade agreements because there is a high degree of overlap among the countries/regions whom China has bilateral trade agreements with, the CPTPP Parties and the participants in international documents. For example, Australia, Peru, New Zealand, Singapore, Chile, some ASEAN countries (Brunei, Vietnam, Malaysia). In addition, South Korea has also applied to join the CPTPP. Under this situation, disputes will arise in the event of differences or the absence of rights and obligations under different international treaties, international instruments and bilateral free trade agreements.

Generally, Chinese bilateral free trade agreements can be separated into three categories according to the environmental protection chapter or clause. (Table 1)

Table 1: Three Groups of Bilateral Free Trade Agreement of China

Lack of Environmental Chapter or Clause	Broad Environmental Protection Clause	Detailed Provisions
Australia- China	China- Chile	China- Korea
China- New Zealand		China- Peru
China- Singapore		
the Association of South East Asian Nations- China		

A group of agreements are lack of environmental chapter or clause, including the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, Free Trade Agreement between the Government of People's Republic of China and the Government of New Zealand, Free Trade Agreement between the Government of China and the Government of Singapore, and Framework Agreement on Comprehensive Economic Co-operation between the Association of South East Asian Nations and the People's Republic of China. The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile, on the other hand, contains a broad environmental protection clause, stipulating that the Parties shall enhance exchanges and cooperation between the contracting Parties in the areas of

labor, social security and the environment through memorandums of understanding on cooperation in labor and social security and environmental cooperation agreements. The most detailed provisions on environmental protection are in the Free Trade Agreement between the Government of People's Republic of China and the Government of the Republic of Korea (China-Korea FTA), and the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru. The China-Korea FTA incorporates a multilateral environmental agreement that guarantees the implementation of environmental agreements to which both China and Korea are Parties and allows for consultation and cooperation on environmental issues. This is very similar to the provisions of the environmental chapter of the CPTPP. China and Peru, two major fisheries countries, have a separate article on fisheries in their agreement. It emphasizes the exchange of information, the conservation of natural resources and responsible fishing in both countries, with a strong commitment to IUU fishing activities. This clearly reflects the importance that both countries attach to fisheries and cooperation, and the integration of China's bilateral trade provisions with the IUU regime.

Of all the Chinese bilateral free trade agreements, apart from the above, only the Free Trade Agreement between the Government of the People's Republic of China and the Government of Georgia, the Free Trade Agreement between the Government of People's Republic of China and the Government of New Zealand, and the Free Trade Agreement between the Government of People's Republic of China and the Government of Iceland, contain provisions or chapters on environmental protection. These agreements are relatively new and therefore the environmental protection provisions and chapters in them may be the effect of the negotiation process between the two parties to keep up with the times in the area of environmental protection. However, China needs to be aware that most of bilateral free trade agreements has not contained environmental provisions yet. However, the counter Parties to these agreements are co-Parties and potential co-Parties with China to other international instruments, multilateral environment agreements and the CPTPP. China will face the issue of updating these agreements and the resulting disputes.

In addition, South Korea, for example, has a long-standing bilateral free trade agreement with America, whose environmental chapter and provisions are particularly like those in the China-Korea FTA and the CPTPP, reflecting the strong influence of the American model of the free trade agreements on the environmental provisions in today's multilateral agreements. However, it seems like that China does not resist using American model in environment chapter of CPTPP, especially in Article 20.16 which is about marine capture. Because United States of America is also a major fishing country, ranking at 6 in 2018.^[4] Besides, China also has made a bilateral free trade agreement with Korea. And before China – Korea FTA, the Free Trade Agreement between the United States of America and the Republic of Korea^[29] (KORUS) has been signed in 2012. It is not hard to find that chapter 20 Environment of KORUS is quite similar to the environmental protection chapter of China – Korea FTA. KORUS also provides the most relevant model for the for the environmental provisions in the TPP.^[30] It means that China would like to design environment provisions according to American Model and join an agreement with an environmental protection chapter that is designed according to American Model. Therefore, it is unreasonable to presume that China will refuse to use American Model in making bilateral free trade agreements.

4. Advice for China

4.1 Making Clear What Constitutes Chinese IUU Fishing

China should first clarify the identification methods of IUU fishing. In recent years China has been subject to controversy over IUU fishing, mainly from Europe and the US and supported by data from think tanks. However, according to the IUU vessel list provided by the FAO, the number of Chinese vessels is much lower than that of the US. Does this mean that there is a possibility that the data provided relies on a different definition of IUU and a different method of identifying them from China? A clear identification method of IUU fishing would therefore help China to clarify its position from the ground up and to explain its suspicions of IUU being accused by other countries in the context of the data that China can provide rather than just statements and individual cases.

Except for the recognition of IUU Fishing, another problem is the territorial and maritime jurisdiction disputes. On this issue, China proposed that neither the content of the agreement should be interpreted as having any legal impact on territory, sovereignty or jurisdiction, and that IUU fishing activities involving disputed waters (including disputes over sovereignty, sovereign rights and jurisdiction) should be excluded from the scope of the agreement.^[31] This is a success of China and a

protection of Parties' sovereignty. However, China should continue to unswervingly safeguard national sovereignty and respond positively and promptly to disputes over territories and maritime jurisdictions. Because, territorial and maritime sovereignty determines the jurisdiction of marine fishing operations conducted in the waters of the country. In addition, China should closely understand the territorial and maritime jurisdiction disputes of other countries and promptly remind Chinese fishing vessels operating in the waters of other countries that they should be aware of the territorial and maritime jurisdiction disputes within the relevant maritime areas.

4.2 Ascertain Fisheries Subsidies

As international organizations associated with the CPTPP, the FAO and the WTO interpret fishery subsidies broadly and differently. Based on the previous data, China's fisheries subsidies account for a high proportion of global fisheries subsidies. Now, China has taken actions. For example, some provinces of China have stopped fuel cost subsidies, applying subsidy policy for the conservation of marine fishery resources instead.^{[32][33]} However, China lacks clear categories of fisheries subsidies, which would make it easy to be challenged as illegal subsidies under SCM Agreement.^[34] And there is a lack of transparency of information on fisheries subsidies globally, including in China. Besides, how the "best evidence available" should be applied has not united. These three factors may lead to discrepancies and misunderstandings among other countries or international organizations regarding China's fisheries subsidies.

Therefore, China, as a major fishery country, should clarify its position as soon as possible and, in the process of applying to join the CPTPP, clarify whether the fisheries subsidies referred to in the CPTPP are the WTO concept of fishery subsidies or the concept given by the FAO, or whether there are other definitions. China should also further clarify the types of fishery subsidies, trying to balance and reduce the portion of fisheries subsidies that are not complied with CPTPP and the Agreement on Fisheries Subsidies (Article 3.8 and Article 4.4). For the fisheries subsidies that have not been decided by the W5 and W20 in the WTO negotiation, China should do enough research and modify the structure of these subsidies and avoid the abuse of them, which can also help China to have a better preparation for the following negotiations. With the pass of the Agreement of Fisheries Subsidies, China should also improve the transparency of fishery subsidies according to Article 8 of this Agreement. What's more, the "best scientific evidence available" should also be ascertained by China and the international communities so that this method can be applied better in recognizing the fisheries subsidies.

Except for the former three problems, another more general problem is also affecting the basis of the recognition of fisheries subsidies. In the face of the international community's questioning of China's status as a developing country, China should prove with stronger data or other evidence that it is necessary to grant fisheries subsidies under Special and Differential Treatment in the field of marine fishing as a developing country and a major fishing nation. For this purpose, developing a fisheries database may also be necessary for China. This is good for China to deal with current disputes and the future negotiations about Special and Differential Treatment in the WTO negotiation.

4.3 Actively Promote the Signing of International Instruments

Article 20.16 of the CPTPP contains several international instruments. If China is not a Party to the CPTPP after its successful accession, the Agreement will not be useful for measuring the fisheries management system in China, and this may inevitably lead to criticism and complaints from other CPTPP Parties that have signed the Compliance Agreement. It is clear from the White Paper that China is studying and working towards accession to the Agreement and is already implementing the Agreement in practice with resources. At the stage of applying for accession to the CPTPP, along with China's negotiations with other CPTPP Parties, China should speed up its research and advance the process of applying for accession to the Compliance Agreement.

4.4 Timely Update of China's Bilateral Free Trade Agreements

The position given by China, the marine capture situation of China and its domestic laws will affect China's room for negotiations in making bilateral free trade agreements. If China's position is clear, its marine capture situation is good enough, and its domestic laws are complete and keeping up with time, China will be greater say in negotiations.

After the US bilateral free trade agreement, CPTPP becomes the first multilateral economic and trade agreement to list the environment as a separate chapter. The balance between trade and environmental protection in trade agreements has gradually become a trend. Therefore, China must take actions. China should enrich and refine the environmental provisions of free trade agreements, because only a few of the free trade agreements signed by China contain environmental provisions.^[35] For bilateral free trade agreements that have not yet included environmental provisions, China should promote upgrading negotiations, and strive to promote the proliferation of environmental provisions or chapters in bilateral free trade agreements within a reasonable range in combination with the current development situation of both sides. For the free trade agreements that already contain environmental provisions but the provisions are too general, China should actively promote negotiations and refine or expand the existing provisions. The reason behind this advice is that the free trade agreements cannot be applied to environment issues if they do not contain any provisions that adjust or affect international environmental relations, because the only two sources of international environment law is international custom and international agreements.^[36] If there is no environment clause in Chinese bilateral free trade agreements, or the environment clause is not clear, it will be recognized that there is no international environmental law contained in the agreement, and both Parties can only deal with their dispute under international trade law instead of international environment law when there is an environmental dispute happened between.

The China – Korea FTA and the China – Peru FTA contain improved environmental provisions or chapters, and even more specific provisions such as fishery protection. For such provisions, China should form a good connection with the CPTPP and other multilateral economic and trade agreements, and timely communicate with each other in combination with the development of the CPTPP negotiations and the following WTO negotiation, to timely coordinate its own free trade agreement and multilateral economic and trade agreement after the negotiation results are obtained. This is conducive to preventing the two sides from negotiating after differences between the bilateral free trade agreement and the CPTPP in advance, improving the efficiency of text updating, reducing the submission of disputes to the CPTPP dispute settlement procedure, and saving time, manpower and economic costs. Besides, except for China - Peru FTA, there is no other free trade agreement containing environment clauses in specific environmental areas, and the environment clauses are also made by promise and do not fall within the jurisdiction of dispute settlement mechanism.^[37] China can perfect its free trade agreements by analyzing the major trades with the counterparties, making more detailed environment clauses in that field. It should also add environmental disputes in dispute settlement mechanism so that both parties are more likely to follow the environment clauses and this kind of dispute can have a chance to be subject to the jurisdiction of the courts of China, which can reduce the waste of time and money once this dispute is subject to the dispute settlement mechanism of CPTPP.

5. Conclusion

Environmental protection has been ignored by human trade activities for a long time. CPTPP lists the environment as a single chapter, which is a reflection on the relationship between environmental protection and trade and the efforts to be made all over the world. As an emerging discipline, international environmental law, compared with legal branches such as international trade law, has vague concept, loose system, many internal contradictions, and the relevant laws lack enforcement. With economic development, many environmental problems emerge in front of us, such as greenhouse effect, energy shortage, biodiversity decline and so on. Marine fishing is an important reason affecting marine biodiversity. Article 20.16 of CPTPP specifically stipulates the management and restrictions on marine fishing. It is hoped that the suggestions put forward in this paper will contribute to China's application for accession to the CPTPP and the improvement of its domestic laws and free trade agreements.

However, this paper does not have enough room to discuss about the relationship between CPTPP and WTO. There is a tension between the WTO Fisheries Subsidy Negotiations and the environment chapter of CPTPP. Whether WTO treat the environment same as CPTPP is still a question. Because the main objective of the WTO rules is to promote global trade liberalization, so that they do not have a special agreement on environment and trade, and the environmental provisions are relatively fragmented.^[26] Whether the suspension of WTO Appellate Body will affect its influence on other agreements in the future is also a problem.

The land is lovely for the sea and the sea is lovely for the coast. Sea is generous and offers human food and water. But it should not be the tool for human to earn money without any limitation. What we

should do in legal field is to bond the sea and coast together and draw a line for human beings so that they can hug each other forever.

References

- [1] *Agreement on Fisheries Subsidies*, 2022, WT/MIN(22)/33 • WT/L/1144.
- [2] Li Wei A. (2020). *The Food and Agriculture Organization of the United Nations (FAO) has released a new | The State of World Fisheries and Aquaculture 2020*. Souhu. https://www.sohu.com/a/401573916_650444
- [3] Frederik Scholte. (2021). *WTO negotiations on fishery subsidies*. European Parliamentary Research Service. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698842/EPRS_BRI\(2021\)698842_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698842/EPRS_BRI(2021)698842_EN.pdf)
- [4] Food and Agriculture Organization of the United Nations. (2020). *The state of world fisheries and aquaculture 2020*. <https://www.fao.org/documents/card/en/c/ca9229en>.
- [5] David A. Gantz. (2011). *Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*. *The University of Miami Inter-American Law Review*, 42(2), 297-366.
- [6] I-Ju Chen. (2019). *An Analysis of Establishing Regional Environmental Governance through a Mega Regional Trade Agreement: The Asia-Pacific Practice*. *Vermont Journal of Environmental Law*, 20(1), 1-31.
- [7] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 2018.
- [8] Chen Panpan. (2018). *The Dilemma of IUU Fishery Subsidy Negotiations and its Countermeasures*. *Journal of Boundary and Ocean Studies*, 3(5), 11.
- [9] Tang Yi, & Wei Dan. (in press). *Study on the Ban on IUU Fishing Subsidies in the WTO Fisheries Subsidy Negotiations*. *Journal of Shanghai Ocean University*.
- [10] IUU Fishing Index. (2021). *China – 2021 country results*. <https://www.iuufishingindex.net/profile/China>
- [11] Ministry of Foreign Affairs of the People's Republic of China. (2020, December 3). *Foreign Ministry Spokesperson Hua Chunying presided over a regular press conference*. Beijing: Ministry of Foreign Affairs of the People's Republic of China. https://www.fmChina.gov.cn/web/fyrbt_673021/jzhsl_673025/202012/t20201203_5419595.shtml
- [12] Ministry of Agriculture and Rural Affairs of the People's Republic of China. (2020). *White paper on compliance with China's distant-water fisheries*.
- [13] Ministry of Foreign Affairs of the People's Republic of China. (2020, December 25). *Foreign Ministry Spokesperson Wang Wenbin presided over a regular press conference*. Beijing: Ministry of Foreign Affairs of the People's Republic of China. https://www.mfa.gov.cn/web/wjdt_674879/fyrbt_674889/202012/t20201225_7817007.shtml
- [14] Hu Qinyuan. (2022). *The role of RFMOs still needs to be strengthened*. *The Supreme People's Procuratorate of People's Republic of China*. https://www.spp.gov.cn/spp/llyj/202008/t20200826_477912.shtml
- [15] Westlund, L. (2004). *Guide for identifying, assessing and reporting on subsidies in the fisheries sector* (No. 438). Food & Agriculture Org.
- [16] Yang Guohua et al. (2020). *Study on the rules of the Trans-Pacific Partnership Agreement (1st ed.)*. Shanghai People's Publishing House.
- [17] Trade and Development Committee. (2022). *Special and differential treatment provisions*. https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm
- [18] Wu Yingying. (2017). *Fisheries subsidy negotiations under the WTO framework – special and differential treatment for developing members*. *China Oceans Law Review*, 2, 1-21.
- [19] Zhang Zizhu. (2020). *The WTO negotiation continues to sprint, and China's fishery subsidies are faced with a choice*. Pengpai. https://www.thepaper.cn/newsDetail_forward_8720249.
- [20] Food and Agriculture Organization of the United Nations. (2022). *Illegal, unreported and unregulated (IUU) fishing*. Food and Agriculture Organization of the United Nations. <https://www.fao.org/iuu-fishing/international-framework/en/>
- [21] People's Republic of China. (1995). *Statement by the Government of the People's Republic of China on the Implementation of the Provisions of 10 December 1982 < United Nations Convention on the Law of the Sea > Concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. The United Nations.
- [22] Food and Agriculture Organization of the United Nations. (2018). *Agreement To Promote Compliance with International Conservation and Management Measures by Fishing Vessels on 6he*

- High Seas – Parties to the Agreement. Food and Agriculture Organization of the United Nations.* https://www.fao.org/fileadmin/user_upload/legal/docs/012s-e.pdf
- [23] Fishery and Fisheries Administration. (2021). Fisheries and Fisheries Administration Bureau of the Ministry of Agriculture and Rural Affairs , 'Opening of the 34th session of the FAO Committee on Fisheries. Food and Agriculture Organization of the United Nations. https://www.moa.gov.cn/hd/zbft_news/dsjqqscyzdh/xgxw_28872/202109/t20210917_6376633.htm
- [24] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2017.
- [25] Food and Agriculture Organization of the United Nations. (2022). Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels. Food and Agriculture Organization of the United Nations. <https://www.fao.org/global-record/tool/extended-search/en/>
- [26] Tang Haitao, & Chen Gong. (2019). CPTPP environmental rules: Commitment, innovation and enlightenment to the perfection of China's law. *Journal of Chongqing University of Technology: Social Science*, 33(8), 12.
- [27] Ma Yujing. (2021). List of National Key Wildlife Conservation. The State of Council of the People's Republic of China. http://www.gov.cn/xinwen/2021-02/09/content_5586227.htm
- [28] China Green Times, & Editorial Board of The Journal of Forests and Humanity. (2021). A quick glance - 185 species of mammals are included in the list of wild animals under national key protection. *Forests and Humanity*. <https://mp.weixin.qq.com/s/vWjoMEcLDxh0EXo8KC6TA>
- [29] U.S. – Korea Free Trade Agreement, 2012.
- [30] Zhou Yamin. (2015). Environmental provisions in the US enhanced free trade agreements and their implications. *Contemporary International Relation*, 4, 1-7.
- [31] Ding Duo. (2022). Agreement on Fisheries Subsidies injects new vitality into multilateralism and global ocean governance. *National Institute for South China Sea Studies*. http://www.nanhai.org.cn/review_c/636.html
- [32] Agriculture and Rural Affairs Division. (2022). From this year, our province will implement the subsidy policy for the conservation of marine fishery resources. *Fujian Provincial Department of Finance*. http://czt.fujian.gov.cn/zwgk/zwzx/czyw/202205/t20220523_5916300.htm;
- [33] Department of Agriculture and Rural Affairs of Shandong Province. (2022). Shandong Provincial Marine Fishery Resources Conservation Subsidy Implementation Plan. *Shandong Fishery Mutual Insurance*.
- [34] Bian Yongmin. (2013). Fishery subsidies and the conservation of fishery resources: present and future. *International Economic Law*.
- [35] CPTPP research group of WTO Law Research Society of China Law Society, Yang Guohua, Hong Xiaodong, Chen Weidong, Qi Tong, Shi Jingxia, Zhu Jun, Hu Jianguo, He Xiaoyong, & Quan Xiaolian. (2021). What does China need to do after China's entry into WTO. *Wuhan University International Law Review*, 5, 1-26.
- [36] Haifeng Deng, & Jie (Jeanne) Huang. (2018). What should China learn from the CPTPP environmental provisions. *Asian Journal of WTO & International Health Law and Policy*, 13(2), 511-550.
- [37] Yao Zhu. (2018). Characteristic changes and institutional implications of TPP environmental rules. *Journal of Gansu Political Science and Law Institute*, 1, 138-146.