WHAT SHOULD CHINA LEARN FROM THE CPTPP ENVIRONMENTAL PROVISIONS?

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ABSTRACT

The Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (hereinafter "CPTPP") provides a close link between environmental protection and trade, forms a source of international environmental law, improves the implementation mechanisms of Multilateral Environmental Agreements, enhances public participation and information disclosure, and triggers new green trade barriers. China should grapple with the international community's tendency, as demonstrated in the CPTPP, to balance trade liberalization with environmental protection. China should learn from the CPTPP's environmental provisions to improve its domestic law through four aspects: increasing opportunity for meaningful public participation, regulating the procurement and use of wild fauna and flora in Traditional Chinese Medicine (TCM) drugs and pharmacology, enhancing access to and benefit-sharing of biological genetic resources, and improving consistency between China's domestic environmental legislation and international trade legislation. The CPTPP's environmental provisions may also encourage China's foreign trade law and policy to become more environmentally friendly.

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KEYWORDS: *CPTPP, environmental protection, free trade agreement, multilateral environmental agreement, China, One Belt One Road*

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I. INTRODUCTION

The Trans-Pacific Partnership (hereinafter "TPP") is an ambitious, comprehensive, high-standard mega-regional free trade agreement (hereinafter "FTA"), aiming to set the standard for 21st-century trade rules.[1] The TPP began as the Trans-Pacific Partnership Strategic Economic Agreement signed by Brunei, Chile, New Zealand and Singapore (hereinafter "P4"). In 2008, the United States (hereinafter "U.S.") joined and gradually predominated over the negotiation.[2] P4 expanded rapidly,[3] and over the course of seven years, twelve countries from the Asia-Pacific region finally reached agreement on the text of the TPP in October 2015.[4] Although the U.S. withdrew from the TPP in 2017,[5] the remaining eleven TPP members agreed to replace the TPP with the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (hereinafter "CPTPP").[6] The CPTPP incorporates the original TPP Agreement with the exception of the provisions contained in the List of Suspended Provisions.[7] The TPP's environment chapter is intact and wholly included in the CPTPP. The CPTPP was signed by its eleven member states on March 8, 2018. On March 29, 2018, U.S. President Trump expressed his interest in re-joining the CPTPP provided that it could be rewritten to be more beneficial to the U.S.[8] If the U.S. eventually re-joins the CPTPP, its international impact will be significantly enlarged.

The CPTPP's environment chapter (Chapter 20) includes a total of twenty-three articles and two annexes obliging CPTPP member states to take measures to maintain ecological balance and biological diversity, control

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[1] Andrew D. Mitchell et al., *Public Health and the Trans-Pacific Partnership Agreement*, 5 ASIAN J. INT'L L. 279, 280 (2015).

[2] *See generally* Yuan Wang & Huiyu Zhao, *TPP and Environmental Protection*, 8 CITIZ. LAW LEG. ED. 12, 12-14, 26 (2014).

[3] *See generally* The "Domestic and Foreign Economic Dynamics" Project supported by the Institute of Economics, Chinese Academy of Social Sciences. *Prospects of and Obstacles to the TPP Development*, 1115 PURSUIT ECON. TRENDS 96, 96 (2010).

[4] The twelve countries are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S. and Viet Nam.

[5] Donald J. Trump, *Presidential Memoranda: Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITEHOUSE.GOV (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidentiall-memorandum-regarding-withdrawal-united-states-trans-pacific.

[6] The eleven countries in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP] are: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam.

[7] For the List of Suspended Provisions, see TPP 11: UNPACKING THE SUSPENDED PROVISIONS, http://www.asiantradecentre.org/talkingtrade//tpp11-unpacking-the-suspended-provisions (last visited Aug. 16, 2018).

[8] Keith Johnson, *The U.S. Wants Back in the TPP? Good Luck with That*, FOREIGN POLICY (Mar. 29, 2018, 4:41 PM), http://foreignpolicy.com/2018/03/29/united-states-wants-back-in-tpp-good-luck-with-that-trans-pacific-partnership-asia/.

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pollution of the marine environment from ships and protect the ozone layer, amongst other aspects. In addition to the independent environment chapter, CPTPP's Chapter 7 (Sanitary and Phytosanitary Measures), Chapter 8 (Technical Barriers to Trade), Chapter 9 (Investment), Chapter 11 (Financial Services) and Chapter 15 (Government Procurement) also refer to trade-related environmental issues, with keywords related to environmental protection and sustainable development appearing more than 140 times. The CPTPP's environment provisions[9] are not limited to broad objectives and general commitments, but also include many detailed provisions regarding particular areas of environmental protection. The CPTPP specifies its parties' obligations and defines the penalties and remedies for breach of obligations. Moreover, it not only contains substantive provisions, but also includes procedural provisions such as provisions relating to public participation, environmental consultation and dispute settlement.

The achievements and deficiencies of the CPTPP's environmental provisions have been widely debated. The CPTPP has been criticized as "weak and unlikely to address the problems of illegal wildlife trade, overfishing, and other environmental concerns described."[10] Opponents also argue that its provisions are actually protectionist measures in disguise.[11] In contrast, supporters claim that compared with other FTAs in the Asia Pacific, the CPTPP's environment provisions are of a relatively higher standard.[12] The CPTPP is environmentally-friendly because it enforces its environmental obligations with the "teeth" of trade sanctions,[13] and requires parties to commit to a high standard of public participation.[14] Compared with traditional FTAs that are devoted to promoting economic growth among

[9] In this paper, "CPTPP environmental provisions" not only include Chapter 20 (Environment) but also trade-related environmental provisions in Chapter 7 (Sanitary and Phytosanitary Measures), Chapter 8 (Technical Barriers to Trade), Chapter 9 (Investment), Chapter 11 (Financial Services) and Chapter 15 (Government Procurement) and accompanying Related Instruments (International Property Related).

[10] Chris Wold, *Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership*, LEWIS & CLARK LAW SCHOOL 2 (Jan. 4, 2016), https://law.lclark.edu/live/files/20857-assessing-the-tpp-environmental-chapter.

[11] *See, e.g.*, *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement*, CTR. FOR INT'L ENVTL. L. 1 (Nov. 2015), http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf; Matthew Rimmer, *The Trans-Pacific Partnership: Intellectual Property, Public Health, and Access to Essential Medicines*, 29 INTELL. PROP. J. 277 (2017).

[12] For positive assessment of CPTPP, see, e.g., Howard F. Chang, *The Environment Chapter of the Trans-Pacific Partnership: An Environmental Agreement Within a Trade Agreement*, 47(5) TRENDS (2016), https://www.americanbar.org/publications/trends/2015-2016/may-june-2016/the_environment_chapter_of_the_trans-pacific_partnership.html.

[13] *Id.* Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, *How Will TPP and TTIP Change the WTO System?*, 18 J. INT'L ECON. L. 679, 684-85 (2015).

[14] *See infra* Table 1, at Section II.A.; *see also Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/agreements/tpp/ (last visited Jan. 13, 2018).

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members through trade liberalization,[15] the CPTPP pays more attention to environmental protection and may better support sustainable development while promoting mega-regional trade liberalization.[16]

This paper tries to add to this debate from a new aspect: why and what should China learn from the CPTPP's environmental provisions to improve its environmental policies and law? China should take notice of the international community's tendency, as demonstrated in the CPTPP, to balance trade liberalization and environment protection. Since the Chinese economic reform and opening up of the 1970s and 80s, Chinese trade law and policy have been disengaged from environmental protection in order to maintain the comparative advantages of low-cost production.[17] Although China has achieved tremendous economic success, it has been at the cost of significant exploitation and degradation of the natural environment.[18] China has the largest population of any state in the world and environmental sustainability is vital to its long-term development. It is in China's own interests to draw insight from the high-standard CPTPP environmental provisions in order to improve environmental protection in its domestic law and foreign trade law. Chinese law and policy should be more environmentally sensitive and promote sustainable development by adopting measures acceptable to China and its trading partners.

In this paper, "spillovers" refer to the insights that China may draw from the CPTPP's environmental provisions.[19] It provides a three-dimensional analysis. First, in the context of China's domestic law, environmental pollution has attracted widespread public attention in recent years.[20] What should China learn from the high-standard environmental provisions of the CPTPP to improve its domestic environmental law? Second, in the domain of FTAs, China currently links trade with environmental protection only in

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[15] Natalie Sears, *Trans-Pacific Partnership—Is It Really "NAFTA on Steroids"*, 21 LAW & BUS. REV. AM. 107, 111-14 (2015).

[16] *See Get the Facts on TPP: What Will TPP Mean for the Environment*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/TPP/#text (last visited Jan. 13, 2018). The U.S. has signed regional free trade agreements with twenty countries including Australia, Canada and Chile, but the United States Trade Representative (USTR) has made a public statement that "TPP includes the most comprehensive environmental commitments we have ever negotiated in a trade agreement . . . ."

[17] Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17(2) CHI. J. INT'L L. 370, 401 (2016).

[18] *See, e.g.*, Marc Lallanilla, *China's Top 6 environmental Concerns*, LIVE SCI. (Mar. 15, 2013, 11:39 AM), https://www.livescience.com/27862-china-environmental-problems.html.

[19] "Spillovers" does not mean the CPTPP will extend beyond the geographical boundaries of its member states—or "spill over" into China, not a member of the CPTPP.

[20] *E.g.*, Eleanor Albert & Beina Xu, *China's Environmental Crisis*, COUNCIL ON FOREIGN REL. (Jan. 18, 2016), https://www.cfr.org/backgrounder/chinas-environmental-crisis; *China and the Environment*, N.Y. TIMES, https://www.nytimes.com/topic/subject/china-and-the-environment (last visited Feb. 22, 2018).

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the China–South Korea FTA[21] and the China–Georgia FTA.[22] What insight may China draw from the CPTPP to enhance its future FTAs in terms of environmental protection? Third, in the non-treaty sphere, China is actively promoting the "One Belt One Road" (hereinafter "OBOR") initiative, a Chinese economic and strategic agenda which involves a significant number of infrastructure projects.[23] Environmental protection is a common concern for the hosting countries of the infrastructure projects.[24] What should China's environmental policies be in the context of OBOR?

Excluding this Introduction, this paper contains four Sections. Section II analyzes the CPTPP's environmental provisions. It argues that the CPTPP establishes a close connection between environmental protection and trade, forms a source of international environmental law, improves the implementation mechanism of Multilateral Environmental Agreements (hereinafter "MEAs"), increases public participation and triggers new green trade barriers. Section III argues that the CPTPP environmental provisions may spill into Chinese domestic law through four aspects: enhancing public participation, regulating the procurement and use of wild fauna and flora in Traditional Chinese Medicine drugs and pharmacology, increasing access to and providing for benefit-sharing of biological genetic resources, and improving consistency between domestic environmental legislation and international trade legislation. Section IV identifies how the CPTPP's environmental provisions may encourage China's foreign trade law and policy to become more environmentally friendly. This Section outlines the current gaps between China's environmental obligations under existing FTAs and the CPTPP's environmental provisions. Based on China's national conditions, it proposes strategies for China to fill in the gaps. Section V concludes this paper.

II. ANALYSIS OF THE CPTPP'S ENVIRONMENTAL PROVISIONS

From a macro perspective, Chapter 20 of the CPTPP covers five major areas of environmental protection: the protection of the ozone layer (Article 20.5), the protection of the marine environment from maritime pollution (Article 20.6), the protection of biodiversity (Articles 20.13, 20.14 and

[21] The China–South Korea Free Trade Agreement [hereinafter FTA] came into effect on December 20, 2015, see *China–Korea FTA*, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/topic/encorea.shtml (last visited Feb. 22, 2018).

[22] The China–Georgia FTA came into effect on January 1, 2018. *See China–Georgia FTA*, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/topic/engeorgia.shtml (last visited Feb. 22, 2018).

[23] *See 2017 "Yi Dai Yi Lu" Da Jishi [Milestones of "One Belt and One Road"]*, YIDAIYILU.GOV.CN (Jan. 16, 2018), https://www.yidaiyilu.gov.cn/xwzx/gnxw/44334.htm.

[24] *See, e.g.*, Dan Southerland, *China's Global Infrastructure Initiative Raises Environmental Concerns*, RADIO FREE ASIA (Sept. 29, 2017), https://www.rfa.org/english/commentaries/china-obor-09292017160823.html.

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20.17), transition to a low emissions economy (Article 20.15) and marine capture fisheries (Article 20.16).[25] The CPTPP expressly refers to three MEAs: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES"), the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter "Montreal Protocol"), and the International Convention for the Prevention of Pollution from Ships (hereinafter "MARPOL 73/78").[26] As a general commitment, Article 20.4 clearly confirms the existing obligations of the CPTPP members under the MEAs. In addition to the general commitment, the CPTPP also contains special provisions for the application of related international environmental conventions in specific areas of environmental protection.[27]

The legal features of the CPTPP's environmental provisions can be summarized from five perspectives.

A. Establishes a Close Connection Between Environmental Protection and Trade

The CPTPP reaffirms for member states the existing obligations under the three MEAs.[28] Although the CPTPP has been criticized as "add[ing]

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[25] For comments, see generally Amanda Rologas Tsangalis, *Fisheries Subsidies Under the Trans-Pacific Partnership: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction Under International Law*, 17 MELB. J. INT'L L. 445 (2016).

[26] The Bipartisan Agreement on Trade Policy published in 2007 by the U.S. Congress and Office of the United States Trade Representative Identified seven multilateral environmental agreements [hereinafter MEAs] for inclusion in FTAs. But only three of them are included in the TPP. This is possibly because the three are the only MEAs that all TPP parties have ratified. INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., ENVIRONMENT IN THE TRANS-PACIFIC PARTNERSHIP: A LEGAL ANALYSIS 4 (2016).

[27] The related international environmental conventions are: the protection of the ozone layer (the 1987 Montreal Protocol and its amendments, if any), the protection of the marine environment from ship pollution (the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973 and its amendments, if any), the marine capture fisheries (the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the United Nations Convention on the Law of the Sea, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the Agreement on Subsidies and Countervailing Measures, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the Code of Conduct for Responsible Fisheries Related Agreements) and the protection of biodiversity (the Convention on International Trade in Endangered Species of Wild Fauna and Flora). *See* COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP), http://investmentpolicyhub.unctad. org/IIA/treaty/3808 (last visited July 31, 2018).

[28] *See generally TPP Environmental Provisions a Major Disappointment*, GREENPEACE (Nov. 6, 2015), https://www.greenpeace.org.au/news/tpp-environmental-provisions-a-major-disappointment/. The three MEAs refer to the Montreal Protocol on Substances that Deplete the Ozone Layer [hereinafter Montreal Protocol], the International Convention for the Prevention of Pollution from Ships [hereinafter MARPOL 73/78], and the Convention on International Trade in Endangered Species of Wild Fauna and Flora [hereinafter CITES].

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nothing to the quality or nature of those obligations",[29] the CPTPP has made a laudable effort, in comparison with other FTAs, to assert the relevance of environmental concerns to trade and investment.[30]

In the arena of international law, many basic rules have been laid down in the WTO legal system. However, in the WTO there is no specialized agreement on trade and environmental issues, only provisions indirectly or peripherally related to environmental protection.[31] WTO agreements which refer to the environment can be divided into general agreements and special agreements.[32] The general agreements are Article XX of General Agreement on Tariffs and Trade (hereinafter "GATT") and Article XIV(a), (b), and (c) of the General Agreement on Trade in Services (hereinafter "GATS"). They have been incorporated into the CPTPP in Chapter 29, "Exceptions and General Provisions."[33] However, it remains to be seen how the CPTPP dispute resolution panels will apply WTO case law in relation to these provisions.[34] There are a total of eight special WTO agreements which refer to environmental concerns, namely the Technical Barriers to Trade (hereinafter "TBT"), the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS"), GATS, the Agreement On Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS Agreement"), the Agreement on Subsidies and Countervailing Measures, the Agreement on Government Procurement, the Agreement on Agriculture and the Understanding on Rules and Procedures Governing the Settlement of Disputes. Compared with the CPTPP, the above WTO agreements are designed to solve environment-related *trade* disputes, and they are less systematic and comprehensive in terms of *environmental protection* compared to the MEAs incorporated into the CPTPP.

Compared with other recently concluded FTAs, such as the EU–Canada Comprehensive Economic and Trade Agreement (hereinafter "CETA"),[35] the CPTPP imposes a greater number of compulsory obligations on its member states in the areas of illegal fishing and illegal trade in wild fauna and flora. Article 24.10 of CETA provides that its parties undertake to

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[29] Wold, *supra* note 10, at 3.

[30] Arne Ruckert et al., *Policy Coherence, Health and the Sustainable Development Goals: A Health Impact Assessment of the Trans-Pacific Partnership*, 27(1) CRITICAL PUB. HEALTH 86, 94 (2017).

[31] Chow, *supra* note 17, at 393. Such provision may be divided into three categories by legal nature: environmental provisions in its constitutional document; environmental provisions in multilateral trade agreements; environmental provisions in ministerial decisions and declarations.

[32] *See generally* RENZHEN LI ET AL., WTO YU HUANJING BAOHU [WTO AND ENVIRONMENTAL PROTECTION] 38 (2006).

[33] CPTPP art. 29.1.

[34] Natassia Ciuriak & Dan Ciuriak, *Climate Change and the Trading System: Implications of the Trans-Pacific Partnership*, 30(4) INT'L TRADE J. 345, 350 (2016).

[35] Comprehensive Economic and Trade Agreement [hereinafter CETA] came into force on September 21, 2017. For more information, see *Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/in-focus/ceta/ (last visited May 22, 2018).

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promote the effective use of CITES but only with regard to timber species considered at risk. However, the CPTPP applies to all endangered species of wild fauna and flora under CITES, which is a much broader obligation than that imposed by CETA.[36] Moreover, CETA combats illegal, unreported and unregulated fishing (hereinafter "IUU") by two measures: exchanging information on IUU activities and excluding IUU products from trade flows and fish farming operations.[37] The CPTPP takes combatting IUU a step further by requiring parties to operate a fisheries management system in order to prevent overfishing and overcapacity, reduce bycatch of non-target species and juveniles, and to promote the recovery of overfished stocks. The CPTPP further identifies four marine animals (*i.e.*, sharks, marine turtles, seabirds, and marine mammals) and requires parties to promote their long-term conservation.[38] Accordingly, the CPTPP provision relating to IUU is more sophisticated and comprehensive than its CETA counterpart.

Compared with other FTAs concluded by the U.S., the CPTPP also makes positive contributions to sustainable trade liberalization. For example, the North American Free Trade Agreement (hereinafter "NAFTA") does not contain a chapter for environmental protection, nor does it regulate biodiversity, genetic resources, invasive species, illegal fishing, and illegal trade in wild fauna and flora.[39] Environmental issues are addressed in the North American Agreement on Environmental Cooperation (hereinafter "NAAEC"). However, NAAEC's vague wording in several important provisions, including those relating to the extent of environmental protection required, renders the corresponding commitments vague and ill-defined. For example, NAAEC requires parties to ensure their laws and regulations provide for high levels of environmental protection, but fails to define what "high levels" means.[40] In May 2017, the U.S. Trade Representative informed Congress that President Trump intended to commence renegotiations of NAFTA with Canada and Mexico.[41] Environment and climate change provisions are likely to be included in the renegotiations in order to modernize NAFTA, and many commentators have suggested that the NAFTA member states draw insights from the TPP in this process.[42]

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[36] CPTPP, *supra* note 33, art. 20.17.

[37] Comprehensive Economic and Trade Agreement, art. 24.11.2(b), EU-Can., Oct. 30, 2016 (entered into force Sept. 20, 2017), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[38] CPTPP, *supra* note 33, art. 20.16.

[39] Douglas A. Schuler, *The NAFTA and the Environment: Trade, Diplomacy, and Limited Protection*, 10(3) INT'L TRADE J. 353, 354 (1996).

[40] North American Agreement on Environmental Cooperation art. 3, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1482 (entered into force Jan. 1, 1994) [hereinafter NAAEC].

[41] North America Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 [hereinafter NAFTA].

[42] Nathalie Bernasconi et al., *Response to the United States Trade Representative's Stated Objectives on NAFTA Negotiations: An Environmental Perspective*, INT'L INST. FOR SUSTAINABLE DEV. 6-7 (Aug. 2017), https://www.iisd.org/sites/default/files/publications/iisd-response-ustr-objectives-nafa-

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Another example is the CPTPP's treatment of MARPOL 73/78. Besides the CPTPP, this MEA has been incorporated into the U.S.–Peru FTA, the U.S.–Columbia FTA, the U.S.–Panama FTA and the U.S.–South Korea FTA.[43] However, compared with these FTAs, the CPTPP requires member states not only to take measures to enforce MARPOL 73/78 but also to make these measures publicly available.[44] Public participation may help enhance compliance with MARPOL 73/78. The following table compares the environmental issues covered by CPTPP and other major FTAs. It shows that the CPTPP has the most comprehensive approach to environmental protection and sustainable liberalization of trade.

negotiations.pdf (indicating that "[t]he TPP language around fisheries provides a useful template for NAFTA, especially its references to regional management agreements and the importance of best-available evidence to monitor fish stocks" and "referencing the MARPOL Agreement in NAFTA, as it is in the TPP, as a means to accelerate progress in reducing air and water pollution from marine ships"); *see* Linda Duncan & Geoff Garver, *NAFTA and the Environment: Time to Come Clean*, CANADA'S NAT'L OBSERVER (Sept. 28, 2017), https://www.nationalobserver.com/2017/09/28/opinion/nafta-and-environment-time-come-clean.

[43] For U.S. FTAs, see *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/ (last visited May 17, 2018).

[44] Article 20.6.2 of the CPTPP requires that "[e]ach party shall make publicly available appropriate information about its programmes and activities, including cooperative programmes, that are related to the prevention of pollution of the marine environment from ships."; U.S.–Korea Free Trade Agreement art. 20.2, annex 20-A.

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TABLE 1: Comparison of Environmental Protection Areas Covered by Major FTAs

Comparison of Environmental Protection Areas Covered by Major FTAs	GATT	APEC	NA FTA	KOR US FTA	CETA	RCEP	CP TPP
Protection of Biodiversity	√	√	X	√	X	X	√
Genetic Resources	X	X	X	X	X	X	√
Invasive Species	√	X	X	X	X	X	√
Illegal Fishing	X	X	X	√	√	X	√
Illegal Trade in Wild Fauna and Flora	X	X	X	√	√	X	√
Technical Barriers to Trade and Environmental Protection	X	X	√	√	√	√	√
Environmental Barriers to Investment	X	X	X	√	√	X	√
Environmental Requirements on Financial Services	X	X	X	√	X	X	√
Environmental Requirements on Government Procurement	X	√	X	√	√	X	√
Environmental requirements on patenting	X	X	√	X	√	X	√
Requirements for Employment in the Environmental Industry	X	X	X	X	X	X	√

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NOTES:
1. APEC is the abbreviation of the Asia-Pacific Economic Cooperation; KORUS FTA is the abbreviation of the U.S.–Korea Free Trade Agreement; and RCEP is the abbreviation of the Regional Comprehensive Economic Partnership.
2. The FTAs (other than the CPTPP) as shown in the first line in the table above are arranged in chronological order according to the dates of signing.
3. In the table above, "√" represents the existence of related provisions in the agreement text, while "X" represents the non-existence of related provisions in the agreement text.

We can see from the above Table that the CPTPP provisions regulating cooperation on job creation in environmental industries and the acquisition and benefit-sharing of genetic resources are the first of their kind to appear in an FTA. The CPTPP also refines and expands the applicability of environmental provisions in previous FTAs that prohibit illegal fishing and exempt trade restrictions imposed in the name of environmental protection from amounting to a technical barrier to trade.

The CPTPP has also enhanced environmental protection standards and relevant implementation procedures to an unprecedented extent. Article 8.7 (Transparency) in CPTPP Chapter 8 (Technical Barriers to Trade) provides that "if urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Party, that Party may notify a new technical regulation or conformity assessment procedure that is in accordance with the technical content of relevant international standards, guides or recommendations, if any, upon the adoption of that regulation or procedure, according to the procedures established under Article 2.10 or 5.7 of the TBT Agreement." By integrating the CPTPP's environmental provisions with the TBT's procedural mechanisms, the CPTPP's environmental protection standards and implementation procedures have significantly more force.

Moreover, in accordance with the principle of national sovereignty, international conventions cannot mandate that any sovereign state join or withdraw from the convention. Any non-member may also join the convention at any time before or after the convention enters into force.[45] However, the CPTPP challenges sovereignty-based autonomy in treaty-making for both founding and potential future member states through its inclusion of a package of obligations enforcing the three MEAs.[46]

[45] *See* Hong Guo, *The Laws in an Age of Globalization Should Adhere to the Principle of National Sovereignty*, 50 CHINA MARK 190, 190-91 (2005).
[46] *See generally* Ching-Wen Hsueh, *A Greener Trade Agreement: Approaches to Environmental Issues in the TPP Negotiations*, 8(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 521 (2013). The

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For the *founding CPTPP members*, the CPTPP re-affirms their obligations under the existing MEAs.[47] These members are under pressure to fully comply with the existing obligations under the MEAs, particularly given the "teeth" of the CPTTP dispute resolution mechanism.[48]

With respect to *prospective CPTPP members*, ratifying the three MEAs effectively forms a precondition to joining the CPTPP. This means that those countries which are not party to the MEAs have been deprived by the CPTPP of their sovereign right to independently exercise their discretion as to whether or not to join the MEAs. The implications of this are two-fold. First, the obligations under the MEAs can therefore be popularized by the CPTPP as more countries join the CPTPP. Second, the environmental concerns of the prominent developed countries in the CPTPP negotiations are further safeguarded because the MEAs reflect their environmental concerns. Developing countries that were originally hesitant to ratify the MEAs are now encouraged to become parties to them in order to access the trade benefits of the CPTPP.

B. A Source of International Environmental Law

International environmental law aims to resolve disputes arising between countries and other subjects of international law relating to the conservation and sustainable use of environmental resources. [49] The "sources" of international environmental law have mainly emerged in two different ways, namely through the recognition of international custom or through the signing of international agreements.[50] Whether or not the title of an agreement contains direct reference to the "environment" does not determine whether the agreement is a source of international environmental law. Instead, the relevant issue is whether provisions in the agreement can be applied to environmental issues. In this sense, an FTA can constitute a source of international environmental law if the FTA text contains any provisions that adjust or affect international environmental relations. The evolution of international environmental law has unsurprisingly demonstrated that an FTA, like the CPTPP, can become a relevant source.

The CPTPP can be considered a new source of international environmental law in two respects: first in its expansion of the substantive obligations under the MEAs specifically referred to in the CPTPP's

three MEAs refer to the Montreal Protocol, MARPOL 73/78 and CITES.

47 *See* CPTPP, *supra* note 33, arts. 20.2.1, 20.6, 20.6.1 n.6, 20.17.2.

48 Ciuriak & Ciuriak, *supra* note 34, at 349.

49 XIANGCONG MA, GUOJI HUANJING FA DAOLUN [INTERNATIONAL ENVIRONMENTAL LAW] 1 (1994).

50 *See generally* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 254-55 (1989).

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environmental protection provisions, and second by broadening the interpretation of the literal meaning of individual words in the MEAs.

An example of the CPTPP's expansion of the substantive obligations imposed by the MEAs is its treatment of the cross-border transfer of wild fauna and flora resources and biological genetic resources. The CPTPP clearly provides that host nations shall adopt border control measures against the illegal gathering or hunting of wild fauna, with the fifth paragraph of CPTPP Article 20.17 specifying that "each Party shall endeavour to take measures to combat the trade of wild fauna and flora transhipped through its territory that, based on credible evidence, were illegally taken or traded." The effect of this provision is that CPTPP members can restrict or prohibit the trade of natural resources with other states, whether or not those states are party to the CPTPP, if such measures are necessary to protect those resources. In contrast, CITES only points out that the cross-border transfer of some species can be regulated. Therefore, in this regard, the CPTPP significantly expands the substantive reach of the relevant provisions of CITES. CPTPP parties assume an additional obligation not to violate regulations of other countries regarding the protection of wild fauna and flora, rendering those provisions a new applicable source of international environmental law. The following table illustrates how the CPTPP goes beyond the obligations contained in the MEAs and therefore creates new obligations, reshaping international relations on environmental issues.

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TABLE 2: CPTPP's Requirements Beyond the MEAs

Protection of the Ozone Layer	Protection of the Marine Environment from Ship Pollution	Protection of Biodiversity	Intellectual Property
Requiring public participation and information disclosure, expanding the requirement for public awareness under Article 9 of the Montreal Protocol	Requiring public participation and information disclosure and strengthening cooperation in special geographical regions except as provided for in the MARPOL 73/78	Requiring public participation and consultation and relevant information disclosure during the enactment and implementation of laws and policies on protection of biodiversity except as provided for in CITES	The patentable subject matter under Article 18.37 in CPTPP Chapter 18 as provided for in the third paragraph of Article 27 of the TRIPS Agreement

An example of how the CPTPP broadens the interpretation of words contained in the MEAs can be found in the provisions combating the illegal taking of, and illegal trade in, wild fauna and flora resources. The first paragraph of Article 20.17 of the CPTPP environment chapter uses footnotes to expand the interpretation of the literal meaning of "take" so that "[t]he term 'take' means captured, killed or collected and with respect to a plant, also means harvested, cut, logged or removed."[51] The CPTPP therefore amounts to a new source of international environmental law through the explicit expansion of the meaning of words contained in the MEAs. With regard to the provisions directed at preventing overfishing in marine fisheries, the fifth paragraph of Article 20.16 of the CPTPP also relies on footnotes to expand the interpretation of the meaning of "fishing" so that "'fishing' means searching for, attracting, locating, catching, taking or

[51] CPTPP, *supra* note 33, art. 20.17.1.

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harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish."[52]

C. Enhancing the Implementation Mechanisms of MEAs

Obligations and compliance mechanisms imposed under traditional international law generally apply to the national or the central administrative level of government only.[53] Conventions or other international legal instruments do not usually impose mandatory requirements or apply the implementation arrangements to the actions of the local administrative levels of government of its signatories. The CPTPP has implicitly challenged this general practice through its inclusion of expansive provisions imposing obligations on sub-central levels of government. For example, Article 20.12.9, the Cooperative Framework, provides that a party may request a dialogue with another party if it believes the sub-central levels of government of another party are not enforcing environmental laws, such that the trade and investments of the requesting party are affected in a sustained or recurring way. Although the clause does not specify how the addressed party should respond or what measures this party should take, it demonstrates that the cooperative mechanism of the CPTPP's environment chapter, at least, will hold a member state accountable for the actions or inaction of sub-central levels of government.[54] Moreover, the expansion by the CPTPP of the applicability of enforcement mechanisms is also embodied in the obligations imposed by the CPTPP on its member states to combat illegal taking of, and trade in, wild fauna and flora. An illuminating example is the mandatory requirement contained in the fifth paragraph of Article 20.17, which requires that "each Party shall take measures to combat the trade of wild fauna and flora trans-shipped *through its territory*" (emphasis added), implicitly covering the jurisdictions of sub-central levels of government.

In addition to its inclusion of and applicability to sub-central levels of government, the CPTPP also contains expansive provisions relating to non-governmental entities. For example, the fourth paragraph of Article 20.17 requires that "[e]ach party further commit to . . . endeavor to develop and strengthen cooperation and consultation with interested non-governmental entities in order to enhance implementation of measures to combat the illegal

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[52] *Id*. art. 20.16.5.

[53] The international environmental treaty compliance mechanism refers to a new kind of implementation guarantee procedures and mechanisms that strengthen the ability of the Parties to implement a treaty through cooperation between the Parties and between the Parties and the treaty body under the framework of international environmental treaties, so as to promote compliance with the treaty, and deal with non-compliance to avoid disputes. *See generally* TINGTING LIU, RESEARCH ON THE COMPLIANCE MECHANISMS UNDER INTERNATIONAL ENVIRONMENTAL TREATIES 3 (2012).

[54] Ciuriak & Ciuriak, *supra* note 34, at 349.

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take of, and illegal trade in, wild fauna and flora." The CPTPP therefore expands the scope of the existing obligations under CITES, which in contrast do not apply to non-governmental entities in a member state.

Furthermore, international environmental law is found across a plethora of different and varied legal instruments, with its contents largely taking the form of general principles. Accordingly, the methods by which international environmental law is enforced are necessarily different from those found in domestic legal systems.[55] For example, international environmental law widely relies on "softer" measures, such as persuasion through the reliance on the pressure of public opinion or the preservation of a positive international reputation, and the provision of technical assistance and financial support, to guarantee its implementation, rather than the threat of retaliation. In stark contrast, the CPTPP enables member states to use trade retaliation to enforce obligations under the three MEAs. The circumstances in which a party may invoke the CPTPP's dispute resolution mechanism for violation of MEAs varies among the MEAs. Although members are encouraged to address any related disputes through the mechanisms in CITES, a member state's failure to adopt, maintain and implement its laws and regulations incorporating its obligations under CITES enables other CPTPP members to utilize the CPTPP's dispute resolution mechanism in bringing a claim.[56] For MARPOL 73/78 and the Montreal Protocol, a member state's failure to maintain laws and regulations implementing obligations under those two conventions does not similarly allow other CPTPP members to bring a claim utilizing the CPTPP's dispute resolution mechanism. The claimant must, in addition, prove that the failure to comply affected trade or investment between the parties.[57] If the dispute cannot be resolved through the three-step consultation mechanism in Chapter 20,[58] parties can request the establishment of a panel under Chapter 28.[59] In circumstances where a losing party refuses to enforce a panel's final report within a reasonable period of time, the CPTPP allows the complainant party to retaliate by suspending benefits of equivalent effect.[60] Therefore, the CPTPP enhances the enforcement mechanisms available in instances of non-compliance with obligations under the MEAs.

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[55] Canling Lin, *Guoji Huanjing Fa Shishi Jizhi Tanxi [An Analysis of the Implementation Mechanism for International Environmental Law]*, 2011(2) J. COMP. L. 93, 93-100.
[56] CPTPP, *supra* note 33, arts. 20.17.2 & nn.23-24.
[57] *Id.* arts. 20.5.1 n.5 & 20.6 n.8.
[58] *Id.* arts. 20.20-23. The three steps refer to environment consultations, senior representative consultations, and ministerial consultations.
[59] *Id.* art. 28.7.
[60] *Id*. arts. 28.20.1-2.

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D. Increasing Public Participation and Information Disclosure

Compared with the MEAs, the CPTPP's environmental provisions adopt strengthened public participation and information disclosure clauses, providing for a greater role for public opinion in international environmental protection and in shaping the reputation of CPTPP member state governments on environmental issues.[61] In the CPTPP's environment chapter, there are three specific provisions relating to the disclosure of environmental information and the role of public participation: namely, Article 20.7 (Procedural Matters), Article 20.8 (Opportunities for Public Participation) and Article 20.9 (Public Submissions). The third paragraph of Article 20.9 in the CPTPP requires that each party notify the other parties of the entity or entities responsible for receiving and responding to any written submissions received from the public within 180 days of the date the CPTPP enters into force. Public participation is also a very important element in the panel system. For example, the CPTPP requires that any hearing before the panel be open to the public except where parties agree otherwise.[62] While confidential information remains protected, each party to the dispute must make its best effort to release documents filed with the panel to the public, including its written submissions, a written version of any oral statement and any written response to a request or question from the panel.[63] The documents shall be released as soon as possible after they are filed or by the time the final report of the panel is issued.[64] The parties to the dispute may take steps to protect confidential information but must still release the final report to the public no later than fifteen days after it is issued.[65]

Moreover, there are references to information disclosure and public participation in each of the provisions governing specific areas of environmental protection in the CPTPP's environment chapter, including the provisions relating to the protection of the ozone layer protection, the protection of the marine environment from maritime pollution and the protection of biodiversity. Even the procedural provision establishing the environmental committee refers to the importance of information disclosure and public participation, highlighting the central importance of these two principles to the CPTPP.

In addition, the CPTPP also allows non-governmental entities to participate in the dispute resolution process. It requires that the panel consider requests from non-governmental entities located in the territory of

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[61] Andrew Jensen Kerr, *The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm*, 27 DUKE ENVTL. L. & POL'Y F. 155, 158 (2016).
[62] CPTPP, *supra* note 33, art. 28.13.
[63] *Id.*
[64] *Id.*
[65] *Id.* art. 28.18.1.

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a party to the dispute to provide written views regarding the dispute that may assist the panel in reaching a decision.[66]

E. Triggering New Green Trade Barriers

The traditional green trade barriers[67] affect the structure, cost and growth rate of commodity exportation.[68] Businesses in the developing world, with its attendant lower standards regarding environmental protection, commonly circumvent traditional green trade barriers by directly investing and manufacturing commodities in developed countries with higher environmental standards.[69]

In addition to the traditional green trade barriers, the CPTPP provides for three new types of green barriers. The first type is the "green investment barriers" stipulated in Article 9.16, which specifies that measures taken with respect to investment activities for the purpose of environmental protection do not constitute a disguised restriction on trade and affirms that each party has the power to conduct environmental supervision over investment activities in its territory. The second type of new green trade barrier can be found in the "green investment expropriation in the name of environmental protection." Annex 9-B of the CPTPP titled "Expropriation" provides that the non-discriminatory regulatory actions taken by a party to protect the environment do not constitute indirect expropriation but "reasonable" expropriation actions, even where such actions have the same consequences as direct expropriation.[70] The third type is the "green technical specifications for government procurement." Article 15.12.6 indicates that a party can develop technical specifications for government procurement aimed at protecting its natural resources and the environment.

The first two types of new green barriers are directed at preventing circumvention of traditional green barriers through direct investment in member states. Both the old and new green trade barriers serve to raise the threshold standard of environmental protection required of developing countries to access outward direct investment and overseas production.

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[66] *Id.* art. 28.13.

[67] In the theories and practices on international trade, the traditional green trade barriers mainly take seven forms, namely, green technical standards, green environment marks (green labels), green health quarantine system, green packing system, green tariffs and market access, green subsidy and anti-subsidy and green trade sanctions. Qiang Du, *Quanqiu Luse Maoyi Bilei yu Woguo Duiwai Maoyi Fazhan Duice [The Global Green Trade Barriers and China's Countermeasures in Foreign Trade Development]*, 2003(2) ASIA-PAC. ECON. REV. 44, 44-47.

[68] Joshua P. Meltzer, *The Trans-Pacific Partnership Agreement, the Environment and Climate Change*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 207 (Tania Voon ed., 2014), at 1-2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326723.

[69] *See generally* Du, *supra* note 67.

[70] CPTPP, *supra* note 33, Annex 9-B, art. 3.

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Consequently, developing countries without sophisticated environmental protection regulations and without appropriate trade protection are disadvantaged in international trade by green trade barriers.[71] Well negotiated, multilaterally accepted and restrictively implemented green barriers are a net positive because they account for and acknowledge that trade liberalization should not be achieved at the expense of environmental degradation and destruction. However, unreasonably high and broad green trade barriers unilaterally imposed by a state are essentially protectionist measures in disguise and pose significant risks to the operation of any free trade system.

III. CPTPP SPILLOVERS INTO CHINESE DOMESTIC LAW

In China, environmental degradation has become an issue which can be ignored no longer.[72] The Report of the 19th Chinese Communist Party National Congress emphasized that "building an ecological civilization is fundamental to the sustainable development of the Chinese nation." Chinese political leaders and the general Chinese public have widely acknowledged and accepted that economic development cannot be at the expense of irreversible and widespread environmental damage. China may draw useful insights from the environmental provisions in the CPTPP to improve Chinese domestic law and China's corresponding environmental protection regulatory system.

A. Enhancing Public Participation

The great importance attached to public participation and information disclosure in the CPTPP has been outlined above. Public participation and public disclosure of information can improve the transparency, fairness and impartiality of decision-making and the process of resolving trade-related environmental disputes. The principles of disclosure of information relevant to environmental protection and public participation are repeatedly highlighted throughout the text of the CPTPP. References are included throughout the entire environmental chapter, from the general provisions to the special provisions, and in the provisions relating to the setting of principles to those implementing the rules. In contrast, provisions allowing for public participation and requiring public disclosure of information remain largely absent from Chinese environmental law.[73]

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[71] *See generally* Xiangshuo Yin et al., *Guoji Maoyi Mocha de Leixing, Yuanyin, Xiaoying ji Huajie Tujing [The Types, Causes, Effects and Solutions of International Trade Friction]*, 7 J. WORLD ECON. 74 (2007).

[72] JUDITH SHAPIRO, CHINA'S ENVIRONMENTAL CHALLENGES 1 (2d ed., 2016).

[73] *See generally* Manjiao Chi, *The "Greenization" of Chinese BITs: An Empirical Study of the*

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The obligation the CPTTP imposes on member states to freely disclose information and enable public participation reflects the substantial developments in the theory and practice of the citizen's environmental rights. The citizen's right to participate in environmental decision-making was enacted into law in the U.S. by the U.S. National Environmental Policy Act in 1969.[74] Since then, the importance of public participation has been endorsed by international legal instruments including the Nairobi Declaration (1982)[75] and the Rio Declaration on Environment and Development (1992).[76] China acknowledged the value of and adopted procedures enabling public participation relatively late compared to Western counterparts. Following careful observation of public participation in practice in other states, China's environmental legislation underwent a gradual transformation culminating in the provision of some meaningful opportunities for public participation in environmental governance. This process has been driven both by internal imperatives and external pressure from the international community. On June 25, 1998, in Aarhus, Denmark, the Ministers of the Environment of each member of the EU unanimously adopted the Convention on Access to Information, Public Participation in Decision-making and Access to Justice on Environmental Matters (hereinafter "Aarhus Convention"). The Aarhus Convention embodied a series of inspirational ideas and new mechanisms of public participation which had emerged by the end of the last century, including democratic principles in environment management, public participation and the role of civil society in environmental decision-making. The adoption of the Aarhus Convention drew Chinese lawmakers' attention to the principles behind and system of public participation.

Consequently, in 2002, China enacted the Environmental Impact Assessment Law. This law contains a clause providing for public participation, which was then unprecedented in the Chinese legal system.[77] The Administrative Permission Law enacted on August 27, 2003 established a system of public hearings to be held when granting administrative licenses

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Environmental Provisions in Chinese BITs and its Implications for China's Future BIT-Making, 18 J. INT'L. ECON. L. 511 (2015).

[74] The National Environmental Policy Act of 1969 §102, 42 U.S.C. § 4332 (2012) provides that "[p]rior to making any detailed statement . . . . Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to . . . the public . . . ."

[75] NAIROBI DECLARATION, ¶ 9, U.N. Doc., http://www.un-documents.net/nair-dec.htm (last visited May 22, 2018).

[76] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992).

[77] *See* Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa [Law of the People's Republic of China on Evaluation of Environmental Effects] (promulgated by Order No. 77 of the President of the People's Republic of China, Oct. 28, 2002, effective Sept. 1, 2003), art. 5, http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382122.htm.

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for projects which would have significant public impact.[78] This provided both substantive and procedural legal grounds for a system of public participation in China. On February 22, 2006, the State Environmental Protection Administration of China,[79] in accordance with the authorization granted by the Environmental Impact Assessment Law, made the Interim Measures for Public Participation in Environmental Impact Assessment, which further strengthened the legitimacy of the public participation system. At present, the legal basis for the public participation system can be found in the Environmental Protection Law. Article 5 of the Environmental Protection Law as amended in 2014 clearly identifies public participation as a fundamental principle of environmental governance in China. Articles 53-58 establishes the logical framework of the public participation system as implemented.[80]

However, significant gaps remain between the public participation requirements contained in the CPTPP and China's legislation and policies in practice. For example, to ensure the implementation of the public participation system, China has established an environmental, public-interest based civil litigation system by modifying the Civil Procedure Law, the Environmental Protection Law, and the Administrative Procedure Law.[81] However, the current laws only grant state agencies and organizations identified as having legal standing to initiate public interest lawsuits. Citizens are prohibited from initiating lawsuits, and therefore lack access to a critically important avenue to actively participate in environmental governance and obtain redress for losses suffered. By comparison, not only do the CPTPP provisions not restrict public participation in this crucial

[78] *See* Zhonghua Renmin Gongheguo Xingzheng Xuke Fa [Administrative Permission Law of the People's Republic of China] (promulgated by the Order No.7 of the President of the People's Republic of China, Aug. 28, 2003, effective July 1, 2004), art. 46, http://english1.english.gov.cn/laws/2005-09/07/content_29926.htm.

[79] The State Environmental Protection Administration of China was transformed to the Ministry of Environment Protection in the first Session of the 10th National People's Congress in March 2008, and further transformed to the Ministry of Environment and Ecology in the First Session of the 13th National People's Congress in March 2018.

[80] Article 53 stipulates that citizens, legal persons and other organizations have rights to obtain environment information, participate in and oversee environment protection. Articles 54-57 provides obligations and rights to government agencies, enterprises and institutions. Article 58 provides a legal basis for environment public interests litigation. Zhonghua Renmin Gongheguo Huanjing Baohu Fa [Environmental Protection Law of the People's Republic of China] (promulgated by Order No.9 of the President of the People's Republic of China on Apr. 24, 2014, effective Jan. 1, 2015), arts. 53-58, https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf.

[81] *See* Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated by Order No. 44 of the President of the People's Republic of China on Apr. 9, 1991, effective Apr. 9, 1991), art. 55, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm; *id.* art. 58; Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Procedure Law of the People's Republic of China] (promulgated by Order No.16 of the President of the People's Republic of China on Apr. 4, 1989, effective Oct. 1, 1990), art. 25.4, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm.

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dimension, they also provide a detailed framework for the protection of public participation by providing clear conditions, procedure and remedies. These CPTPP provisions can serve as valuable reference points for China in the future enactment of domestic environmental laws, and in drafting provisions for future FTAs.

B. Regulating the Procurement and Use of Wild Fauna and Flora in Traditional Chinese Medicine (hereinafter "TCM") Drugs and Pharmacology

The second paragraph of Article 20.17 of the CPTPP clearly provides that "each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under [CITES]." However, China does not presently comply with the requirements of CITES, particularly in its failure to adequately regulate the procurement and use of wild fauna and flora in TCM drugs and pharmacology.

TCM medications are largely herbal in nature, and include animal and plant products or natural minerals. Accordingly, the TCM industry is highly reliant on wild fauna and flora products.[82] A number of TCM drugs contain animal products sourced from endangered wild fauna which are protected by China as well as the international community. As recorded in the 2000 edition of the Pharmacopoeia of the People's Republic of China, there are sixty-two kinds of TCM medicine which contain animal products. Of those sixty-two medications, 9, or 15%, contain animal products from protected species. CITES also identifies fifteen animal species requiring protection due to being traded for medicinal purposes.[83] Although China established implementation mechanisms at both central and local levels of government after ratifying CITES, the protection of endangered species of wild fauna for medical use in China continues to suffer from a chaotic administrative system. The division of power and responsibility between government agencies administrating the system to protect endangered species of wild fauna for medical use is unclear and has resulted in overlapping powers and unfilled regulatory gaps. Weak enforcement of administrative law renders the costs of violating the law far lower than the costs of compliance with the law. This has had the effect of encouraging smuggling and other illegal trade activities.[84] China's existing protections of wild fauna and flora for medical

[82] Kerr, *supra* note 61, at 177.

[83] *See generally* Dejun Li, *The Current Status and Strategic Thinking of the Endangered Fauna Resources for Medicinal Used in China*, *in* TRADITIONAL CHINESE MEDICINE RESOURCES AND PROTECTION OF ENDANGERED SPECIES OF WILD FAUNA AND FLORA 10-15 (Shanghai University of Traditional Chinese Medicine Press 2004).

[84] *See generally* JUNHUI ZHANG, RESEARCH ON LEGAL PROTECTION OF WILD MEDICINAL MATERIAL RESOURCES IN WESTERN MINORITY AREAS 62-63 (2013).

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use does not yet comply with the requirements under CITES which have subsequently been incorporated into the CPTPP.

C. Access and Benefit-sharing of Biological Genetic Resources (hereinafter "ABS")

Biological genetic resources are of great scientific and commercial value.[85] They are foundational to the development of modern biological industries, and are therefore important strategic resources in economic and social development.[86] Research institutes and commercial enterprises all around the world compete for access.[87] With the increasing dependence of commercial enterprises on genetic resources, the issues surrounding ABS and intellectual property protection are drawing increasing amounts of attention from the international community.[88] The developed-country member states of the CPTPP, with more sophisticated biological industries, have an interest in reducing and removing obstacles to the access to genetic resources in the developing-country member states. As expressly stipulated in the fourth paragraph of Article 20.13 of the CPTPP, "[t]he Parties recognise the importance of facilitating access to genetic resources within their respective national jurisdictions, consistent with each Party's international obligations." In addition, CPTPP also uses the concept of "*ordre public* or morality" to exclude genetic resources from the international intellectual property protection system. As provided for in Article 18.37 of the CPTPP's intellectual property chapter, "a Party may exclude from patentability [genes and other biological genetic resources], the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre* public or morality." The interpretation of "*ordre* public or morality" is highly dependent on country-specific attributes, and so its interpretation varies widely from country to country. This creates the risk that a CPTPP member may fail to safeguard its own interests if it is

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[85] Ministry Ecology & Env't China, Guanyu Jiaqiang Duiwai Hezuo yu Jiaoliuzhong Shengwu Yichuan Ziyuan Liyong yu Huiyi Fenxiang Guanli de Tongzhi [Circular No. [2014] 156 issued by the Ministry of Environmental Protection of China: Notice Concerning the Administration of the Access to Biological Genetic Resources and Benefit Sharing in Foreign Cooperation and Exchanges] (Oct. 30, 2014), http://www.mep.gov.cn/gkml/hbb/bwj/201411/t20141105_291155.htm?keywords=%B9%D8%D3%DA%BC%D3%C7%BF%B6%D4%CD%E2%BA%CF%D7%F7%D3%EB%BD%BB%C1%F7%D6%D0%C9%FA%CE%EF%D2%C5%B4%AB%D7%CA%D4%B4%C0%FB%D3%C3%D3%EB%BB%DD%D2%E6%B7%D6%CF%ED%B9%DC%C0%ED%B5%C4%CD%A8%D6%AA.

[86] *Id.*

[87] *Id.*

[88] *See generally* Kuo Huang et al., *"Chuantong" yu "Xiandai" de Duihua: Lun Yichuan Ziyuan Huoqu ji Huiyi Fenxiang yu Zhishi Chanquan [The "Tradition" and "Modern" Dialogue: On the Access to Genetic Resources and Benefits Sharing and Intellectual Property Rights]*, 2008(2) THEORETICAL INVESTIGATION 166.

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ineffective at regulating access to its biological genetic resources in the absence of intellectual property protections.

China has a great variety of biological genetic resources. However, as a consequence of its rapid economic development, China faces not only a serious loss of biological genetic resources through environment degradation, but also faces the risk of the theft and economic exploitation of various genetic resources from China by other states, often under the guise of scientific and technological research and collaborative exchange through collaborative research.[89] In China there are no substantive and procedural laws that clearly and comprehensively regulate the acquisition of genetic resources. The current classified management system of different types of genetic resources is insufficient. At present, it mainly focuses on biological resources and addresses the protection of precious wild plants and animals. The protection of genetic resources and their associated intellectual property is limited and the protection of microbial genetic resources is a legal vacuum in China.

Based on an analysis of the Nagoya Protocol to the Convention on Biological Diversity and the international multilateral trade agreements including the CPTPP on their approach to establishing a system of benefit-sharing and access to genetic resources, the Chinese Government is now prepared to introduce domestic legislation in this field. A bill has been drafted and public consultation is currently ongoing. The bill clearly stipulates the purpose of the legislation in relation to access and benefit-sharing of biological genetic resources, namely: "Strengthening the management of access and benefit-sharing of genetic resources, conservation and sustainable use of biological diversity, safeguarding the national interests."[90] There are seven chapters and forty-eight articles in the bill.[91] The bill has specific provisions on the responsible authorities' management responsibilities for biological genetic resources, China's and foreign parties' methods for accessing biological genetic resources, benefit-sharing and outbound management of biological genetic resources, and penalties imposed by the competent authorities.[92] Article 29 of the bill provides for circumstances of non-granting of intellectual property, which, like the CPTPP Article 18.37, fully absorbs the principle of "*ordre public* or

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[89] *See generally* Li Peng, *Woguo Shengwu Yichuan Ziyuan Falu Boahu Wenti Tantao [Discussion on Legal Protection of Biological Genetic Resources in China]*, 2012(10) SCI.-TECH. ENTERPRISE 333, 333.

[90] *Shengwu Yichuan Ziyuan Huoqu he Huiyi Fenxiang Guanli Tiaoli Caoan [Drafting Instructions for the Regulations on the Administration of Biogenetic Resources Access and Benefit Sharing (Draft for Soliciting Opinions)]*, MINISTRY ECOLOGY & ENV'T CHINA (Mar. 23, 2017), http://sts.mep.gov.cn/swdyx_1/swdyxxz/201703/W020170323537476385060.pdf.

[91] *Id.*

[92] *Id.*

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morality".[93] The passage of the bill would represent a significant step in the regulation of access to and benefit-sharing of biogenetic resources in China.

D. Increasing Consistency Between Domestic Environmental Legislation and International Trade Legislation

China should seek to harmonize its domestic environmental legislation with international trade legislation. It is of crucial importance to establish a domestic environmental law system that corresponds to international trade rules.[94] However, there is a lack of consistency between Chinese domestic environmental legislation and international trade legislation. At present, the two are like parallel lines that never cross, and seldom think of each other. The China Foreign Trade Law only briefly addresses environmental protection, while only a few provisions relating to trade appear in China's environmental laws including the China Environmental Protection Law and the Drug Administration Law.[95] In addition, there is a significant gap between China and developed countries in domestic legislation dealing with trade sanctions and investment expropriation. To this end, when dealing with environment-related trade disputes, China should further improve its trade-related environmental legislation and attempt to harmonize its trade law and environmental law. China should hasten the introduction of legislation on environmental protection with respect to the legislative gaps in areas of environmental protection such as, medical waste management, blood test waste disposal and the elimination of ozone depleting substances. China's next steps should include expanding the coverage of related environmental legislation and enhancing the practical operability of those laws by amending ambiguous legal principles. China should then look at aligning the technical standards in Chinese environmental law with the environmental standards contained in international trade instruments.[96]

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[93] *Shengwu Yichuan Ziyuan Huoqu he Huiyi Fenxiang Guanli Tiaoli Caoan [The Regulations on the Administration of Biogenetic Resources Access and Benefit Sharing (Draft) (Draft for Soliciting Opinions)*, MINISTRY ECOLOGY & ENV'T CHINA (Mar. 23, 2017), http://sts.mep.gov.cn/swdyx_1/swdyxxz/201703/W020170323537476188359.pdf.

[94] Meltzer, *supra* note 68, at 8.

[95] *See generally* Xiaoyu Chen, *The Thinking of National Environmental Legislation in China's Foreign Trade*, 21 BUS. J. 14 (2014).

[96] *See generally* LI YAN, LEGAL STUDY ON ENVIRONMENTAL PROTECTION IN INTERNATIONAL TRADE (2007).

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IV. CPTPP SPILLOVERS INTO CHINA'S FUTURE FTAS AND POLICY

A. Gaps Between China's FTAs and the CPTPP Environmental Provisions

The environmental provisions in the CPTPP are aimed at being a template for "21st-century trade rules" and, with the prospect of the U.S. re-joining the TPP, will likely shape the development of environmental provisions in future FTAs.[97] Given the dual backdrops of an increasingly globalized world reliant on international trade and the period of staggering economic growth following China's economic reform and opening up, it is impossible for China to return to the era of a closed and planned economy. Inevitably, China will further liberalize trade in response to increasing economic globalization. To date, China has signed and implemented seventeen FTAs, including the China–Australia FTA, the China–New Zealand FTA, and the China–Chile FTA. China has also entered into negotiations on eleven FTAs such as the China–Japan–South Korea FTA, the China–Israel FTA and the China–Norway FTA, and is conducting feasibility studies on the possibility of FTAs with India, Columbia, Fiji, Nepal, and Canada respectively.[98]

Among China's FTA counterparts, many are the member states of the CPTPP. For example, negotiations between China and Japan, a member of the CPTPP, in the context of the China–Japan–South Korea FTA, are underway. In addition, China has signed a bilateral FTA with Chile, Australia, Singapore, New Zealand and Peru, respectively, all of which are CPTPP members. China has also entered into negotiations to establish a "China–ASEAN Free Trade Area" and signed the upgraded version of the Framework Agreement on China–ASEAN Comprehensive Economic Cooperation with four Southeast Asian countries (Brunei, Vietnam, Malaysia and Singapore), covering the goods and services trade, investment, economic and technical cooperation, and so on.[99]

When a non-party negotiates an FTA with a CPTPP member state, the significant spillover effects of the CPTPP's environmental provisions may cause the non-party to undertake the obligations of environmental protection under the CPTPP, and China may be no exception.[100] This is because the legal obligations relating to the environment and environmental standards

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[97] Mitchell et al., *supra* note 1, at 280.

[98] CHINA FTA NETWORK, http://fta.mofcom.gov.cn/english/index.shtml (last visited Mar. 2, 2018).

[99] *Zhongguo Dashi Zaichu Jianada Shangtan Zimaoqu Xianghu Chengli Wenhua Zhongxin (China's Ambassador to Re-promote Canada to Negotiate Free Trade Areas and Mutual Establishment of Cultural Centers)*, CHINA NEWS (Aug. 6, 2015), http://www.chinanews.com/gn/2015/08-06/7450248.shtml.

[100] *See* Ming Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECON. L. 407, 423-24 (2015).

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imposed by trade and investment agreements will likely have the effect of improving relevant domestic environmental law and regulation in member states. With the improvement of domestic laws, the CPTPP members may then expect, in FTA negotiations with other states, that those countries uphold similar standards of environmental protection when conducting international trade. For example, they may require other FTA parties to ratify CITES and fully implement it. Therefore, eventually, some CPTPP provisions may be indirectly transferred into the FTAs between CPTPP members and non-CPTPP members, and China will have to accept some of the CPTPP's high-standard environmental requirements when negotiating bilateral and multilateral FTAs with CPTPP members.

Among the FTAs that China has signed, the China–South Korea FTA contains the most comprehensive environmental protection provisions,[101] and the China–Georgia FTA also contains an environment chapter.[102] Chapter Sixteen of the China–South Korea FTA regulates environment and trade, and contains nine articles: context and objectives, scope, levels of protection, MEAs, enforcement of environmental measures, environmental impact, bilateral cooperation, institutional and financial arrangement, and non-application of dispute settlement. Although it is the first of China's FTAs to contain an environmental chapter, some of its measures provide for a high level of environmental protection.

First, like the CPTPP, China's FTAs, although confirming member states' sovereign right to regulate their own environment,[103] require states to ensure that their domestic laws and policies provide for and encourage high levels of environmental protection and to strive to continue improving their respective levels of environmental protection.[104] This general commitment demonstrates that China's FTAs seek to strike a balance between a state's sovereign right to determine regulation standards within its borders and the importance of environmental protection.

Second, China's FTAs also adopt provisions similar to those in the CPTPP that forbid member states from waiving or otherwise derogating from required environmental measures to encourage trade and investments in their territories.[105] This demonstrates a change in attitude from one that "races to the bottom" in pursuing economic development, attracting foreign

[101] The China–South Korea FTA came into effect on December 20, 2015, see *China-Korea FTA*, *supra* note 21.
[102] The China–Georgia FTA came into effect on January 1, 2018, see *China–Georgia FTA*, *supra* note 22.
[103] Article 16.3.1 of the China–South Korea FTA, Article 9.1 of the China–Georgia FTA and Article 20.3.2 of the CPTPP.
[104] Article 16.3.2 of the China–South Korea FTA and Article 20.3.3 of the CPTPP.
[105] Articles 12.16 and 16.5.2 of the China–South Korea FTA. Article 9.2.1 of the China–Georgia FTA. Article 20.3.6 of the CPTPP.

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investment and promoting exports without any regard to the environmental impacts.

However, compared with the CPTPP, China's FTAs do not contain "hard law" on environmental protection. Instead, most of their provisions are "soft-law" suggestions and avoid imposing mandatory environmental protection obligations on member states. In contrast, the CPTPP divides environmental issues into seven categories and imposes compulsory obligations in respect to each of them.[106]

Despite recognizing the significance of MEAs, China's FTAs do not incorporate any MEAs. China and its FTA partners only reaffirm that domestic legislation will be used to effectively implement their existing commitments to the MEAs to which both parties are members.[107] This differs from the CPTPP, which creates new obligations including requiring public participation in legislation and undertaking to implement within the domestic legal system their commitments under the specified MEAs.[108]

Moreover, unlike the CPTPP, China's FTAs neither formulate specific dispute resolution processes for environmental disputes nor apply the general dispute resolution mechanism contained in those FTAs to disputes arising from their environment chapters.[109] Under the China–South Korea FTA, these disputes may be resolved through the points of contact between the two states or the Committee on Environment and Trade.[110] However, the contact points and the Committee cannot issue binding decisions; in contrast, the CPTPP, enables the resolution of trade-related environment disputes by either the three-step consultation procedures or the panel and decisions from either procedure are binding upon the parties.[111] A binding dispute resolution mechanism is necessary to enforce obligations in instances of violation, as the CPTPP's environment chapter imposes hard-law obligations upon the parties. However, the environment chapters of China's FTAs do not create any hard-law obligations and China remains at the preliminary stages of incorporating environmental regulation in its FTAs. Accordingly, China is presently uninterested in referring environmental issues to a binding dispute resolution procedure.

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[106] *See generally* INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., *supra* note 26.

[107] Article 16.4.3 of the China–South Korea FTA and Article 9.3 of the China–Georgia FTA.

[108] CPTPP, *supra* note 33, arts. 20.7-8.

[109] The China–South Korea FTA explicitly indicates that Chapter 20 (Dispute Settlement) shall not be applied to its environment chapter. See Article 16.9 of the China–South Korea FTA. The China–Georgia FTA is silent regarding whether the general dispute resolution mechanism under the FTA can be applied to disputes arising under its environment chapter.

[110] Article 16.8 of the China–South Korea FTA.

[111] The three-step consultation procedures refer to environment consultations (Article 20.20 of the CPTPP), senior representative consultations (Article 20.21 of the CPTPP), and ministerial consultations (Article 20.22 of the CPTPP). The panel procedure can be found in Chapter 28 of the CPTPP.

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B. China's Strategies to Fill in the Gaps

In the negotiations of future FTAs, China may seek to implement four strategies in response to spillovers from the CPTPP's environmental provisions.

First, China should actively participate in the development of international environmental law. In today's increasingly interconnected and interdependent global economy, international trade is necessary for sustaining economic development. Any state that remains passive and accepts the terms dictated by active participants in the development of international law faces a significant risk of failing to protect its own national interests. Particularly with respect to the environmental issues arising from international trade, China has an interest in actively participating in the negotiation and development of relevant environmental conventions and even leading the negotiation and development of FTA environmental provisions, playing a greater role in the development of relevant environmental laws, and therefore being in a position to propose amendments to unfavorable environmental provisions. Only through active participation and leadership can China avoid eventually having to passively comply with environmental provisions that are inconsistent with its economic development and thereby better safeguard its own economic interests while ensuring that future development is sustainable. China should comprehensively analyze and consider its national strategy, environmental and economic interests and issues surrounding ecological security to establish a strategic approach, template and timetable for negotiations on environmental provisions. China should depart from the current practice where environmental provisions are formulated in a case-by-case fashion and differ in each FTA.[112] Instead, China should put forward a high-standard "Chinese version" of trade-related environmental provisions and adopt it in China's future FTA negotiations. This can help to ensure that China's trade-related environmental obligations are consistent across its FTAs.

Second, China may make reservations to relevant terms or sign ancillary agreements regarding environment issues when concluding its future FTAs.

When it is necessary to become a signatory to an international convention or FTA where China cannot lead the negotiations, China should consider making reservations to some unfavorable provisions therein, with consideration given to China's national interests. Where a convention does not allow reservations to be made, China should minimize the adverse effects of their environmental provisions by signing an instrument, such as an understanding, memorandum, or exchange of letters, with another member

[112] *See generally* THE INTERNATIONAL TRADE RESEARCH ROOM OF THE INSTITUTE OF WORLD ECONOMY AND POLITICS, THE CHINESE ACADEMY OF SOCIAL SCIENCES, TRANS-PACIFIC PARTNERSHIP AGREEMENT — TEXT INTERPRETATION 28 (2016).

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state, without affecting that members' obligations. Some of the developing country CPTPP member states have already made use of the aforementioned ways to mitigate the risk of non-compliance arising from their relatively low standards of environmental protection. The environment-related instruments accompanying CPTPP, as published by the United States Trade Representative (USTR), contain four memoranda of understanding or exchanges of letters dated February 4, 2016 between the U.S. and other CPTPP parties. These instruments include the US-CL Understanding regarding Fisheries Subsidies and Natural Disasters, the US-MY Exchange of Letters on Committee to Coordinate Implementation of Environment Chapters, the US-PE Understanding regarding Biodiversity and Traditional Knowledge, and the US-PE Understanding regarding Conservation and Trade.[113] The Australian government also publishes the environment-related instruments accompanying CPTPP signed with Malaysia and Peru, respectively.[114]

Third, China should seek mutual recognition of environmental protection measures and environmental standards with OBOR countries.

China is actively promoting large infrastructure projects to countries alongside the OBOR Initiative.[115] However, China has concluded few FTAs with these countries,[116] and it is unrealistic for China to conclude FTAs with all OBOR countries in a short period of time.[117] Some of these countries and non-governmental organizations have strongly urged China to be environmentally conscious in its implementation of the OBOR Initiative.[118]

In this context, China should encourage OBOR countries to mutually recognize each other's environmental protection measures and environmental standards. This is because OBOR relates to both highly developed countries such as Germany and less developed countries such as Cambodia. The OBOR also includes both CPTPP and non-CPTPP members. Vast differences in environmental standards exist between these countries because they are at different stages of economic development. As compliance with sophisticated environmental standards usually relies on a state's advanced scientific and technological capacity, developing countries are significantly disadvantaged. This disadvantage is generally reflected and

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[113] *TPP Full Text*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Feb. 20, 2018).

[114] *See TPP-11 Text and Associated Documents*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, ht tp://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx (last visited Feb. 20, 2018).

[115] For the significance of the "Belt and Road" Initiative to China's domestic economy, see generally Boya Li, *The "One Belt and One Rad" Is a Strategy to Optimize Regional Pattern Focus*, 114 TWENTY-FIRST CENTURY ECON. REP. 10, 11 (2015).

[116] Jie (Jeanne) Huang, *Silk Road Economic Belt: Can Old BITs Fulfil China's New Initiative?*, 50(4) J. WORLD TRADE 733, 737-39 (2016).

[117] *Id.*

[118] *China–Georgia FTA*, *supra* note 22.

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accounted for in the trade-related environmental conventions. China can adopt mutual recognition of environmental protection measures and environmental standards by actively signing bilateral and multilateral agreements on environmental protection with OBOR countries, and thereby reduce environment-related trade friction.

Fourth, China should strategically employ the WTO's dispute resolution mechanisms to resolve environment-related trade disputes with OBOR and CPTPP member countries.

Considering the fact that China and most OBOR countries are WTO members, China should attempt to resolve trade-related environmental disputes through the WTO's dispute resolution mechanism in instances where negotiations have failed. The WTO neither imposes substantive restrictions on national environmental protection measures and standards, nor discriminates between developed and developing countries. Instead, the WTO suggests that all WTO member countries should implement environmental protection measures and establish environmental standards on the basis of international standards.[119]

Utilizing the WTO dispute settlement mechanism is also an ideal method by which China can resolve environment-related trade disputes arising with CPTPP member states.[120] Environment-related trade disputes mostly appear in connection with the differing interpretations of GATT Articles XX(b) and XX(g). The words used in the two paragraphs are so obscure that trade protectionists have the opportunity to exploit these ambiguous terms for their own benefit.[121] The CPTPP chapter on exceptions and general provisions provides that the CPTPP parties have the right to invoke "environmental exceptions" contained in the WTO trade rules. In addition, when a trade dispute arises between a CPTPP party and a non-party, and both of them are WTO members, they may also resort to the WTO dispute settlement mechanism. China can safeguard its trade and environmental interest by utilizing the WTO dispute settlement mechanism in the event that such an environment-related trade dispute arises in the process of trading with a CPTPP party or any state involved in OBOR.

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[119] *See generally* Xiaohong Zhong, *WTO Huanjing yu Maoyi Guize de Lifa Tedian ji Qi Shish izhong Chunzai de Wenti [The Legislative Characteristics of WTO Environment and Trade Rules and the Existing Problems in Their Implementation]*, 4 JIANGXI SOC. SCI. 202 (2005).

[120] *See generally* THE INTERNATIONAL TRADE RESEARCH ROOM OF THE INSTITUTE OF WORLD ECONOMY AND POLITICS, *supra* note 112, at 308.

[121] Such contentious words include: what measures are "necessary" to protect life or health under Article XX(b) of GATT. Does the word "necessary" means the only choice to achieve the goal or the most effective choice or the least conflicting choice? Are there any limitations on the meaning of the word "health"? What measures are "relating" to the conservation of exhaustible natural resources, and to what extent can be referred to as "relating", and so on. Guangsheng Sun, *GATT/WTO Kuangjia Xia Huanjing Yu Maoyi Zhengduan De Jiejuejizhi [Environment and Trade Dispute Settlement Mechanism under the GATT/WTO Framework]*, 2001(1) MOD. ECON. SCI. 45, 45-50.

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V. CONCLUSION

This paper finds that the CPTPP's environmental provisions closely link the issues of environmental protection and international trade, forms a source of international environmental law, enhances the implementation of MEAs, increases opportunity for public participation and the disclosure of information, and triggers new green trade barriers. Compared with traditional FTAs, CPTPP is more attentive to striking a balance between trade liberalization and environmental protection.

In light of the current state of China's environment-related trade law, this paper argues that China's domestic law, FTAs and policies should address the international tendency to balance sustainable development and trade liberalization, as demonstrated by the CPTPP. This paper suggests: (1) in the domestic sphere, China should enhance the opportunities for public participation in environmental decision making, regulate the procurement of animal and plant products used in TCM, increase access and benefit-sharing of biogenetic resources, and improve the alignment between domestic environmental legislation and international trade legislation; (2) With regard to FTAs, China should actively participate in the formulation of international environmental law and make reservations to relevant international environmental treaty provisions or seek to sign ancillary agreements to protect its national interests; and (3) within the OBOR non-treaty domain, China should adopt mutual recognition of environmental protection measures and environmental standards of other countries, and make use of the WTO dispute settlement mechanism where necessary.

臺灣大學學術期刊資料庫

REFERENCES

Books

KELSEN, HANS (1989), PRINCIPLES OF INTERNATIONAL LAW.

LI, RENZHEN ET AL. (2006), WTO YU HUANJING BAOHU [WTO AND ENVIRONMENTAL PROTECTION].

LIU, TINGTING (2012), RESEARCH ON THE COMPLIANCE MECHANISMS UNDER INTERNATIONAL ENVIRONMENTAL TREATIES.

MA, XIANGCONG (1994), GUOJI HUANJING FA DAOLUN [INTERNATIONAL ENVIRONMENTAL LAW].

SHAPIRO, JUDITH (2016), CHINA'S ENVIRONMENTAL CHALLENGES, 2d ed.

THE INTERNATIONAL TRADE RESEARCH ROOM OF THE INSTITUTE OF WORLD ECONOMY AND POLITICS (2016), THE CHINESE ACADEMY OF SOCIAL SCIENCES, TRANS-PACIFIC PARTNERSHIP AGREEMENT - TEXT INTERPRETATION.

YAN, LI (2007), LEGAL STUDY ON ENVIRONMENTAL PROTECTION IN INTERNATIONAL TRADE.

ZHANG, JUNHUI (2013), RESEARCH ON LEGAL PROTECTION OF WILD MEDICINAL MATERIAL RESOURCES IN WESTERN MINORITY AREAS.

Articles

Chen, Xiaoyu (2014), *The Thinking of National Environmental Legislation in China's Foreign Trade*, 21 BUSINESS JOURNAL 14.

Chi, Manjiao (2015), *The "Greenization" of Chinese BITs: An Empirical Study of the Environmental Provisions in Chinese BITs and Its Implications for China's Future BIT-Making*, 18 JOURNAL OF INTERNATIONAL ECONOMIC LAW 511.

Chow, Daniel C.K. (2016), *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17(2) CHICAGO JOURNAL OF INTERNATIONAL LAW 370.

Ciuriak, Natassia & Dan Ciuriak (2016), *Climate Change and the Trading System: Implications of the Trans-Pacific Partnership*, 30(4) INTERNATIONAL TRADE JOURNAL 345.

Du, Ming (2015), *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 JOURNAL OF INTERNATIONAL ECONOMIC LAW 407.

Du, Qiang (2003), *Quanqiu Luse Maoyi Bilei yu Woguo Duiwai Maoyi Fazhan Duice [The Global Green Trade Barriers and China's Countermeasures in Foreign Trade Development]*, 2003(2) ASIA-PACIFIC ECONOMIC REVIEW 44.

Guo, Hong (2005), *The Laws in an Age of Globalization Should Adhere to the Principle of National Sovereignty*, 50 CHINA MARK 190.

臺灣大學學術期刊資料庫

Hsueh, Ching-Wen (2013), *A Greener Trade Agreement: Approaches to Environmental Issues in the TPP Negotiations*, 8(2) ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 521.

Huang, Jie (Jeanne) (2016), *Silk Road Economic Belt: Can Old BITs Fulfil China's New Initiative?*, 50(4) JOURNAL OF WORLD TRADE 733.

Huang, Kuo et al. (2008), *"Chuantong" yu "Xiandai" de Duihua: Lun Yichuan Ziyuan Huoqu ji Huiyi Fenxiang yu Zhishi Chanquan [The "Tradition" and "Modern" Dialogue: On the Access to Genetic Resources and Benefits Sharing and Intellectual Property Rights]*, 2008(2) THEORETICAL INVESTIGATION 166.

Hufbauer, Gary Clyde & Cathleen Cimino-Isaacs (2015), *How Will TPP and TTIP Change the WTO System?*, 18 JOURNAL OF INTERNATIONAL ECONOMIC LAW 679.

Kerr, Andrew Jensen (2016), *The Trans-Pacific Partnership and the Construction of a Syncretic Animal Welfare Norm*, 27 DUKE ENVIRONMENTAL LAW & POLICY FORUM 155.

Li, Boya (2015), *The "One Belt and One Road" Is a Strategy to Optimize Regional Pattern Focus*, 114 TWENTY-FIRST CENTURY ECONOMY REPORT 10.

Li, Dejun (2004), *The Current Status and Strategic Thinking of the Endangered Fauna Resources for Medicinal Used in China*, *in* TRADITIONAL CHINESE MEDICINE RESOURCES AND PROTECTION OF ENDANGERED SPECIES OF WILD FAUNA AND FLORA 10 (Shanghai University of Traditional Chinese Medicine Press).

Li, Peng (2012), *Woguo Shengwu Yichuan Ziyuan Falu Boahu Wenti Tantao [Discussion on Legal Protection of Biological Genetic Resources in China]*, 2012(10) SCIENCE-TECHNOLOGY ENTERPRISE 333.

Lin, Canling (2011), *Guoji Huanjing Fa Shishi Jizhi Tanxi [An Analysis of the Implementation Mechanism for International Environmental Law]*, 2011(2) JOURNAL OF COMPARATIVE LAW 93.

Meltzer, Joshua P. (2014), *The Trans-Pacific Partnership Agreement, the Environment and Climate Change*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 207 (Tania Voon ed.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326723.

Mitchell, Andrew D. et al. (2015), *Public Health and the Trans-Pacific Partnership Agreement*, 5 ASIAN JOURNAL OF INTERNATIONAL LAW 279.

Prospects of and Obstacles to the TPP Development (2010), 1115 THE PURSUIT OF ECONOMIC TRENDS 96.

Rimmer, Matthew (2017), *The Trans-Pacific Partnership: Intellectual Property, Public Health, and Access to Essential Medicines*, 29 INTELLECTUAL PROPERTY JOURNAL 277.

臺灣大學學術期刊資料庫

Ruckert, Arne et al. (2017), *Policy Coherence, Health and the Sustainable Development Goals: A Health Impact Assessment of the Trans-Pacific Partnership*, 27(1) CRITICAL PUBLIC HEALTH 86.

Schuler, Douglas A. (1996), *The NAFTA and the Environment: Trade, Diplomacy, and Limited Protection*, 10(3) INTERNATIONAL TRADE JOURNAL 353.

Sears, Natalie (2015), *Trans-Pacific Partnership—Is It Really "NAFTA on Steroids"*, 21 LAW AND BUSINESS REVIEW OF THE AMERICAS 107.

Sun, Guangsheng (2001), *GATT/WTO Kuangjia Xia Huanjing Yu Maoyi Zhengduan De Jiejuejizhi [Environment and Trade Dispute Settlement Mechanism under the GATT/WTO Framework]*, 2001(1) MODERN ECONOMIC SCIENCE 45.

Tsangalis, Amanda Rologas (2016), *Fisheries Subsidies Under the Trans-Pacific Partnership: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction Under International Law*, 17 MELBOURNE JOURNAL OF INTERNATIONAL LAW 445.

Wang, Yuan & Huiyu Zhao (2014), *TPP and Environmental Protection*, 8 CITIZEN AND LAW LEGAL EDITION 12.

Yin, Xiangshuo et al. (2007), *Guoji Maoyi Mocha de Leixing, Yuanyin, Xiaoying ji Huajie Tujing [The Types, Causes, Effects and Solutions of International Trade Friction]*, 7 JOURNAL OF WORLD ECONOMY 74.

Zhong, Xiaohong (2005), *WTO Huanjing yu Maoyi Guize de Lifa Tedian ji Qi Shish izhong Chunzai de Wenti [The Legislative Characteristics of WTO Environment and Trade Rules and the Existing Problems in Their Implementation]*, 4 JIANGXI SOCIAL SCIENCES 202.

Internet Sources

2017 "Yi Dai Yi Lu" Da Ji Shi [Milestones of "One Belt and One Road"], YIDAIYILU.GOV.CN (January 16, 2018), https://www.yidaiyilu.gov.cn/xwzx/gnxw/44334.htm.

Albert, Eleanor & Beina Xu, *China's Environmental Crisis*, COUNCIL ON FOREIGN RELATIONS (January 18, 2016), https://www.cfr.org/backgrounder/chinas-environmental-crisis.

Bernasconi, Nathalie et al., *Response to the United States Trade Representative's Stated Objectives on NAFTA Negotiations: An Environmental Perspective*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (August 2017), https://www.iisd.org/sites/default/files/publications/iisd-response-ustr-objectives-nafa-negotiations.pdf.

Chang, Howard F. (2016), *The Environment Chapter of the TransPacific Partnership: An Environmental Agreement Within a Trade Agreement*, 47(5) TRENDS, https://www.americanbar.org/publications/trends/2015-

臺灣大學學術期刊資料庫

2016/may-june-2016/the_environment_chapter_of_the_trans-pacific_partnership.html.

China and the Environment, THE NEW YORK TIMES, https://www.nytimes.com/topic/subject/china-and-the-environment.

CHINA FTA NETWORK, http://fta.mofcom.gov.cn/english/index.shtml.

China–Georgia FTA, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/topic/engeorgia.shtml.

China–Korea FTA, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/topic/enkorea.shtml.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, http://dfat.gov.au/trade/agreements/tpp/.

COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP), http://investmentpolicyhub.unctad.org/IIA/treaty/3808.

Comprehensive Economic and Trade Agreement (CETA), EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/in-focus/ceta/.

Comprehensive Economic and Trade Agreement, EU-Canada, October 30, 2016, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

Duncan, Linda & Geoff Garver, *NAFTA and the Environment: Time to Come Clean*, CANADA'S NATIONAL OBSERVER (September 28, 2017), https://www.nationalobserver.com/2017/09/28/opinion/nafta-and-environment-time-come-clean.

Free Trade Agreements, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/.

Get the Facts on TPP: What Will TPP Mean for the Environment, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/TPP/#text.

Johnson, Keith, *The U.S. Wants Back in the TPP? Good Luck with That*, FOREIGN POLICY (March 29, 2018, 4:41 PM), http://foreignpolicy.com/2018/03/29/united-states-wants-back-in-tpp-good-luck-with-that-trans-pacific-partnership-asia/.

Lallanilla, Marc, *China's Top 6 environmental Concerns*, LIVE SCIENCE (March 15, 2013, 11:39 AM), https://www.livescience.com/27862-china-environmental-problems.html.

Ministry Ecology and Enviornment China, Guanyu Jiaqiang Duiwai Hezuo yu Jiaoliuzhong Shengwu Yichuan Ziyuan Liyong yu Huiyi Fenxiang Guanli de Tongzhi [Circular No. [2014] 156 issued by the Ministry of Environmental Protection of China: Notice Concerning the Administration of the Access to Biological Genetic Resources and Benefit Sharing in Foreign Cooperation and Exchanges] (October 30,

臺灣大學學術期刊資料庫

2014), http://www.mep.gov.cn/gkml/hbb/bwj/201411/t20141105_291155.htm?keywords=%B9%D8%D3%DA%BC%D3%C7%BF%B6%D4%CD%E2%BA%CF%D7%F7%D3%EB%BD%BB%C1%F7%D6%D0%C9%FA%CE%EF%D2%C5%B4%AB%D7%CA%D4%B4%C0%FB%D3%C3%D3%EB%BB%DD%D2%E6%B7%D6%CF%ED%B9%DC%C0%ED%B5%C4%CD%A8%D6%AA.

NAIROBI DECLARATION, U.N. Doc., http://www.un-documents.net/nair-dec.htm.

Shengwu Yichuan Ziyuan Huoqu he Huiyi Fenxiang Guanli Tiaoli Caoan [Drafting Instructions for the Regulations on the Administration of Biogenetic Resources Access and Benefit Sharing (Draft for Soliciting Opinions)], MINISTRY ECOLOGY & ENVIRONMENT CHINA (March 23, 2017), http://sts.mep.gov.cn/swdyx_1/swdyxxz/201703/W020170323537476385060.pdf.

Shengwu Yichuan Ziyuan Huoqu he Huiyi Fenxiang Guanli Tiaoli Caoan [The Regulations on the Administration of Biogenetic Resources Access and Benefit Sharing (Draft) (Draft for Soliciting Opinions), MINISTRY ECOLOGY & ENVIRONMENT CHINA (March 23, 2017), http://sts.mep.gov.cn/swdyx_1/swdyxxz/201703/W020170323537476188359.pdf.

Southerland, Dan, *China's Global Infrastructure Initiative Raises Environmental Concerns*, RADIO FREE ASIA (September 29, 2017), https://www.rfa.org/english/commentaries/china-obor-09292017160823.html.

The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (November 2015), http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-AnalysisNov2015.pdf.

TPP 11: UNPACKING THE SUSPENDED PROVISIONS, http://www.asiantradecentre.org/talkingtrade//tpp11-unpacking-the-suspended-provisions.

TPP Environmental Provisions a Major Disappointment, GREENPEACE (November 6, 2015), https://www.greenpeace.org.au/news/tpp-environmental-provisions-a-major-disappointment/.

TPP Full Text, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

TPP-11 Text and Associated Documents, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx (last visited Feburary 20, 2018).

Trump, Donald J., *Presidential Memoranda: Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITEHOUSE.GOV (January

臺灣大學學術期刊資料庫

23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-transpacific.

Wold, Chris, *Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership*, LEWIS & CLARK LAW SCHOOL (January 4, 2016), https://law.lclark.edu/live/files/20857-assessing-the-tpp-environmental-chapter.

Zhongguo Dashi Zaichu Jianada Shangtan Zimaoqu Xianghu Chengli Wenhua Zhongxin (China's Ambassador to Re-promote Canada to Negotiate Free Trade Areas and Mutual Establishment of Cultural Centers), CHINA NEWS (August 6, 2015), http://www.chinanews.com/gn/2015/08-06/7450248.shtml.

Zhonghua Renmin Gongheguo Huanjing Baohu Fa [Environmental Protection Law of the People's Republic of China] (promulgated by Order No.9 of the President of the People's Republic of China on April 24, 2014, effective January 1, 2015), https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf.

Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa [Law of the People's Republic of China on Evaluation of Environmental Effects] (promulgated by Order No. 77 of the President of the People's Republic of China, October 28, 2002, effective September 1, 2003), http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382122.htm.

Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China] (promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991, effective April 9, 1991), http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm.

Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Procedure Law of the People's Republic of China] (promulgated by Order No.16 of the President of the People's Republic of China on April 4, 1989, effective October 1, 1990), http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383912.htm.

Zhonghua Renmin Gongheguo Xingzheng Xuke Fa [Administrative Permission Law of the People's Republic of China] (promulgated by the Order No.7 of the President of the People's Republic of China, August 28, 2003, effective July 1, 2004), http://english1.english.gov.cn/laws/2005-09/07/content_29926.htm.

Other Sources

INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (2016), ENVIRONMENT IN THE TRANS-PACIFIC PARTNERSHIP: A LEGAL ANALYSIS.

North America Free Trade Agreement, Canada–Mexico–United States of America, December 17, 1992, 32 I.L.M 289.

臺灣大學學術期刊資料庫

North American Agreement on Environmental Cooperation, Canada–Mexico–United States of America, September 14, 1993, 32 I.L.M. 1482.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. § 4332 (2012).

U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (August 12, 1992).

臺灣大學學術期刊資料庫