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How to Assess Regional Trade Agreements? Deep FTAs v. China's Trade Agreements

HENG WANG*

I. Introduction

Regional trade agreements come in various forms, including free trade agreements (FTAs) and agreements like the 2020 U.S.-China Phase One agreement (Phase One agreement).¹ These agreements have now played an increasingly important role due to the stagnation of the World Trade Organization (WTO), in part due to the dysfunction of its Appellate Body.² The assessment of regional trade agreements is crucial due to the major impacts they have on the parties, and the spillover effects they may have on non-parties (e.g., trade diversion).³ This is important for better understanding the trade approaches of different states because they cover crucial issues ranging from investment to intellectual property (IP).⁴ Such an assessment is also particularly timely as trade agreements are in flux and fast changing. To illustrate, the Phase One agreement is unprecedented

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1. See generally Economic and Trade Agreement, China-U.S., Jan. 15, 2020, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [<https://perma.cc/EZ85-P8X8>] [hereinafter U.S.-China Phase One Agreement].

2. Vineet Hegde, *As WTO's Dispute Settlement Body Dies a Dysfunctional Death, What Comes Next?*, GLOBE (Dec. 16, 2019), https://www.globe-project.eu/en/as-wto-s-dispute-settlement-body-dies-a-dysfunctional-death-what-comes-next_7281 [<https://perma.cc/68H6-R9G7>].

3. See generally Naomi Powell, ‘Canada Should Be Worried’: Canadian Exporters May Become Collateral Damage of U.S-China Trade Deal, FIN. POST (Jan. 14, 2020), <https://business.financialpost.com/news/economy/canada-should-be-worried-canadian-exporters-may-become-collateral-damage-of-u-s-china-trade-deal> [<https://perma.cc/9LT9-RAQV>].

4. See generally Trade Agreements, INT’L TRADE ADMIN., [https://www.trade.gov/trade-agreements#:~:text=the%20World%20Trade%20Organization%20\(WTO\),impact%20the%20flow%20of%20trade](https://www.trade.gov/trade-agreements#:~:text=the%20World%20Trade%20Organization%20(WTO),impact%20the%20flow%20of%20trade) [<https://perma.cc/KAZ4-WNMA>] (last visited Jan. 3, 2021).

among the trade agreements signed by the United States and China.⁵ The United States Trade Representative (USTR) Robert Lighthizer described the Phase One agreement as “the first agreement like this of its kind.”⁶ The Phase One agreement, regardless of questions as to its future operation, is also crucial to understanding the approaches of the United States and China. All these factors add urgency to assessing trade agreements based on an in-depth comparative study, which has to date received insufficient attention.

Trade agreements can be separated into two major categories: deep and shallow.⁷ This paper focuses on deep FTAs and China’s trade agreements as the representatives of these two categories of trade agreements. Deep FTAs predominantly set out rules and tackle wide-ranging, behind-the-border issues (e.g., the harmonization of national regulations concerning services, labor, and the environment).⁸ They range from the Trans-Pacific Partnership (TPP)⁹ that has developed into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹⁰ to the EU-Canada Comprehensive Economic and Trade Agreement (CETA),¹¹ and the United States–Mexico–Canada Agreement (USMCA).¹²

Shallow trade agreements mainly address border measures, particularly tariff barriers and quotas.¹³ China’s trade agreements, consisting of FTAs

5. Kevin Freking & Paul Wiseman, *Read the Full U.S.-China ‘Phase 1’ Trade Agreement*, PBS (Jan. 16, 2020, 7:52 AM), <https://www.pbs.org/newshour/economy/read-the-full-u-s-china-phase-1-trade-agreement> [<https://perma.cc/TGV2-45KK>].

6. *Id.*

7. Alasdair Young, *The Politics of Deep Integration*, 30 CAMBRIDGE REV. INT’L AFFS., 353, 354 (2017).

8. Aaditya Mattoo & Michele Ruta, *Regional Trade Agreements*, WORLD BANK (Apr. 5, 2018), <https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements> [<https://perma.cc/KCL5-5VFT>]; MARC BACCHETTA ET AL., WORLD TRADE REPORT 2011: THE WTO & PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 11, 47, 112 (2011), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf [<https://perma.cc/3HX5-WGRU>].

9. Trans-Pacific Partnership, ch.18, sec. I, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf> [<https://perma.cc/SPK2-88E6>] [hereinafter TPP].

10. *See generally* Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 25.5, Mar. 8, 2018, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/> [<https://perma.cc/6KV8-2YB5>] [hereinafter CPTPP].

11. *See generally* Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, Can.-Eur., Oct. 30, 2016 [hereinafter CETA].

12. *See generally* Agreement Between the United States of America, the United Mexican States, and Canada, ch. 7, Dec. 10, 2019 [hereinafter USMCA].

13. Josh Ederington & Michele Ruta, *Non-Tariff Measures and the World Trading System 2*, 38 (Policy Research Working Paper No. 7661, 2016), <https://openknowledge.worldbank.org/bitstream/handle/10986/24499/Non0tariff0mea0world0trading0system.pdf?sequence=1&isAllowed=Y> [<https://perma.cc/7UAM-VJVU>]; *see also* BACCHETTA ET AL., *supra* note 8, at 9.

and the Phase One agreement, are largely shallow, and differ markedly from those concluded by major developed economies.¹⁴

The fast-changing trade agreements, including their differences, complexity, and rationale, have not been fully explored in the literature. In particular, an analytical framework for regional trade agreements is lacking, and such a framework is crucial for at least three reasons. First, there is a critical need for a theoretical framework to measure trade agreements, including new kinds of agreements like the Phase One agreement that focuses on measurable market access outcomes and unilateral enforcement.¹⁵ Such a framework provides key insights into the significant heterogeneity and real differences that lie beneath the substantial textual differences between trade agreements. It focuses our attention on what really matters when looking at trade agreements, and support analysis of the effects of these agreements. This is crucial for the public and private stakeholders to clearly understand trade agreements.¹⁶ Second, an analytical framework is critical for the preparation of negotiations in respect of new trade agreements, such as by enhancing understanding of potential partners' commitments in their trade agreements, awareness of best practices and areas where practices diverge or converge across different actors, and identification of gaps between domestic law and trade agreements.¹⁷ Third, an analytical framework can support various states in designing and adjusting their trade agreement models and approaches.¹⁸

This paper will analyze the following two crucial questions: What are the approaches behind China's trade agreements and deep FTAs? How can we assess trade agreements (particularly China's trade agreements and deep FTAs)? The paper proposes a tripartite theoretical framework with various indicators to assess trade agreements in terms of their impact on domestic regulation and applies this framework to China's trade agreements and deep FTAs. The analytical framework would allow for the categorisation of different types of trade agreements and a clear understanding of the rationale behind the differences. This would then lay a solid foundation for future research on the actual merits of the different types of agreements.

This article argues that China's trade agreements reflect an early harvest approach, while deep FTAs are concerned with regulatory plowing (Part II). The following crucial differences are further explained under a theoretical framework, which explores three crucial variables and six indicators of trade

14. Michael Sampson, *The Evolution of China's Regional Trade Agreements: Power Dynamics and the Future of the Asia-Pacific*, PAC. REV. 1, 7 (2019).

15. Heng Wang, *Selective Engagement? Future Path for US-China Economic Relations and Its Implications*, 55 J. WORLD TRADE (forthcoming Apr. 2021) (manuscript at 2), <https://ssrn.com/abstract=3620758>.

16. See *Engaging and Consulting on Trade Agreements*, OECD 1 (Oct. 27, 2019), https://issuu.com/oecd.publishing/docs/engaging_and_consulting_on_trade_agreements [<https://perma.cc/5LVZ-YPMV>].

17. *Overview: The Evolution of Deep Trade Agreements*, in HANDBOOK OF DEEP TRADE AGREEMENTS 24, (Aaditya Mattoo, et al. eds., July 8, 2020), <http://hdl.handle.net/10986/34055>.

18. *Id.* at 4.

agreements as indicated in Table 1 (Parts III though V): (i) breadth; (ii) depth; and (iii) strength. They assess trade agreements' rule development, their implications for domestic law, and the strength of rules through dispute settlement.

Table 1: Variables, Indicators and Elements of Trade Agreements

Variables	Indicators	Crucial Elements
Breadth	<ul style="list-style-type: none"> • WTO-plus obligations that are stricter than WTO obligations • WTO-beyond rules that address issues outside the WTO aegis 	Rule coverage
Depth	<ul style="list-style-type: none"> • Regulatory cooperation and coherence • Domestic law changes 	Rule content
Strength	<ul style="list-style-type: none"> • State-to-state dispute settlement (SSDS) rules • SSDS coverage) 	Rule implementation

This paper analyses representative examples to support the framework explanation. The TPP (and CPTPP) and China-Korea FTA, the negotiations for both of which were concluded in 2015,¹⁹ are the exemplars of deep Chinese FTAs. This distinction is instructive, as the CPTPP is arguably the most adequate benchmark for assessing the striking difference between deep and shallow integration: it has the largest membership coverage among deep FTAs and still largely serves as the basis of future U.S. trade negotiations.²⁰ The USMCA builds on the CPTPP. For instance, both are similar in terms of the core regulatory coherence provision of regulatory impact assessment.²¹ The China-Korea FTA is one of the highest-level²² trade agreements of China, despite the disparity between China's FTAs and deep FTAs. For instance, the China-Korea FTA is the first Chinese FTA to cover electronic commerce.²³ It was also deemed the biggest free-trade deal signed by China,²⁴ and "involve[s] the largest trade

19. Shannon Tiezzi, *It's Official: China, South Korea Sign Free Trade Agreement*, THE DIPLOMAT (June 02, 2015), <https://thediplomat.com/2015/06/its-official-china-south-korea-sign-free-trade-agreement/> [<https://perma.cc/LLX9-8EM8>].

20. Heng Wang, *The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?*, 53(2) J. WORLD TRADE 317, 318-319 (2019).

21. CPTPP, *supra* note 10, at art. 25.2; USMCA, *supra* note 12, at art. 28.11.

22. Si-Qi Li et al., *Progress and Implications of the China-Korea FTA*, 31 KOREA'S ECON. 13, 17 (2017).

23. Heng Wang, *The Features of China's Recent FTA and Their Implications: An Anatomy of the China-Korea FTA*, 11 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 115, 120 (2016).

24. S. Korea, *China Formally Sign Free Trade Deal*, YONHAP (June 1, 2015, 5:27 PM), <https://en.yna.co.kr/view/AEN20150601001552320> [<https://perma.cc/QRN9-Z9V2>].

value and most comprehensive areas.”²⁵ Other agreements are referred to when appropriate because these two FTAs do not represent the entirety of China’s trade agreements and deep FTAs practice.²⁶ This paper, however, does not focus on the merits of different rules adopted across agreements. This is a question deserving of separate legal, economic, and social analysis.

II. Different Approaches Behind Deep FTAs and China’s Trade Agreements: Regulatory Plowing v. Early Harvest

As a starting point, it is important to first explore the nature of trade agreements by developing a useful analytical framework to better understand various trade agreements, their differences, and the underlying rationale. Deep FTAs and China’s trade agreements arguably sit at two ends of the spectrum in terms of their approach: on one end, regulatory plowing seen in deep FTAs; and, on the other end, early harvesting adopted in China’s trade agreements.

A. DEEP FTAs: REGULATORY PLOWING

Deep FTAs adopt an approach of regulatory plowing: they (i) set new standards in new areas to constrain regulatory latitude (breadth); (ii) often address regulatory heterogeneity and endeavor to be “transformative FTAs” that regulate trade far beyond WTO rules (depth);²⁷ and (iii) subject most FTA obligations to strong enforcement (strength).

Foremost, regulatory plowing means that deep FTAs feature comprehensive regulations and standards (e.g., streamlined regulations) in areas such as goods, services, IP, investment, and capital. This contrasts with selective market access for goods and services under shallow agreements.²⁸ Deep FTAs aim for “integration beyond trade or deep integration.”²⁹

Second, regulatory plowing essentially addresses coordination externalities (the multiplicity of national policies and measures) through deep FTAs.³⁰ It substantially constrains regulatory latitude. Taking e-

25. See News Release, China FTA Network, Statement on China-ROK FTA Completed Negotiations (Mar. 11, 2015, 8:41 AM), http://fta.mofcom.gov.cn/enarticle/enrelease/201503/20754_1.html [<https://perma.cc/Y278-E6RV>].

26. For the differences of deep FTAs and the underlying reasons, see, e.g., Wang, *The Future of Deep Free Trade Agreements*, *supra* note 20, 341–42.

27. Ernst-Ulrich Petersmann, *CETA, TTIP, and TiSA: New Trends in International Economic Law*, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TiSA 34 (Stefan Griller et. al. eds., 2017).

28. See generally Joost Pauwelyn, *Taking the Preferences Out of Preferential Trade Agreements: TTIP as a Provider of Public Goods? in THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD* 188–89 (Jean-Frédéric Morin et al. eds., Routledge 2015).

29. See Mattoo & Ruta, *supra* note 8, at 3.

30. Ederington & Ruta, *supra* note 13, at 55.

commerce as an example, the CPTPP e-commerce chapter addresses various systematic regulatory issues ranging from the prohibition of data server localization requirements,³¹ to the equal treatment of digital content.³² Relatedly, the TPP highlights IP enforcement in the digital context and is the first FTA signed by the United States that explicitly requires most enforcement measures to be available “in the digital environment.”³³

Third, the effects of regulatory plowing are twofold. Deep agreements promote global value chains (GVCs) through “access and assurances in terms of border and domestic regulations, investment and capital flows, transport and infrastructure, IP protection and overall good governance” (make things).³⁴ If properly managed, deep FTAs also provide public goods (e.g., transparency), many of which might benefit outsiders.³⁵ Publication provides a prime example. Deep FTAs contain requirements on the reasonable time between the publication date and effective date of laws,³⁶ and requirements on the publication place and timing of the regulation, including its purpose and rationale,³⁷ amongst others. Notably, the requirements here affect the content of the publications, by requiring publishing of purpose and rationale to the extent possible.

B. CHINA’S TRADE AGREEMENTS: EARLY HARVEST

China’s trade agreements reflect an early harvest approach, as seen in its low-level breadth, depth, and strength.³⁸ First, early harvest refers to shallow agreements that focus more on “reciprocal exchanges” of market access commitments (e.g. tariff cuts) than systematic, regulatory disciplines.³⁹ An early harvest approach is also reflected in shallow agreements, under which states are permitted greater leeway in setting domestic policy only subject to limited overriding rules.⁴⁰ The Phase One agreement reflects selective engagement that focuses on market access (measurable target outcome and targeted regulatory discipline) and delegatized implementation.⁴¹ China’s FTAs are conservative in ambition and

31. CPTPP, *supra* note 10, art. 14.13.2.

32. *Id.* art. 14.4.

33. TPP, *supra* note 9, at art. 18.17.2; Marty Hansen et al., *What’s New in the TPP’s Intellectual Property Chapter*, GLOB. POL’Y WATCH (Nov. 24, 2015), <https://www.globalpolicywatch.com/2015/11/whats-new-in-the-tpps-intellectual-property-chapter/> [https://perma.cc/WJ56-QVTL].

34. Pauwelyn, *supra* note 28, at 188.

35. *Id.*

36. TPP, *supra* note 9, art. 26.2.3.

37. *Id.* art. 26.2.4, 26.2.5.

38. See Sampson, *supra* note 14.

39. Pauwelyn, *supra* note 28, at 187.

40. Ederington & Ruta, *supra* note 13, at 38.

41. Wang, *Selective Engagement? Future Path for US-China Economic Relations and Its Implications*, *supra* note 15, 9–11.

coverage.⁴² They often provide for non-discriminatory treatment and reciprocity, but do not “intervene in domestic economic policies beyond this requirement.”⁴³ The new development of China’s FTAs is softened by weak obligations.⁴⁴ China’s FTAs contain “chapters of a regulatory nature but solely with ‘best endeavours’ and mere cooperative intentions” beyond WTO rules.⁴⁵ For WTO-plus and WTO-beyond issues, China’s FTAs are closer to a legal inflation approach (i.e., a relatively substantial number of areas covered by the pact, while very few of them include enforceable obligations) than a functionalist approach (aimed at guaranteeing the enforceability of selected policy areas).⁴⁶

E-commerce provides a good example. China’s FTAs do not address many major regulatory issues found in deep FTAs; this includes data flow, consumer protection, mandated transfer of source code, unsolicited commercial electronic messages, cybersecurity, the principle of open networks, privacy, non-discrimination in e-commerce, among other issues.⁴⁷ For the four crucial digital-trade-related policy objectives (cybersecurity, online consumer protection, personal data protection, and privacy), China’s FTAs keep quiet (on cybersecurity), refer to WTO exceptions (on privacy) or call for domestic frameworks (on online consumer protection, and personal data protection), which contrasts with the regulatory provisions in the U.S. and EU FTAs.⁴⁸ Overall, China’s FTAs highlight digital trade facilitation given the prominence of China-based e-commerce platforms selling goods, which contrasts with deep FTAs’ substantive e-commerce chapters covering various regulatory issues (ranging from online consumer protection to privacy).⁴⁹ China’s early harvest approach in e-commerce may be attributable to, inter alia, the effects of regulatory disciplines on behind-the-border measures and the constraint of “right-oriented” rules on regulatory powers.⁵⁰

Second, early harvest essentially involves standard forms of coordination under shallow agreements to address terms-of-trade externalities,⁵¹ which means states use restrictions (particularly tariffs) to “shift the cost of

42. Dilip K. Das, *Ripening Regional Economic Architecture in Asia*, 8–9 (CSGR Working Paper, Paper No. 277/13, 2013).

43. See BACCHETTA ET AL., *supra* note 8, at 110.

44. JACQUES PELKMANS ET AL., *TOMORROW’S SILK ROAD: ASSESSING AN EU-CHINA FREE TRADE AGREEMENT* 156 (Rowman & Littlefield Int’l 2016).

45. *Id.* at 9.

46. Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 *WORLD ECON.* 1565, 1580 (2010).

47. Ines Willemys, *Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, 23 *J. INT’L ECON. L.* 221, 225, 227 (2020).

48. *Id.* at 227, 239, 241.

49. *Id.* at 238.

50. Jie Huang, *Comparison of E-commerce Regulations in Chinese and American FTAs: Converging Approaches, Diverging Contents, and Polycentric Directions?*, 64 *NETH. INT’L L. REV.* 309, 323, 332, (2017).

51. Ederington & Ruta, *supra* note 13, at 55.

protecting a domestic industry onto foreign producers by altering the terms of trade.⁵² Trade agreements remove trade barriers to internalize externalities that states impose on each other.⁵³ This is terms-of-trade liberalization, which is often reflected in market access commitments (such as tariff cuts that avoid trade war and retaliatory tariffs) to escape the prisoner's dilemma.⁵⁴ Early harvest does not substantially constrain regulatory latitude, which predominantly concerns behind-the-border measures. Instead, tariff cuts are the major achievement of China's FTAs, and it is observed that China's FTAs prefer a "quid pro quo approach to negotiation."⁵⁵

The Phase One agreement also reflects efforts to mitigate prisoner's dilemma, and features short-term objectives and short-form rules.⁵⁶ As the low-hanging fruits of trade negotiations, it contains two major components: (i) China's purchase commitments that embody managed trade; and (ii) the reduction of targeted non-tariff measures (NTMs).⁵⁷ It addresses prioritized market access issues, instead of addressing long-term regulatory issues and setting systematic rules.⁵⁸ The early harvest approach can be compared with Mexico that appears to take a deeper approach. As a developing country, Mexico has four principles in its USMCA negotiations with the United States: (1) enhanced regional competitiveness through trade barrier reduction, investment promotion, regulatory improvements, and preferred market entry; (2) improved rule inclusiveness and sustainability (through new generation rules on labor, environment, small and medium size enterprises, anti-corruption, and so on); (3) technology-friendly rules (e.g., new rules on IP, digital trade, and financial technologies); and (4) enhanced predictability of the business environment (through strengthened dispute settlement processes and rules on state-owned enterprises (SOEs), competitiveness, and government procurement).⁵⁹ Most of these objectives are absent in the Phase One agreement, particularly the fundamental factors of rule inclusiveness and sustainability, and the predictability of the business environment.⁶⁰

52. Rodney D. Ludema & Anna Maria Mayda, *Do Terms-of-Trade Effects Matter for Trade Agreements? Theory and Evidence From WTO Countries*, 128 Q.J. ECON. 1837, 1838 (2013).

53. Asrat Tesfayesus, *Liberalization Agreements in the GATT/WTO and the Terms-of-trade Externality Theory: Evidence from Three Developing Countries*, 24 REV. INT'L ECON. 1, 3, (2016).

54. Ederington & Ruta, *supra* note 13, at 48, 49; Tesfayesus, *supra* note 53, at 1, 2.

55. Qingjiang Kong, *China's Uncharted FTA Strategy*, 46 J. WORLD TRADE 1191, 1196 (2012).

56. *What's in the U.S.-China Phase 1 Trade Deal*, REUTERS, (Jan. 15, 2020, 12:16 PM), <https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-1-trade-deal-idUSKBN1ZE2IF> [<https://web.archive.org/web/20201009152923/https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-1-trade-deal-idUSKBN1ZE2IF>].

57. *Id.*

58. *Id.*

59. Amrita Bahri & Monica Lugo, *Trumping Capacity Gap with Negotiation Strategies: the Mexican USMCA Negotiation Experience*, 23 J. INT'L ECON. L. 1, 4 (2020).

60. *Id.*

Third, the effects of early harvest include, primarily, the “‘trade creation’ versus ‘trade diversion’ effect” (“you’re-in-or-you’re-out,” “sell things”) under shallow agreements.⁶¹ Compared with deep FTAs, this effect is more obvious under early harvest given its focus on selective market access, which explains the concerns about possible trade diversion under the Phase One agreement.⁶² Early harvest often cannot fully address policy substitution in shallow agreements whereby states retract the effects of negotiated tariff concession by “utilizing alternate policies as a secondary trade barrier,” as seen with NTMs.⁶³ The three fundamental differences between regulatory plowing and early harvest will be further explored under the tripartite framework in the following sections: breadth, depth, and strength. The following sections will compare deep FTAs and China’s trade agreements and set off the factors of the analytical framework.

III. Breadth: Regulatory Outreach

The breadth of trade agreements refers to their regulatory outreach, which is defined as the “extensive” margin, reflecting the policy areas covered by trade agreements.⁶⁴ WTO agreements provide a useful threshold, in which regulatory outreach could be measured in two dimensions: (1) WTO-plus provisions (also termed as “WTO+”)⁶⁵ that are stricter commitments than or add to WTO obligations, like enhanced transparency rules; and (2) WTO-beyond obligations (also termed as “WTO-extra” or “WTO-X”)⁶⁶ that address issues not dealt with under the WTO and outside the WTO aegis, like those on labour market regulations, the environment and measures on asylum.⁶⁷ Featuring these rules, deep FTAs address “a larger set of policy areas, at the border and behind the border,” and have much broader breadth than China’s agreements.⁶⁸ The China-Korea FTA, as probably the most developed Chinese FTA, meanwhile, is “far from best” regarding the scope of its obligations.⁶⁹ Moreover, China’s FTAs contain “many carve-outs for sensitive sectors and are characterized by a low level of legal obligations.”⁷⁰

Breadth and depth are two interrelated sides of one coin. Extended outreach may also demand creating new and more sophisticated regulatory

61. Pauwelyn, *supra* note 28, at 187.

62. See, e.g., Powell, *supra* note 3.

63. Ederington & Ruta, *supra* note 13, at 34.

64. See BACCHETTA ET AL., *supra* note 8, at 9.

65. Horn et al., *supra* note 46, at 1567.

66. *Id.* at 1567.

67. See BACCHETTA ET AL., *supra* note 8, at 11.

68. See Mattoo & Ruta, *supra* note 8, at 6.

69. Jeffrey J. Schott et al., *An Assessment of the Korea-China Free Trade Agreement*, PETERSON INST. FOR INT’L ECON. (Dec. 2015), <https://www.piie.com/publications/pb/pb15-24.pdf> [<https://perma.cc/KG97-MA6Z>].

70. KA ZENG, HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 6 (2019).

mechanisms.⁷¹ WTO-plus and WTO-beyond obligations (e.g., enhanced transparency rules) also quantify the depth of agreements.⁷² To illustrate, regulatory coherence is provided in the CPTPP but not China's trade agreements, reflecting the former's broader breadth.⁷³ Meanwhile, regulatory coherence deepens the CPTPP through, *inter alia*, the adoption of good regulatory practices that profoundly affect domestic regulation.⁷⁴ Not surprisingly, an FTA could be broad and deep.⁷⁵ For instance, the USMCA and Australia–Singapore FTA are both the “deepest and most comprehensive” e-commerce FTAs to date.⁷⁶

A. WTO-PLUS RULES

1. *Overview*

Deep FTAs develop a large number of WTO-plus obligations, many of which are absent in China's trade agreements.⁷⁷ Deep FTAs set rules at a higher level across WTO-covered areas and go substantially beyond WTO law.⁷⁸ Deep FTAs drive down trading costs by “limiting or coordinating” NTMs through at least two types of WTO-plus rules: (1) rules on behind-the-border measures (e.g., regulations and standards on financial services and telecommunication, IP), and (2) “good governance-type” requirements in areas like transparency, customs administration, and trade facilitation.⁷⁹ To illustrate, the U.S. and EC FTAs have a high degree of similarity regarding the coverage of WTO plus areas,⁸⁰ going beyond China's trade agreements. These deep FTA rules range from those on sanitary and phytosanitary (SPS) issues (e.g., streamlined approval processes,⁸¹ often lacking in China's agreements) to government procurement (WTO-plus government procurement disciplines, while the negotiations on government procurement under China's FTAs will start after China's accession to the Agreement on Government Procurement).

71. BACCHETTA ET AL., *supra* note 8, at 110.

72. Horn et al., *supra* note 46, at 1569.

73. Ching-Fu Lin & Han-Wei Liu, *Regulatory Rationalisation Clauses in FTAs: A Complete Survey of the US, EU and China*, 19 MELBOURNE J. INT'L L. 149, 160 (2019).

74. *Id.* at 150.

75. Willemyns, *supra* note 47, at 241.

76. *Id.*

77. Nargiza Salidjanova & Jacob Koch-Weser, *China's Trade Ambitions: Strategy and Objectives Behind China's Pursuit of Free Trade Agreements*, STAFF RESEARCH REPORT, U.S.–CHINA ECON. & SECURITY REVIEW COMM'N 1, 18 (May 28, 2015), <https://www.uscc.gov/sites/default/files/Research/China's%20Trade%20Ambitions%20-%2005.28%2015.pdf> [<https://perma.cc/7Y5X-ZN2C>]; see also Pauwelyn, *supra* note 28, at 191–92.

78. Pauwelyn, *supra* note 28, at 187–96; Salidjanova & Koch-Weser, *supra* note 77, at 17.

79. Pauwelyn, *supra* note 28, at 188.

80. Horn et al., *supra* note 46, at 1575.

81. *CETA – Summary of the Final Negotiating Results*, EUR. COMM'N (Feb. 2016), https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf [<https://perma.cc/6WJF-Z9YY>].

China's FTAs are WTO-style agreements in WTO-covered areas and spill much more ink over traditional trade in goods and services than other areas.⁸² There is path dependence in China's FTAs, which closely follow WTO law.⁸³ WTO norms have made limited progress in promoting further cooperation on new policy issues to address the spillover effects of domestic regulation on international commerce.⁸⁴ To illustrate, the WTO system takes a shallow integration approach to product standards featured predominantly by the national treatment principle.⁸⁵ China's FTAs have a limited number of WTO-plus disciplines that clarify or develop targeted WTO rules.⁸⁶ For example, in e-commerce, Chinese FTAs limit their scope mainly to clarifying WTO obligations (including reiterating the WTO moratorium on electronic transmission and GATS exceptions) and focus on e-commerce promotion (trade in goods facilitated by the Internet).⁸⁷ Concerning anti-dumping investigations, often against Chinese exports, the China-Korea FTA calls for no "use of surrogate price or surrogate cost in determining normal value and export price."⁸⁸

The Phase One agreement contains more sectoral WTO-plus rules than China's FTAs.⁸⁹ For technology transfer, the agreement goes beyond China's WTO accession commitment that "any other means of approval for importation . . . or investment" shall not be conditioned on technology transfer.⁹⁰ China agrees to prohibit forced technology transfer as a precondition of administrative approvals, market entry, or receiving advantages from the government.⁹¹ The Phase One agreement prohibits the support of outbound investments aimed at acquiring foreign technology pursuant to industrial plans that create distortion.⁹² Both provisions are

82. Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?*, GERMAN DEV. INST., (July 2013), https://www.die-gdi.de/uploads/media/DP_7.2013.pdf [<https://perma.cc/DHU6-BW2D>].

83. Francis Snyder, *China, Regional Trade Agreements and WTO Law*, 43 J. WORLD TRADE 1, 1 (2009).

84. Bernard Hoekman & Petros C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, INT'L CTR. FOR TRADE & SUBSTANTIAL DEV., (Apr. 2015), <http://e15initiative.org/wp-content/uploads/2015/04/E15-Regulatory-OP-Hoekman-and-Mavroidis-FINAL.pdf> [<https://perma.cc/F9CC-B398>].

85. Ederington & Ruta, *supra* note 13, at 52–53.

86. *Understanding the WTO: The Agreements: Anti-dumping, Subsidies, Safeguards: Contingencies, etc.*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm [<https://perma.cc/22QW-3HAE>] (last visited Jan. 3, 2021).

87. Willemyns, *supra* note 47, at 227, 240.

88. Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea, China-S. Kor., at 67 (art. 7.7.4), June 1, 2015 [hereinafter China-Korea FTA].

89. See generally U.S. China Phase One Agreement, *supra* note 1.

90. World Trade Organization, Ministerial Decision of 10 November 2001, WTO Doc. WT/L/432 § 7.3 (2001).

91. U.S. China Phase One Agreement, *supra* note 1, at art. 2.3.2.

92. *Id.* at art. 2.1.3.

unprecedented in international agreements signed by China.⁹³ Due process and transparency are required for the enforcement of laws, regulations, and administrative proceedings.⁹⁴ In agriculture, the Phase One agreement provides for China's increased acceptance of international standards.⁹⁵ It also provides for streamlined procedures and improved efficiency regarding audits and inspections for dairy products and infant formula.⁹⁶ But coverage of WTO-plus rules in the Phase One agreement is limited to selective areas (prioritizing IP, agriculture and technology transfer) and is much narrower than deep FTAs.⁹⁷ Outside these prioritized areas, the Phase One agreement contains few WTO-plus obligations.⁹⁸

2. Case Study: E-commerce, Trade Facilitation, and IP

E-commerce, trade facilitation, and IP provide key illustrations of the differences between Chinese FTAs and deep trade agreements. E-commerce is an area in which China is playing a leading role, and trade facilitation is an area prioritized by China, which has shared interests with developed economies in terms of reducing trading costs.⁹⁹ IP is a major issue in both Chinese and deep trade agreements.¹⁰⁰

China has cautiously adopted e-commerce-related FTA rules since 2003, in contrast with the considerable WTO-plus rules in U.S. FTAs' e-commerce chapters.¹⁰¹ As discussed above, deep FTAs contain detailed regulatory rules such as the prohibition of data server localization requirements and the equal treatment of digital content.¹⁰² China's FTAs focus on trade facilitation instead of strict regulatory disciplines and lack many of the WTO-plus rules seen in deep FTAs (e.g., the CPTPP, KORUS FTA and Australia-U.S. FTA (AUSFTA)).¹⁰³ The three-page China-Korea FTA e-commerce chapter only addresses five major issues: (1) the support of electronic authentication and signatures,¹⁰⁴ (2) and non-imposition of duties on electronic transmissions,¹⁰⁵ (3) paperless trading,¹⁰⁶ (4) personal

93. Jyh-An Lee, *Shifting IP Battlegrounds in the U.S.–China Trade War*, 43(3) COLUM. J. L. & ARTS 147, 174 (2020).

94. U.S. China Phase One Agreement, *supra* note 1, at art. 2.4.

95. *See, e.g., id.* at ch. 3, annex 4, ¶ 5.

96. *Id.* at ch. 3, annex 2, ¶ 4(b).

97. *See generally* U.S. China Phase One Agreement, *supra* note 1.

98. *Id.*

99. Willemys, *supra* note 47, at 235.

100. Pratyush Nath Upreti & María Vásquez Callo-Müller, *Phase One US-China Trade Deal: What Does It Mean for Intellectual Property?*, 69(4) GRUR INT'L J. EUR. & INT'L IP L. 1, 3 (2020).

101. Willemys, *supra* note 47, at 225.

102. *See* discussion *supra* Section II.A.

103. *See* Willemys, *supra* note 47, at 241.

104. China-Korea FTA, *supra* note 88, at art. 13.4.

105. *Id.* at art. 13.3.

106. *Id.* at art. 13.6.

information protection,¹⁰⁷ and (5) regulatory cooperation.¹⁰⁸ Most of these rules, like the support of electronic authentication and signatures, and paperless trading, fall within digital trade facilitation.¹⁰⁹

The Phase One agreement lacks e-commerce rules except for several IP-related aspects (online infringement¹¹⁰ and infringement on e-commerce platforms).¹¹¹ The agreement provides for a notice and takedown system to address online piracy and counterfeiting, in which it eliminates liability for erroneous takedown notices submitted in good faith, and penalizes notices and counter-notifications submitted in bad faith.¹¹² The lack of e-commerce rules is partially due to the gap between the United States and China on crucial issues like data flow.¹¹³

Even in customs administration, an area in which China's FTAs are close to deep FTAs, the rules are different. Deep FTAs and the China-Korea FTA provide for simplified customs procedures for the efficient release of goods.¹¹⁴ The Phase One agreement does not contain such provisions on customs administration.¹¹⁵ Deep FTAs develop new rules on trade facilitation,¹¹⁶ which go beyond the WTO Agreement on Trade Facilitation (TFA). Shown in the total page numbers of the respective chapter on customs administration and trade facilitation, deep FTAs (the USMCA at twenty-four pages and the CPTPP at ten pages) contain more detailed and stringent obligations than the China-Korea FTA with its seven pages.¹¹⁷ As an illustration, the TPP is more stringent in requiring express shipments to be normally released within six hours after submission of customs documents and provided the shipment has arrived.¹¹⁸ The USMCA requires, inter alia, online publication (e.g., web links to current customs duties, fees and charges, including when the fee or charge applies, and the amount or rate);¹¹⁹ a mechanism to regularly communicate with traders on the procedures related to the importation, exportation, and transit of goods;¹²⁰ and uniform procedures throughout its territory for the issuance of advance rulings,

107. *Id.* at art. 13.5.

108. *Id.* at art. 13.7.

109. See Willemyns, *supra* note 47, at 223.

110. U.S. China Phase One Agreement, *supra* note 1, at art. 1.13.

111. *Id.* at art. 1.14.

112. *Id.* at art. 1.13.2.

113. See Willemyns, *supra* note 47, at 235.

114. See, e.g., China-Korea FTA, *supra* note 88, at art. 4.14; CPTPP, *supra* note 10, at art. 5.10.1; CETA, *supra* note 11, at art. 6.3.1.

115. See U.S. China Phase One Agreement, *supra* note 1, at art. 1.21.

116. Caroline Freund, *Other New Areas: Customs Administration and Trade Facilitation, Anticorruption, Small and Medium-Sized Enterprises, and More* 66, 67–8, PETERSON INST. FOR INT'L ECON. (Mar. 2016), <https://www.piie.com/system/files/documents/piieb16-4.pdf> [https://perma.cc/MM3G-RTUS].

117. Compare USMCA, *supra* note 12, at ch. 7, with CPTPP, *supra* note 10, at ch. 5, and China-Korea FTA, *supra* note 88, at ch. 4.

118. CPTPP, *supra* note 10, at art. 5.7.1.

119. USMCA, *supra* note 12, art. 7.2.

120. *Id.* art. 7.3.2.

including a detailed description of the information required to process a ruling application.¹²¹

Concerning IP, China's FTAs either have weaker coverage than deep FTAs or follow the features of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹²² China's FTAs make limited progress in respect of TRIPS-plus obligations.¹²³ The WTO-plus rule on genetic resources, traditional knowledge and folklore in the China-Australia FTA (ChAFTA) is one example.¹²⁴ The possible measures on genetic resources, traditional knowledge and folklore are subject to both international obligations and domestic law.¹²⁵ Regulatory latitude is nearly unaffected as the obligation is subject to domestic law.¹²⁶

Regarded as representing high standards,¹²⁷ the TRIPS-plus provisions of the Phase One agreement narrow the differences with deep FTAs and go far beyond China's FTAs in length and magnitude.¹²⁸ IP rules represent the deepest disciplines within the Phase One agreement and provide an excellent example to compare with deep FTAs.¹²⁹ On the one hand, the Phase One agreement substantially expands the coverage of IP issues to include new issues (like electronic intrusions¹³⁰ and the permission of patent applicants to rely on supplemental data),¹³¹ and broadens the scope of liability (so that any natural or legal persons could be liable for trade secret misappropriation¹³² and assumed by e-commerce platforms for IP infringement).¹³³ In particular, Phase One IP rules go far beyond the TRIPS in respect of issues like trade secrets protection.¹³⁴ They go a long way toward transplanting the U.S. rules, especially enforcement norms, into China.¹³⁵ Some of these

121. *Id.* art. 7.5.5.

122. Schott et al., *supra* note 69, at 13.

123. *Id.*

124. Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, art. 11.17, June 17, 2015, [2015] ATS 15 [hereinafter ChAFTA].

125. *Id.* art. 11.17.1.

126. *Id.*

127. *Economic and Trade Agreement Between the United States of America and the People's Republic of China Fact Sheet: Intellectual Property*, OFF. U.S. TRADE REPRESENTATIVE 1, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Phase_One_Agreement-IP_Fact_Sheet.pdf [<https://perma.cc/TT58-74TQ>] (last visited Jan. 3, 2021) [hereinafter USTR IP Fact Sheet].

128. Upreti & Callo-Müller, *supra* note 100, at 9.

129. *See id.* at 3.

130. U.S.-China Phase One Agreement, *supra* note 1, arts. 1.4.2(a), 1.8.2.

131. *Id.* art. 1.10.

132. *Id.* art. 1.3.1; *USTR IP Fact Sheet*, *supra* note 127, at, 1–2 (This scope goes beyond “entities directly involved in the manufacture or sale of goods and services” and covers former employees and cyberhackers.).

133. U.S.-China Phase One Agreement, *supra* note 1, art. 1.14.

134. Upreti & Callo-Müller, *supra* note 100, at 392.

135. *Id.*

provisions, such as criminal procedures and penalties for trade secret misappropriation, resemble the counterparts in U.S. FTAs.¹³⁶

On the other hand, with some exceptions,¹³⁷ the Phase One agreement is distinct from deep FTAs. The IP criminal and civil enforcement rules in the TPP¹³⁸ are much more detailed than in the Phase One agreement.¹³⁹ Many deep IP rules are adopted in a shortened version or are absent in the Phase One agreement.¹⁴⁰ As an example, the Phase One agreement is observed to still be “short” on specifics about the size and application of penalties for IP infringement.¹⁴¹ Notice and takedown against online infringement provisions in the Phase One agreement are similar to those in the U.S. Digital Millennium Copyright Act, but are “a much shorter version” of the U.S. counterpart.¹⁴² Various key TPP IP provisions that are absent in the Phase One agreement are suspended in the CPTPP,¹⁴³ including the extended terms of protection for copyright,¹⁴⁴ inventions derived from plants,¹⁴⁵ technological protection measures,¹⁴⁶ rights management information,¹⁴⁷ as well as legal remedies and Safe Harbours.¹⁴⁸

B. WTO-BEYOND RULES

Deep FTAs regulate trade and investment to an extent far beyond WTO rules.¹⁴⁹ They are much more comprehensive than China’s trade agreements in WTO-beyond areas.¹⁵⁰ The WTO-beyond rules in deep FTAs range from SOEs, competition, and anti-corruption, to currency and social matters.¹⁵¹

Deep FTAs strive to reduce or harmonize NTMs in WTO-beyond areas (e.g., capital flows), and to incorporate good governance rules in various areas (e.g., “the making and enforcement of labour and environmental laws

136. *Id.* at 390.

137. *Id.* (Under the Phase One agreement, the burden of proof shifts to the defendant in civil proceedings if the trade secret owner provides reasonable evidence of trade secret misappropriation. This is unprecedented in the U.S. trade agreements.).

138. TPP, *supra* note 9, ch. 18, sec. I.

139. Upreti & Callo-Müller, *supra* note 100, at 391.

140. *Id.* at 392.

141. Michael Collins et al., *What’s in Trump’s ‘Phase One’ Trade Deal Between the U.S. and China?*, USA TODAY (Jan. 16, 2020, 10:55 AM), <https://www.usatoday.com/story/news/politics/2020/01/15/trump-trade-agreement-china-what-in-phase-one-agreement/4434624002/> [<https://perma.cc/2TNC-JMBZ>].

142. Upreti & Callo-Müller, *supra* note 100, at 391.

143. *Id.* at 392.

144. TPP, *supra* note 9, at art. 18.63.

145. *Id.* art. 18.37.

146. *Id.* art. 18.68.

147. *Id.* art. 18.69.

148. *Id.* art. 18.82.

149. Petersmann, *supra* note 27, at 34.

150. Sampson, *supra* note 14.

151. Horn et al., *supra* note 46, at 15.

and regulations”).¹⁵² To illustrate, rules on competition policy protect business interests through the promotion of a level playing field.¹⁵³ In the same vein, deep FTAs start to develop increasingly strong rules on currency.¹⁵⁴ The TPP is the first FTA to be explicitly connected to exchange rate and macroeconomic policies.¹⁵⁵ These provisions have developed into an USMCA chapter. The USMCA is the first FTA to include “measures to guard against currency manipulation,” although the provisions have a limited reach due to the U.S. Department of Treasury’s reluctance to address currency issues in trade agreements.¹⁵⁶

Chinese trade agreements adopt a cautious and selective approach to WTO-beyond issues, except for investment.¹⁵⁷ These WTO-beyond rules are generally far from fully-fledged.¹⁵⁸ China’s FTAs eschew many new issues (like competition, SOEs, and substantive rules regarding the digital sphere).¹⁵⁹ They extend to a very limited number of preferred issues, such as investment facilitation in the China-Singapore FTA upgrade that calls for cooperation rather than substantive provisions.¹⁶⁰ The Phase One agreement covers fewer new issues than China’s FTAs, but addresses currency issues for the first time in China’s trade agreements. The short-form rules on currency in the Phase One agreement essentially confirm the international commitments of the parties and are less detailed than the USMCA. They build on the USMCA, under which the parties will publish monthly data on foreign exchange reserve balances and intervention in foreign exchange markets, quarterly balance of payments data and other reporting to the IMF.¹⁶¹ These rules increase the transparency of foreign exchange and prohibit competitive devaluations.¹⁶² They require the disclosure of monthly data on foreign exchange reserves, quarterly exports

152. Pauwelyn, *supra* note 28, at 188.

153. Asif H. Qureshi, *International Legal Aspects of Free Trade Agreements in Northeast Asia*, 16 MANCHESTER J. INT’L L. 2, 8 (2019).

154. Fred Bergsten & Jeffrey J. Schott, *TPP and Exchange Rates*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 116 (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

155. *Id.* at 115.

156. David A. Gantz, *The United States-Mexico-Canada Agreement: Overview and Analysis*, BAKER INST. REP. 3 (2018).

157. Ganeshan Wignaraja, *PRC and India: Pursuing the Same Approach to Free Trade Agreements?*, ADB INST. (Oct. 24, 2012), <https://www.asiapathways-adbi.org/2012/10/prc-and-india-pursuing-the-same-approach-to-free-trade-agreements/> [<https://perma.cc/Z2W8-4NUG>].

158. *Id.*

159. Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order?*, 1, 28 (U.C. Irvine Sch. L. & Legal Stud. Rsch. Paper Series No. 2019-21, 2019).

160. China-Singapore Free Trade Agreement Upgrade Protocol, China-Sing., app. 4, art. 21, Oct. 16, 2019.

161. USMCA *supra* note 12, at art. 33.5; David Lawder et al., *What’s in the U.S.-China ‘Phase One’ Trade Deal*, REUTERS (Dec. 31, 2019, 5:19 PM), <https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-one-trade-deal-idUSKBN1YH2IL> [<https://perma.cc/ZY8W-MVRR>].

162. U.S. China Phase One Agreement, *supra* note 1, Article 5.2.3.

and imports of goods and services, and balance of payments.¹⁶³ Notably, the USMCA imposes more obligations than the Phase One agreement with respect to the publishing of monthly interventions in spot and forward foreign exchange markets.¹⁶⁴

In particular, the cautious approach is reflected in social issues. Social issues are basically absent in the Phase One agreement given its narrow focus on market access. China's FTAs occasionally contain an extremely limited number of general and non-binding rules on a narrow range of social issues. China's FTAs only touch upon certain aspects of consumer protection¹⁶⁵ and often use more ambiguous conflicts clauses that confirm the rights and obligations under other agreements like those on the environment.¹⁶⁶ The issue of human rights was raised by Australia in the ChAFTA negotiations, yet the final ChAFTA text avoids mentioning it.¹⁶⁷

Given that China and the United States have both entered into FTAs with Chile and Peru, they provide excellent illustrative examples.¹⁶⁸ China's FTAs with Chile and Peru focus on the establishment of strong trade relations, and only comment on the issues of labour, the environment, and transparency within the declaratory and thus non-binding language of the pacts' preambles.¹⁶⁹ The United States' FTAs with Chile and Peru are more regulation-oriented, and directly tackle issues not considered in Chinese FTAs.¹⁷⁰ They set out strict compliance requirements within three key areas: labour, the environment, and transparency.¹⁷¹

This selective approach is reflected in the form of rules on social issues. China's FTAs often adopt Memorandums of Understanding (MOUs) or side agreements.¹⁷² If demanded by trading partners, China prefers to address labour issues in standalone side agreements or MOUs.¹⁷³ Related to the China-Switzerland FTA, the Agreement on Labour and Employment reaffirms the international obligations of the two sides under relevant treaties and international organizations and calls for collaboration but does

163. *Id.* art. 5.3.

164. USMCA, *supra* note 12, at art. 33.5.

165. China-Korea FTA, *supra* note 88, at art. 14.6., annex 9-1.

166. Lorand Bartels, *Social Issues: Labour, Environment, and Human Rights, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 364, 374, (Simon Lester et al. eds., 2016).

167. Sheng Zhang, *Human Rights and International Investment Agreement: How to Bridge the Gap?*, 7 CHINESE J. COMPAR. L. 457, 472 (2019).

168. See generally Free Trade Agreement, Chile-China, Apr. 13, 2008; Free Trade Agreement, China-Peru, Apr. 28, 2009.

169. Salidjanova & Koch-Weser, *supra* note 77, at 31.

170. *Id.* at 19.

171. *Id.* at 18.

172. Henry Gao, *China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements* RTA EXCHANGE (Aug. 25, 2017), <https://ictsd.iisd.org/opinion/china-3> [<https://perma.cc/KPK2-U5QM>].

173. *Id.*

not impose stringent binding obligations.¹⁷⁴ In contrast, labour and environment rules appear as part of the CPTPP and are subject to dispute settlement.¹⁷⁵ The rules on social issues reveal the substantial gap between deep FTAs and China's trade agreements in going beyond WTO rules.

IV. Depth: Regulatory Density

Depth is concerned with regulatory density—the penetration¹⁷⁶ of trade agreements into domestic regulatory practice primarily through reduced regulatory barriers. The content of FTAs is becoming increasingly deeper. Deep agreements move beyond “a simple free trade area” and contain deeper policy commitments (such as the harmonization of domestic regulation of financial services, and environmental standards).¹⁷⁷ This is because behind-the-border measures have become a topic of increasing concern over the years. Two major indicia enable the evaluation of such depth: (1) regulatory cooperation and coherence, and (2) domestic law changes.

A. REGULATORY COOPERATION AND COHERENCE

Regulatory cooperation and coherence are representative elements by reference to which the depth of agreements can be evaluated. This is because regulatory cooperation and coherence are hallmarks of deep FTAs and bring into play regulatory changes that are otherwise difficult to generate. Affecting wide-ranging areas, they address coordination externalities (i.e., the heterogeneity of different national policies and measures).¹⁷⁸

1. Deep FTAs

Deeper regulatory cooperation and coherence represent the new frontier of deep FTAs and are distinctive characteristics of recent FTAs involving OECD members (like the CPTPP, USMCA) and TTIP negotiations.¹⁷⁹ They are intended to reduce the spillover effects of regulatory measures through steps like mutual recognition agreements.¹⁸⁰

174. China-Switzerland Agreement on Labour and Employment, China-Switz., art. 10, ¶3, July 6, 2013.

175. CPTPP, *supra* note 10, at arts. 19.15, 20.23.

176. Jale Tosun & Christoph Knill, *Economy and Sustainability—How Economic Integration Stimulates Stringent Environmental Regulations*, 1 SUSTAINABILITY 1305, 1313 (Dec. 15, 2009), <https://www.mdpi.com/2071-1050/1/4/1305/pdf> [<https://perma.cc/8WZL-PJZZ>].

177. Bacchetta et al., *supra* note 8, at 8–9, 110.

178. Ederington & Ruta, *supra* note 13, at 42–43.

179. Hoekman & Mavroidis, *supra* note 84, at 8.

180. *Id.* at 2.

Regulatory coherence and cooperation of deep FTAs¹⁸¹ usually involve three types of rules: (1) regulatory coherence across regulatory regimes, which adopts good regulatory practices relating to domestic processes for the adoption, enactment, and administration of regulatory measures;¹⁸² (2) loose forms of regulatory cooperation that establish procedural or institutional frameworks to enhance regulatory collaboration;¹⁸³ and (3) deep forms of regulatory cooperation to substantively harmonize standards, and develop arrangements on mutual recognition or the equivalency of regulations recognising each other's laws, standards, measures or processes¹⁸⁴ (like in CETA protocol on the mutual acceptance of the results of conformity assessment).¹⁸⁵

Put differently, regulatory coherence often refers to the adoption of common principles of due process in domestic regulation (including transparency and stakeholder engagement) and focuses more on processes than the substance of regulation, while regulatory cooperation refers to measures that may reduce divergence between jurisdictions (like information sharing, mutual recognition, equivalence arrangements, and regulatory compatibility) and often proceed to substantive issues.¹⁸⁶

Deep FTAs highlight regulatory cooperation and coherence. The TPP and CETA have "a similar basic structure" regarding regulatory coherence or cooperation.¹⁸⁷ Featuring the hallmarks of U.S. administrative law, regulatory coherence has been hardened by the United States from non-binding instruments in trans-governmental networks (e.g., OECD and APEC) into a core part of the TPP.¹⁸⁸ The CPTPP is the first mega FTA containing all regulatory coherence elements.¹⁸⁹ These include transparency and public consultation, regulatory impact assessment, inter-agency coordination and compatibility, and accountability based on administrative

181. For the differences between the U.S. and EU approaches, see, e.g., Simon Lester & Inu Manak, *Will Regulations Sink EU-U.S. Free Trade?*, (Oct. 15, 2013), <http://www.cato.org/publications/commentary/will-regulations-sink-eu-us-free-trade> [<https://perma.cc/SW4L-KT7W>].

182. For example, the call for regulatory measures that are "plainly written . . . clear, concise, well organised and easy to understand." CPTPP, *supra* note 10, at art. 25.4.

183. Like the sharing of information used in risk assessment, or the Regulatory Cooperation Forum under CETA. CETA, *supra* note 11, at art. 21.6.

184. Elizabeth Golberg, *Regulatory Cooperation – A Reality Check*, 6 (M-RCBG Assoc. Working Paper Series, No. 115, 2019).

185. Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?*, 15 *WORLD TRADE REV.* 587, 596 (2016).

186. Junji Nakagawa, *Regulatory Co-operation and Regulatory Coherence Through Mega-FTAs: Possibilities and Challenges*, in *INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA* 392–93 (Julien Chaisse & Tsai-yu Lin eds., 2016); Hoekman & Mavroidis, *supra* note 84, at 2.

187. Joana Mendes, *Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation* 6, n.19 (Inst. Int'l. L. & Just. Working Paper No. 2016/5, 2016).

188. Lin & Liu, *supra* note 73, at 12.

189. *Id.* at 15.

and judicial review.¹⁹⁰ The CETA is the first FTA that contains a chapter on regulatory cooperation.¹⁹¹ Later, the USMCA's good regulatory practices chapter (fifteen pages) doubles the rules of its CPTPP counterpart (seven pages) and introduces more stringent disciplines.¹⁹² The new regulatory coherence rules in the USMCA range from retrospective review to decide the need for modification or repeal¹⁹³ to information quality (e.g., "reliable and of high quality")¹⁹⁴ and the publication of regulatory processes (like information about mechanisms employed by regulators to prepare, evaluate, or review regulations).¹⁹⁵

More broadly, deep FTAs aim to bring regulatory harmony by affecting different countries' regulatory regimes. Regulatory harmony means reduced inconsistency among diverse regulatory systems through various means such as mutual recognition, recognition of equivalence, and regulatory harmonization that refers to convergence on the substance of regulatory norms.¹⁹⁶ Addressing the relationship between "means" and "ends" to "rationalize" policies, regulatory coherence intends to provide harmony across policies so that the interventions are not excessively demanding or inconsistent.¹⁹⁷ A variety of specific issues in domestic regulation are affected, including trademark law,¹⁹⁸ workplace safety communication rules,¹⁹⁹ and domestic regulation of product safety, environmental, and social conditions.²⁰⁰ These domestic regulatory practices are affected in various ways—for example, through consultations between USMCA parties' regulators to narrow differences between their regulations,²⁰¹ and regulatory reforms under NAFTA to harmonize North American law, at least to some degree.²⁰² Given the variations in domestic regulatory systems, it may be enormously difficult to converge on the substance of all regulatory norms, but the reduction of regulatory divergency is needed.²⁰³

190. *Id.* at 13.

191. Sheargold & Mitchell, *supra* note 185, at 596.

192. USMCA, *supra* note 12, at ch. 28; CPTPP, *supra* note 10, at ch. 25.

193. USMCA, *supra* note 12, at art. 28.13(1).

194. *Id.* art. 28.5(1).

195. *Id.* art. 28.15(1)-(2)(a), (c).

196. Hoekman & Mavroidis, *supra* note 84, at 3.

197. *Id.* at 4.

198. Roberta L. Horton, *Harmonizing Trademark Laws: Changes at the Heart of the USMCA*, ARNOLD & PORTER (Oct. 29, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/harmonizing-trademark-laws> [<https://perma.cc/MPE5-5QVB>].

199. Sharon Anglin Treat, *FAQ—Regulatory Cooperation, Harmonization and “Good Regulatory Practices” in USMCA*, IATP (Jan. 16, 2019), <https://www.iatp.org/new-nafta-grp> [<https://perma.cc/62U6-DQK2>].

200. Bernard Hoekman & Charles Sabel, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO*, 1 (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Stud., Working Paper No. RSCAS 2019/10, July 5, 2019).

201. Treat, *supra* note 200.

202. Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 420 (1995).

203. Lester & Manak, *supra* note 181.

2. *China's FTAs*

Differing markedly from deep FTAs, China's FTAs focus on loose forms of regulatory cooperation rather than regulatory coherence. They neither develop a dedicated chapter on regulatory coherence or cooperation nor provide for regulatory coherence. Regulatory cooperation, provided in China's FTAs, is a way of leaving the discussion of certain issues to a future date than setting rules now.

Foremost, China involves itself in extremely limited deep forms of regulatory cooperation. Typical deep forms of regulatory cooperation are mutual recognition arrangements (MRAs) in the China-New Zealand FTA, which focuses on market access.²⁰⁴ Its MRA on electrical and electronic equipment enables New Zealand to be "one of the only countries in the world where China Compulsory Certification (CCC) can be approved outside of China."²⁰⁵ Such arrangements are not common in China's trade agreements.

Regulatory cooperation in Chinese FTAs often involves optional information sharing. Concerning economic cooperation, the China-Korea FTA provides that both sides "may use instruments and modalities, such as exchange of information, experiences, and best practices, for the identification, development, and implementation of projects."²⁰⁶ It mentions "best practices" three times and is usually limited to the information exchange of best practices,²⁰⁷ instead of the adoption of best practices under deep FTAs. Similarly, China treats good regulatory practices ambiguously under the narrow technical barriers to trade (TBT) context in very few FTAs, reflecting the complicated social, legal, and other underpinnings of China.²⁰⁸ The China-New Zealand FTA has a side agreement on environmental cooperation.²⁰⁹ These common cooperation activities appear to be mostly exchanges of experiences and visits, and joint events (like seminars).²¹⁰

Second, China's FTAs eschew regulatory rights and follow a "developing country" FTA pattern.²¹¹ The lax and aspirational regulatory cooperation rules in China's FTAs are provided in loosely worded obligations or hortatory statements. Dent argues that China's regulatory disciplines are

204. *Id.*

205. *New Zealand Ministry of Foreign Affairs and Trade, Using the New Zealand-China FTA*, N.Z. FOREIGN AFFS. & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/using-nz-china-fta/> [<https://perma.cc/9PHT-QUS3>] (last visited Jan. 26, 2021).

206. China-Korea FTA, *supra* note 88, at art. 17.2.3.

207. *Id.* arts. 13.7, 17.2.3, 17.23.2.

208. Lin & Liu, *supra* note 73, at 19–20.

209. Free Trade Agreement, China-N.Z., Apr. 7, 2008.

210. Environment Cooperation Agreement, art. 3, Mar. 25, 2010, 3 NZTS A. 615.

211. Christopher M. Dent, *Free Trade Agreements in the Asia-Pacific a Decade on: Evaluating the Past, Looking to the Future*, 10 INT'L REL. ASIA-PAC. 201, 231 (2010).

“more geared towards trade development capacity needs.”²¹² Therefore, they generally prefer shallow regulatory cooperation over more onerous regulatory disciplines.²¹³ For e-commerce, China’s FTAs contain less structured cooperation rules (e.g., cooperation on addressing spam) than those of the United States and EU.²¹⁴ In some settings, China prefers maintaining national frameworks instead of regulatory cooperation. This preference is the case with China’s online consumer protection in e-commerce provisions, which contrast with EU FTAs’ regulatory cooperation provisions.²¹⁵

Third, China’s regulatory cooperation often targets prioritized areas. It is uncommon to find detailed and across-the-board regulatory cooperation rules in China’s FTAs. To illustrate, the China-ASEAN FTA identified several prioritized cooperation areas, including agriculture, information and communications technology, human resources development, investment, and Mekong River basin development.²¹⁶

3. *The Phase One Agreement*

The Phase One agreement is deeper than Chinese FTAs on strengthening regulatory cooperation. But it lags behind deep FTAs because it is limited to very narrow areas (particularly agriculture) and does not have systematic rules on regulatory cooperation or coherence.²¹⁷

The Phase One agreement provides for select deep forms of regulatory cooperation, including the recognition of the equivalency of U.S. regulations and the adoption of international standards.²¹⁸ This is particularly evident in agriculture, where NTMs are common. Such provisions range from the recognition of the U.S. dairy-safety system as providing the same level of protection as China’s counterpart,²¹⁹ to the recognition of inspection of U.S. pork and beef by the Food Safety and Inspection Service of the U.S. Department of Agriculture,²²⁰ and the recognition of the U.S. beef and beef products traceability system.²²¹ China will also adopt a U.S. automation system for accessing export certificates regarding meat and poultry.²²² China has committed to adopting international standards for maximum residue

212. *See id.*

213. *Id.*

214. Willemyns, *supra*, note 47, at 232.

215. *Id.* at 19.

216. Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People’s Republic of China, art. 7, Nov. 4, 2002.

217. *See generally* U.S. China Phase One Agreement, *supra* note 1.

218. *Id.*

219. *Id.* at Annex 2-2(b), art. 3.1.

220. *Id.* at Ch. 3, Annex 4, ¶ 4, Annex 6, ¶ 2.

221. *Id.* at Ch. 3, Annex 4, ¶ 3.

222. *Id.* Ch. 3, annex 8, ¶ 1; Faith Oktay *The Phase One Trade Deal: What’s in IT for China?*, THE DIPLOMAT (Jan. 18, 2020), <https://thediplomat.com/2020/01/the-phase-one-trade-deal-whats-in-it-for-china/> [https://perma.cc/47BG-9K35].

limits of Codex Alimentarius Commission regarding beef.²²³ Along with other provisions, China's regulatory changes in agricultural trade, as a whole, account for over a quarter of the Phase One agreement text.²²⁴

The Phase One agreement calls for other regulatory cooperation in select issues, including trade secret protection,²²⁵ measures against counterfeiting and infringement in the e-commerce market,²²⁶ IP border enforcement,²²⁷ agriculture,²²⁸ and financial services.²²⁹ IP protection cooperation refers to information sharing, industry outreach, and regular meetings.²³⁰ Notably, the most detailed regulatory cooperation rules are an eleven-paragraph annex on agriculture.²³¹ Going beyond information exchange, the annex provides for technical consultations (including pesticide registration and trial data, the setting of maximum residue levels, and sustainable agricultural development) and engagement on agriculture-related TBT and SPS measures (including on the subject of risk communication).²³²

Overall, China's FTAs resemble WTO norms that have few obligations imposed for harmonization.²³³ Additionally, the possibility of regulatory harmonization is further constrained by China's lack of consistent FTA practices.²³⁴ China often relies on the FTA proposals of trading partners.²³⁵ In the end, the Phase One agreement deviates from the loose form of regulatory cooperation in China's FTAs and pushes for limited regulatory harmony particularly regarding agriculture.²³⁶

B. DOMESTIC LAW CHANGE

The modification of domestic law is an important indicator of trade agreements' depth—with deep FTAs being the deepest, China's FTAs being the shallowest, and the Phase One agreement sitting in the middle. Deep integration (like deep FTAs) requires states to directly negotiate over and create domestic policies, while shallow integration (like China's FTAs) provides states with more latitude in domestic policy making (e.g., NTMs).²³⁷ The Phase One agreement is deeper than China's FTAs but still falls within shallow integration.

223. U.S.-China Phase One Agreement, *supra* note 1, at 3-9.

224. Oktay, *supra* note 224.

225. U.S.-China Phase One Agreement, *supra* note 1, at 1-2.

226. *Id.* at Ch. 1 § E.

227. *Id.* at art. 1.21.3.

228. *Id.* at art. 3.1(a).

229. *Id.* at arts. 4.1, 4.2.

230. *Id.* at art. 1.33.

231. *Id.* at Ch. 3, Annex 1 ¶ 1.

232. *Id.* at Ch. 3, Annex 1 ¶ 2.

233. Hoekman & Mavroidis, *supra* note 84, at 3.

234. Salidjanova & Koch-Weser, *supra* note 77, at 22.

235. *Id.*; Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 J. WORLD INV. & TRADE 843, 867 (2015) (regarding China's investment rules).

236. See U.S.-China Phase One Agreement, *supra* note 1, at annex 1.

237. Ederington & Ruta, *supra* note 13, at 38-39.

1. *Deep FTAs*

Deep FTAs are much more constraining than China's trade agreements. The Phase One agreement is distinct from deep FTAs because it has much less regulatory discipline covering narrow issues. To some extent, the Phase One agreement is closer to U.S.-China Joint Commission on Commerce and Trade outcome sheets than FTAs.²³⁸

Deep FTAs often feature precise binding disciplines governing domestic policies and stricter obligations, like harmonization or mutual recognition.²³⁹ Deep FTAs increasingly target NTMs (the substantive chapters of the CETA mostly address NTMs)²⁴⁰ and set stringent regulatory controls for domestic regulation. These pacts, such as the TPP and CETA, provide for higher standards than previous trade pacts in dealing with crucial issues like labour and the environment.²⁴¹

Deep FTAs, like other deep international agreements, require "extensive changes to existing behaviour."²⁴² Deep regulatory rules require institutional development and a high policy coordination level, which brings major rule changes when developing country are parties.²⁴³ These rules directly constrain domestic policymaking because enforceable regulatory obligations could "lock in structural reforms at national-level and promote implementation of second generation reforms."²⁴⁴ Deep rules like TPP provisions require "deeper domestic administrative, regulatory, and legal reforms."²⁴⁵ To illustrate, the CPTPP IP rules are expected to bring significant changes to Vietnam.²⁴⁶

238. Mark Cohen, Comment to *Selective Engagement? Future Path for US-China Economic Relations and Its Implications*, LINKEDIN, <https://www.linkedin.com/feed/update/urn:li:activity:6674591821076819968?commentUrn=urn%3A%3Acomment%3A%28activity%3A6674591821076819968%2C6674693062188527616%29> [https://perma.cc/6VBB-MDAU] (last visited Jan. 21, 2021).

239. Ederington & Ruta, *supra* note 13, at 40.

240. Hoekman & Mavroidis, *supra* note 84, at 8.

241. Aaron Cosbey, *Inside CETA: Unpacking the EU-Canada Free Trade Deal*, 9 *BIORES* 14, 14–15 (Nov. 2014).

242. Laurence R. Helfer, *Flexibility in International Agreements*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 175*, 175 (Dunoff & Pollack eds., Cambridge Univ. Press 2012).

243. Benjamin Faude, *Breaking Gridlock: How Path Dependent Layering Enhances Resilience in Global Trade Governance*, 11 *GLOB. POL'Y* 448, 454 (2020).

244. Wignaraja, *supra* note 157.

245. Jing Tao, *TPP and China: A Tale of Two Economic Orderings?*, in *MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP* 79, 92 (Benedict Kingsbury et al. eds., Oxford Univ. Press 2019).

246. See, e.g., Linh Duy Mai, *CPTPP Brings Significant and Effective Change to Vietnam's IP Landscape*, *MANAGING IP* (Feb. 4, 2019), <https://www.tilleke.com/resources/cptpp-brings-significant-and-effective-changes-vietnam%E2%80%99s-ip-landscape> [https://perma.cc/DVD2-V6VA].

2. *China's Trade Agreements*

China's FTAs, including the China-Korea FTA, do not seek to push through significant domestic regulatory reform.²⁴⁷ They contain traditional rules that often focus on border measures (like tariff cuts), rather than stringent regulatory disciplines on NTMs.²⁴⁸ China's FTAs usually can be implemented by administrative agencies.²⁴⁹ They do not require legal amendments by the legislature, nor a wide-ranging review of domestic law.²⁵⁰ Put differently, China's FTAs may bring certain changes, predominantly in the administrative practice sphere,²⁵¹ and thus may thus be considered as shallow FTAs that permit states greater latitude in adopting NTMs.²⁵²

The impacts of the Phase One agreement on the Chinese legal system are deeper than those brought by Chinese FTAs. This is reflected in its more stringent but sector-specific regulatory rules in narrow prioritized areas (particularly IP, agriculture, financial services, and technology transfer).²⁵³ The Phase One agreement is likely to impact judicial and administrative practices related to criminal enforcement of IP rules.²⁵⁴ For instance, the Supreme People's Court overruling of two previous lower court judgments concerning the Chinese name of Michael Jordan arguably reflects the commitments under the Phase One agreement.²⁵⁵

Some of China's laws may be modified given the discrepancies between them and the Phase One agreement. The implementation of the Phase One agreement "at least to some extent require[s] structural reforms and substantial revisions of China's intellectual property laws that should presumably extend more broadly."²⁵⁶ Possible domestic law changes include aspects of E-Commerce Law (such as the removal of liability for erroneous takedown notices submitted in good faith, twenty working days for right

247. Schott et al., *supra* note 69, at 4.

248. *Id.* at 1.

249. Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 AM. J. INT'L L. 503-04 (July 2011).

250. *See id.*

251. *Id.*

252. Ederington & Ruta, *supra* note 13, at 4.

253. *See, e.g.*, Jiao Hongbin & Liu Yuxin, *An IP Roadmap for Phase-One Sino-US Economic and Trade Agreement*, CHINA L. INSIGHT (Jan. 22, 2020), <https://www.chinalawinsight.com/2020/01/articles/intellectual-property/an-ip-roadmap-for-phase-one-sino-us-economic-and-trade-agreement/> [<https://perma.cc/2LJW-ZMVG>].

254. *Id.*

255. Cissy Zhou, *China Sports Firm Illegally Used Michael Jordan's Name but Did Not Violate Image Rights, Top Court Rules*, S. CHINA MORNING POST (Apr. 9, 2020), <https://www.scmp.com/economy/china-economy/article/3079028/china-sports-firm-illegally-used-michael-jordans-name-did-not> [<https://perma.cc/4AMW-RLEX>].

256. Eugenia Kolivos, *Intellectual Property, Technology Transfers and the US-China Trade Deal: Key Takeaways for Australia*, CORRS CHAMBERS WESTGARTH (Feb. 4, 2020), <https://corrs.com.au/insights/intellectual-property-technology-transfers-and-the-us-china-trade-deal-key-take-aways-for-australia> [<https://perma.cc/8MS7-WPA7>].

holders to file a judicial or administrative complaint after receipt of a counter-notification, and the penalties against notices and counter-notifications submitted in bad faith), Copyright Law (the primary burden of proof to be removed from copyright owner regarding copyrighted works' ownership), Civil Procedure Law (removing or streamlining notarization requirements regarding the authentication of foreign-sourced evidence), and Patent Law (pharmaceutical patent linkage).²⁵⁷ For instance, the pharmaceutical patent linkage system provided in the Phase One agreement is "totally brand new to [the] Chinese patent system both legislatively and judicially" and is likely to be part of China's Patent Law amendment, although China's recent policy documents have repeatedly called for exploring such pharmaceutical patent linkage system.²⁵⁸

Meanwhile, the Phase One agreement has impacted China's legislative reform particularly concerning IP, but such impacts are not significant.²⁵⁹ Many obligations of the Phase One agreement have been reflected in Chinese law modification before the conclusion of the Phase One agreement.²⁶⁰ These rules of Chinese domestic law include the 2019 revised Anti-Unfair Competition Law (expanding trade secrets to confidential business information, the inclusion of electronic intrusions in trade secret misappropriation, the liability of any natural or legal persons for conducting trade secret misappropriation, and the reversal of the burden of proof); newly released Measures on Protection of Overseas Geographical Indication and revised Trademark Law (geographical indications and bad-faith trademarks);²⁶¹ 2019 Foreign Investment Law ("administrative authorities and officers [are not allowed to] force technology transfer by administrative means");²⁶² and 2019 E-Commerce Law (e-commerce operators to establish rules of IP protection).²⁶³

V. Strength: Rule Use Intensity

Rule use intensity refers to the extent to which trade agreements can be implemented either through resort to binding dispute settlement (with disputes heard by adjudicators) or other ways (e.g., suspended obligations or remedial action such as tariffs imposed by the states, the provision for remedy sought by private parties). It is concerned with the strength of rules from the perspective of dispute settlement, judged from both SSDS rules, including private access, and the coverage of dispute settlement mechanisms.

257. Jiao & Liu, *supra* note 253.

258. *Id.*

259. Wang Feng et al., *China and the United States Announce "Phase One" Trade Deal - Key Issues and Takeaways for Business*, KING & WOOD MALLESONS (Jan. 17, 2020), <https://www.kwm.com/en/us/knowledge/insights/china-and-the-us-announces-phase-one-trade-deal-key-issues-and-takeaways-for-business-2020> [https://perma.cc/GVR7-TT54].

260. Jiao & Liu, *supra* note 253.

261. *Id.*

262. Wang Feng et al., *supra* note 259.

263. *Id.*

A. RULES ON STATE-TO-STATE DISPUTE SETTLEMENT

1. *Deep FTAs*

Compared with China's trade agreements, deep FTAs strengthen dispute settlement through institutional and rule development. Institutionally, the USMCA creates a Secretariat that consists of national sections and "will assist dispute settlement."²⁶⁴ This is lacking in China's trade agreements.

Deep FTAs contain new or more detailed rules on panel proceedings which are weak in China's FTAs and absent in the Phase One agreement.²⁶⁵ For the panel functions, the USMCA provides the following, which are absent in the China-Korea FTA counterpart: whether a party has "otherwise failed to carry out" its FTA obligations, whether an impugned measure is "causing nullification or impairment," other determinations required in the terms of reference, recommendation on resolving the disputes upon request, and the "reasons for the findings and determinations."²⁶⁶ Concerning the panel process, deep FTAs provide for the roster or list of the panel²⁶⁷ and submissions of non-governmental entities,²⁶⁸ both of which are absent in China's FTAs. Going beyond China's trade agreements, other advancements in deep FTAs range from transparency (e.g., open panel hearings,²⁶⁹ the written submissions and final panel being made publicly available²⁷⁰) to efficiency (e.g., up to 350 days from the consultation request to the issuance of a final panel report under the TPP).²⁷¹ Regarding compliance with dispute settlement reports, the CPTPP provides for the possibility of a monetary assessment, which is essentially a fine and replaces retaliation by the winning party.²⁷² Deep FTAs begin to allow private access: the private right to action with the possible redress in the form of "injunctive, monetary or other remedies"²⁷³ in the TPP competition chapter, likely a first for an FTA.²⁷⁴

Deep FTA dispute settlement has been used in practice. As pointed out by the Mexican USMCA negotiator, "[d]ispute resolution is for the small

264. USMCA, *supra* note 12, at art. 30.6.

265. Heng Wang, *Selective Engagement? Future Path for US-China Economic Relations and Its Implications*, *supra* note 15, at 9–11.

266. USMCA, *supra* note 12, at art. 31.13.1.

267. USMCA, *supra* note 12, at arts. 31.8; CETA, *supra* note 11, at art. 29.8; CPTPP, *supra* note 10, at art. 28.11.

268. CPTPP, *supra* note 10, at art. 28.13(e).

269. *Id.* art. 28.13(b).

270. *Id.* arts. 28.13(d), 28.18.

271. Jennifer Hillman, *Dispute Settlement Mechanism*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 101–02* (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., Peterson Inst. for Int'l Econ. 2016).

272. CPTPP, *supra* note 10, at arts. 28.20.7, 28.20.8.

273. TPP, *supra* note 9, at art. 16.3.1.

274. R. Michael Gadbaw, *Competition Policy*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 83, 87* (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., Peterson Inst. for Int'l Econ. 2016).

country,”²⁷⁵ and this is a major reason why smaller economies are interested in deep FTAs.²⁷⁶ For one thing, deep FTAs often provide for more detailed rules that make it easier to adjudicate on trade disputes. There were three SSDS cases under the NAFTA, although later cases could not proceed largely due to the U.S. delay in panel proceedings (particularly the panel formation) under NAFTA Chapter 20.²⁷⁷

2. *China’s Trade Agreements*

China’s FTAs closely follow the WTO dispute settlement rules with little development of new rules. Instead, China’s FTAs have a strong preference for a non-adversarial approach and are less hard-edged.²⁷⁸ They often emphasise non-litigious alternative dispute resolution methods (like consultation) over detailed, rigid and compulsory formal dispute settlement rules as in deep FTAs.²⁷⁹ The China-Korea FTA provides that the parties “shall make every attempt through cooperation and consultations” to solve disputes under the FTAs.²⁸⁰ As with other Chinese FTAs, disputes under the China-Korea FTA will be addressed by the panelists when consultations fail to resolve the dispute in time.²⁸¹ As in the case of bilateral FTAs, states to FTAs could have “significant disparities in wealth and political influence,” and China is likely to be in a better position from the perspective of such asymmetry between states.²⁸² Given the strong preference for consultation, the nature of bilateral FTAs, and the vague rules, it remains to be seen whether and how the panel process will be utilized in China’s FTAs. This may explain why the panel process has not been used in China’s FTAs. China’s FTAs have played little role in addressing China’s trade tensions with Australia and Korea²⁸³ through dispute settlement.

Moreover, Chinese FTAs usually do not provide private access which means that private actors have the right of action to enforce the trade agreement (such as regarding competition issues in the TPP). Instead, the China-Korea FTA prohibits a right of action under one party’s domestic law

275. Simon Lester, *Mexico’s View of the Problems with the NAFTA Panel Appointment Process*, INT’L ECON. LAW & POLICY BLOG (Oct. 12, 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/10/mexicos-view-of-the-problems-with-nafta-chapter-20.html> [<https://perma.cc/P2LJ-TCED>].

276. *Id.*

277. David Gantz, *Addressing Dispute Resolution Institutions in a NAFTA Renegotiation*, MEXICO CENTER: RICE UNIVERSITY’S BAKER INSTITUTE FOR PUBLIC POL’Y (Apr. 2018), <https://www.bakerinstitute.org/media/files/files/fa4d9adf/mex-pub-nafta-040218-1.pdf> [<https://perma.cc/CGX2-FX2E>].

278. Guiguo Wang, *supra* note 249.

279. *Id.* at 503.

280. China-Korea FTA, *supra* note 88, at article 20.1.

281. *Id.* at art. 20.6.

282. Michael J. Trebilcock & Joel Trachtman, *Preferential Trade Agreements*, in *ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW* 56 (2nd ed. Edward Elgar, 2020).

283. See, e.g., *S Korea Complains to WTO About China over Thaad*, BBC (Mar. 20, 2017), <https://www.bbc.com/news/business-39324536> [<https://perma.cc/L8J6-C57P>].

against the other party on the ground that the other party's measure is incompatible with the FTA.²⁸⁴

The Phase One agreement has much stronger consultation arrangements than China's FTAs in terms of design, the various administrative levels involved, and the frequency of meetings. It lays out a three-tier process: (i) designated officials of Bilateral Evaluation and Dispute Resolution Office (BEDRO) in each country to address day-to-day matters, regularly meeting at least once a month (functional level of daily work); (ii) a designated Deputy USTR and a designated Vice Minister of China who head the BEDRO, meeting quarterly (vice-ministerial level engagement); and (iii) the Trade Framework Group led by the USTR and a designated Vice Premier of China, meeting every six months (high level engagement compared with the seemingly vice-ministerial level consultation under the China-Korea FTA).²⁸⁵ If the consultation fails, the complaining party could suspend obligations under the deal or subsequently take remedial action.²⁸⁶ This appears to be a kind of self-help measure. The other party could withdraw from the agreement with sixty days written notice if it thinks that the complaining party suspended the obligation or adopted the remedial measure in bad faith.²⁸⁷ A withdrawing party is not required to resume obligations, and the other party could continue the responsive actions—both of which are likely to disturb trade.²⁸⁸

But the Phase One agreement eschews third-party adjudication, which leads to the de-legalization of international economic relations. Legalization refers to the delegation of dispute settlement to designated third parties and the parties to the agreement agreeing to accept binding third-party adjudication decisions under clear and applicable rules (legal delegation).²⁸⁹ Legal delegation is also measurable by the extent to which private actors are allowed to start a legal proceeding (legalized dispute settlement processes) to enforce the agreement (private access).²⁹⁰ Such private access is largely absent in the Phase One agreement. Through bilateral evaluation and dispute resolution, the Phase One agreement shifts towards unilateral enforcement. In contrast, third-party dispute resolution is particularly strong with deep FTAs.

284. China-Korea FTA, *supra* note 88, at 198.

285. See, e.g., News Release, China-Korea FTA, The 2nd Joint Commission on China-ROK FTA Held in Seoul (Mar. 23, 2018), http://fta.mofcom.gov.cn/enarticle/enkorea/enkoreanews/201808/38460_1.html [<https://perma.cc/ZL9T-FR4P>]. See also China-U.S. Phase One Agreement, *supra* note 1, at 7-1-4, annex 7-A.

286. *Id.* at art. 7.4.4(b).

287. *Id.* at arts. 7.4.4(b), 8.3.2.

288. David A. Gantz et al., *The Scorecard of the Phase One Trade Agreement*, EUR. J. INT'L L. BLOG (Feb. 14, 2020), <https://www.ejiltalk.org/the-scorecard-of-the-phase-one-trade-agreement/> [<https://perma.cc/HZT4-KR5D>].

289. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 415 (2000).

290. *Id.* at 416.

B. THE SCOPE OF DISPUTE SETTLEMENT

1. *Deep FTAs*

Deep FTAs are more ambitious in the coverage of dispute settlement than older agreements, with limited exceptions to accommodate regulatory space (like competition due to the sovereignty concerns on competition policy) or country-specific preferences.²⁹¹

Crucially, deep FTAs expand the coverage of binding dispute settlement, particularly regarding an increasing number of WTO-beyond issues. The expanded areas include commercial consideration requirements on SOEs,²⁹² government procurement, financial services, and, to a lesser extent, select social issues (labour and environment), regulatory coherence, anti-corruption, and the movement of natural persons. A number of issues are spared from dispute settlement in previous FTAs, including government procurement and financial services.²⁹³ The EU and U.S. FTAs used to have quite a small number of enforceable WTO-beyond provisions.²⁹⁴ Government procurement²⁹⁵ and financial services²⁹⁶ are subject to dispute settlement under deep FTAs. The TPP subjects rules on anti-corruption to modified dispute settlement provisions²⁹⁷ and sets conditional access to dispute settlement for the chapter on the movement of natural persons.²⁹⁸ Transparency and reporting obligations related to macroeconomic policies and exchange rate matters are subject to USMCA dispute settlement processes.²⁹⁹ For social issues, labor and environment disputes are subject to procedures and rules in CETA labor and environment chapters³⁰⁰ and are to be decided by a Panel of Experts.³⁰¹ Commitments under the TPP labor chapter are subject to SSDS mechanisms if labor consultation fails,³⁰² while its environment chapter is subject to dispute settlement with certain limitations.³⁰³ More broadly, dispute settlement regarding regulatory coherence has been strengthened from the CPTPP's non-application of dispute settlement³⁰⁴ to the USMCA's limited application of dispute settlement (regarding a sustained course of (in)action).³⁰⁵

291. Wang, *The Future of Deep Free Trade Agreements*, *supra* note 20, at 332–33.

292. CPTPP, *supra* note 10, at art. 17.4.

293. Victoria Donaldson & Lester Simon, *Dispute Settlement, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 399 (Simon Lester, et al. eds., 2016).

294. Horn et al., *supra* note 46, at 1587.

295. *See, e.g.*, CETA, *supra* note 11, at art. 19.18.4.

296. *Id.* at art. 13.20.1; TPP, *supra* note 9, at art. 11.21.1.

297. TPP, *supra* note 9, at art. 26.12.1.

298. *Id.* art. 12.10.

299. USMCA, *supra* note 12, at art. 33.8.1.

300. CETA, *supra* note 11, at arts. 23.11.1, 24.16.1.

301. *Id.* arts. 23.10.2, 24.15.2.

302. TPP, *supra* note 9, at arts. 19.15.12, 19.15.13.

303. *See id.* art. 20.23.3.

304. CPTPP, *supra* note 10, at art. 25.11.

305. USMCA, *supra* note 12, at art. 28.20.3.

2. *China's Trade Agreements*

Reflecting a selective approach, China's trade agreements have a narrower dispute settlement coverage than deep FTAs. Nearly all rules on WTO-beyond issues (with the exception of investment) and many WTO-plus rules are exempt from China's FTA dispute settlement processes.³⁰⁶ To take e-commerce as an example of WTO-plus rules, it is observed that China "did not include a single binding obligation" related to wide-ranging e-commerce terms searched for in FTAs, which contrasts with the U.S. and EU FTAs.³⁰⁷ The e-commerce chapter remains non-enforceable in the latest China-Singapore FTA upgrade.³⁰⁸ This contrasts with the enforceable CPTPP e-commerce rules.³⁰⁹ As an illustration of WTO-beyond areas, Chinese FTAs contain broad exclusions from dispute settlement for rules on non-trade concerns.

The Phase One agreement addresses only a few select areas and only subjects a limited number of sectors to dispute settlement. That said, it features new developments. There are arguments that macroeconomic policies and exchange rate issues are governed by the dispute settlement system of the Phase One agreement, which means that unilateral tariffs could be imposed.³¹⁰ This appears to be supported by the statement of the U.S. Treasury Secretary Steven Mnuchin that "China has made enforceable commitments to refrain from competitive devaluation."³¹¹ This reflects a hybrid approach of formal consultations with IMF and the possible remedial measures (like tariffs). If so, the Phase One agreement goes further than the TPP. Currency issues are not addressed in the TPP text but in a separate document (joint declaration³¹²) and are not subject to dispute settlement. All in all, currency rules have taken harder forms in the Phase One agreement.

306. See generally, Razeen Sappideen & Ling Ling He, *Dispute Settlement Under Free Trade Agreements: The Proposed Australia-China Free Trade Agreement*, 12 J. WORLD INV. & TRADE 581, 581 (2011).

307. Willemyns, *supra* note 47, at 231.

308. China-Singapore Free Trade Agreement Upgrade Protocol, China-Sing., Nov. 14, 2018, MINISTRY OF COMMERCE OF PEOPLE'S REPUBLIC OF CHINA, appendix 6, ch. 15, art. 11.

309. See CPTPP, *supra* note 10, ch.14.

310. James Politi, *What's in the US-China 'Phase One' Trade Deal?*, FIN. TIMES (Jan. 15, 2020), <https://www.ft.com/content/a01564ba-37d5-11ea-a6d3-9a26f8c3cba4> [<https://perma.cc/8ZTQ-M2NW>].

311. Thomas Franck, *US Removes China from Currency Manipulator List Ahead of Trade Deal Signing*, CNBC (Jan. 15, 2020, 3:46 PM), <https://www.cnbc.com/2020/01/13/us-will-no-longer-consider-china-a-currency-manipulator.html> [<https://perma.cc/Y8Z3-9GLK>].

312. *Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries*, U.S. DEP'T TREASURY (Nov. 5, 2015), https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf [<https://perma.cc/6QSW-NLWQ>].

VI. Concluding Remarks

Trade agreements are a moving target and increasingly complex. China does not have a model for trade agreements.³¹³ China's trade agreements develop on an ad hoc basis and vary according to the situation warranting a trade pact.³¹⁴ The Phase One agreement is unprecedented for both China and the United States. For FTAs negotiated by the United States, mini trade agreements appear to increase (e.g., the 2019 U.S.-Japan Trade Agreement regarded as a "limited" trade agreement,³¹⁵ and the planned U.S.-India trade deal negotiations).³¹⁶ The GVCs are now under pressure.

Different categories of trade agreements adopt different approaches, as demonstrated by a comparison of deep FTAs and China's trade agreements. Representing regulatory plowing, deep FTAs develop comprehensive regulatory standards and address coordination externalities. Regarding effects, deep FTAs strengthen GVCs and, if properly managed, could provide public goods. In contrast, reflecting an early harvest approach, China's trade agreements focus on selective market access and often address terms-of-trade externalities. Therefore, these agreements (particularly the Phase One agreement as the prime example of selective engagement) could lead to more discussion as to trade diversion or trade creation, although trade diversion or trade creation may also exist in deep FTAs. A major challenge faced by Chinese trade agreements is that they are far from sufficient to address the heterogeneity of national measures. This affects predictability in trade. This challenge is even more significant in the post-COVID-19 era with the rise of deglobalization and decoupling.

The tripartite analytical framework with six indicators focuses on crucial elements of trade agreements: (i) breadth (indicators: WTO-plus obligations that are stricter than WTO obligations, and WTO-beyond rules that address issues outside the WTO aegis); (ii) depth (indicators: regulatory cooperation and coherence, and domestic law changes); and (iii) strength (indicators: state-to-state dispute settlement (SSDS) rules, and SSDS coverage). This framework covers rule coverage, essence, and implementation. Breadth and depth of trade agreements largely determine the landscape of trade, while strength decides how the rules will be followed.

The tripartite analytical framework has great strength and utility. First, such tripartite framework is crucial to the categorization of different types of trade agreements and advances the understanding of their key differences and nuances. Second, it is critical to the in-depth analysis of future trade law

313. Salidjanova & Koch-Weser, *supra* note 77, at 22.

314. Kong, *supra* note 55, at 1205.

315. Paul Wiseman & The Associated Press, *Trump Signs Japan Mini Trade Deal wiith No Change in Auto Tariffs*, FORTUNE (Oct. 7, 2019, 12:51 PM), <https://fortune.com/2019/10/07/us-trade-deal-japan-auto-tariffs-us-farmers-trump-signs-mini-trade-deal-with-japan/> [<https://perma.cc/6NED-QFDM>].

316. Trevor Cloen & Irfan Nooruddin, *The U.S.-India Trade Deal Fell Through. What Happens Now?*, WASH. POST (Mar. 5, 2020, 6:20 AM), <https://www.washingtonpost.com/politics/2020/03/05/us-india-trade-deal-fell-through-what-happens-now/> [<https://perma.cc/VK6Q-CGJX>].

and its implications. The tripartite analytical framework lays a solid foundation for the further measurement of various trade agreements, their actual merits, and their effects. The indicators concerning regulatory outreach strongly support the assessment of the “width” of trade agreements’ impacts on domestic regulation and their differences from those arising from WTO rules. The indicators of regulatory density (i.e., regulatory cooperation and coherence, and domestic change) greatly help to measure the “depth” of trade agreements’ impacts on regulatory autonomy. The indicators of rule use intensity are useful in assessing how trade agreements are implemented and enforced. The framework carefully targets key issues and variables and supports the quantification of the effects and merits of trade agreements in future research. It enables various stakeholders (including businesses, NGOs, and the public) to better understand trade agreements, their trends, and their implications. The framework can be used in preparing for new trade agreement negotiations, including identifying best practices if any and designing the negotiation plan to explore desirable outcomes. Overall, it is a valuable tool for better understanding the increasingly complex trade agreements and rapidly changing trade law landscape.

