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How to assess regional trade agreements? Deep FTAs v. China's trade agreements

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

Heng Wang*

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Abstract: Regional trade agreements are undergoing many changes. Notably, the trajectory of China's trade agreements has been affected by the unique US-China Phase One agreement, and these agreements extend beyond free trade agreements (FTAs). China's trade agreements represent a different path forward from that mapped out by deep FTAs (e.g., the CPTPP) in respect of the future of trade law. This paper analyses two crucial but underexplored questions: What are the approaches behind deep FTAs and China's trade agreements? How can we assess trade agreements (particularly China's trade agreements)?

The article critically reviews China's trade agreements and deep FTAs. Based on in-depth comparative study, it argues that China's trade agreements adopt an early harvest approach, which contrasts starkly with the regulatory plowing approach found in deep FTAs. It further proposes a tripartite theoretical framework with six indicators to assess trade agreements in terms of their impacts on domestic regulation. It theorizes about three crucial variables of trade agreements: (i) breadth (regulatory outreach) with two indicators (WTO-plus and WTO-beyond rules); (ii) depth (regulatory density) with two indicators (regulatory cooperation and coherence, and domestic law changes); and (iii) strength (rule use intensity) with two indicators (state-to-state dispute settlement (SSDS) rules, and SSDS coverage). This framework provides key insights into the significant heterogeneity and rationales behind trade agreements. It is critical to the in-depth analysis of evolving trade agreements and their implications, and supports the thorough assessment of the merits of different agreements in future research.

Key words: free trade agreements, deep FTAs, China's FTAs, Phase One agreement, breadth, depth, strength

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I. Introduction

Regional trade agreements come in various different forms, including free trade agreements (FTAs) and agreements like the 2020 US-China Phase One agreement¹ (Phase One agreement). 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. The assessment of regional trade agreements is crucial due to the major impacts they have on the parties, and the spill over effects they may have on non-parties (e.g., trade diversion). This is important for better understanding the trade approaches of different states, since they cover crucial issues ranging from investment to intellectual property (IP). Such an assessment is also particularly timely as trade agreements are in flux and fast changing. To illustrate, the Phase One agreement is unprecedented among the trade agreements signed by the US and China. The United States Trade Representative (USTR) Robert Lighthizer described the Phase One agreement is unique as “the first agreement like this of its kind.”² The Phase One agreement, regardless of questions as to its future operation, is also crucial to understanding the approaches of the US and China. All these factors add urgency to assessing trade agreements based on in-depth comparative study, which has to date received insufficient attention.

Trade agreements can be separated into two major categories: deep and shallow. This paper focuses on deep FTAs and China’s trade agreements as the representative examples 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

¹ US-China Economic and Trade Agreement (2020).

² Kevin Freking & Paul Wiseman, *Read the Full U.S.-China ‘Phase 1’ Trade Agreement*(2020), available at <https://www.pbs.org/newshour/economy/read-the-full-u-s-china-phase-1-trade-agreement>.

concerning services, labor and the environment).³ They range from the Trans-Pacific Partnership (TPP) that has developed into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the United States–Mexico–Canada Agreement (USMCA).

Shallow trade agreements mainly address border measures, particularly tariff barriers and quotas.⁴ China's trade agreements, consisting of FTAs and the Phase One agreement, are largely shallow, and differ markedly from those concluded by major developed economies.

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.⁵ 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. 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.⁶ Third, an analytical framework can support various states in designing and adjusting their trade agreement models and approaches.

This paper will analyse 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 categorization 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 the theoretical framework which explores three crucial variables of trade agreements (Parts III to V): (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). These factors and indicators are considered as they are crucial elements of

³ World Bank, *Regional Trade Agreements*(2018), available at

<https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements>; World Trade Organization, *World Trade Report 2011*, 9, 45, 110 (2011).

⁴ Josh Ederington & Michele Ruta, *Non-Tariff Measures and the World Trading System*, POLICY RESEARCH WORKING PAPER 7661, 2 (2016); World Trade Organization, 9 (2011).

⁵ Heng Wang, *Selective Engagement? Future Path for US-China Economic Relations and Its Implications*, 55 JOURNAL OF WORLD TRADE (2021 forthcoming).

⁶ Aaditya Mattoo, et al., *Overview: The Evolution of Deep Trade Agreements*, in HANDBOOK OF DEEP TRADE AGREEMENTS 24, (Aaditya Mattoo, et al. eds., 2020).

trade agreements in terms of their coverage, content and implementation, respectively. They assess trade agreements' rule development, their implications for domestic law, and the strength of rules through dispute settlement.

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, are the exemplars of deep and 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 the US' future trade negotiations.⁷ The USMCA builds on the CPTPP. For instance, both are similar in terms of the core regulatory coherence provision of regulatory impact assessment.⁸ The China-Korea FTA is one of the highest-level⁹ trade agreements of China, although there is a huge gap between China's FTAs and deep FTAs. For instance, the China-Korea FTA is the first Chinese FTA to cover electronic commerce.¹⁰ It was also deemed to be the biggest free trade deal signed by China,¹¹ and "involve[e] the largest trade value and most comprehensive areas."¹² Other agreements are referred to when appropriate, since these two FTAs do not represent the entirety China's trade agreements and deep FTAs practice.¹³ This paper, however, does not focus on the particular value or merits of the 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 a spectrum in terms of their approach: on one end, regulatory plowing, as seen in deep FTAs; and, on the other end, early harvesting, as 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

⁷ Heng Wang, *The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?*, 53 JOURNAL OF WORLD TRADE 317, 318-319 (2019).

⁸ CPTPP Article 25.5; USMCA Article 28.11.

⁹ Si-qi Li, et al., *Progress and Implications of the China-Korea FTA*, 31 KOREA'S ECONOMY 13(2017).

¹⁰ Heng Wang, *The Features of China's Recent FTA and Their Implications: An Anatomy of the China-Korea FTA*, 11 ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY 115, 120 (2016).

¹¹ Yonhap, *S. Korea, China Formally Sign Free Trade Deal*(2015), available at <http://english.yonhapnews.co.kr/national/2015/06/01/95/0301000000AEN20150601001552320F.html>.

¹² China FTA Network, *China-ROK FTA Negotiations Completed*(2015), available at http://fta.mofcom.gov.cn/enarticle/enrelease/201503/20754_1.html.

¹³ For the differences of deep FTAs and the underlying reasons, see, e.g., Wang, JOURNAL OF WORLD TRADE, 341-342 (2019).

endeavor to be “transformative FTAs” that regulate trade far beyond WTO rules (depth);¹⁴ 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 particularly goods, services, IP, investment and capital, which contrasts with selective market access for goods and services under shallow agreements.¹⁵ Deep FTAs aim for “integration beyond trade or deep integration.”¹⁶

Second, regulatory plowing essentially addresses coordination externalities (the multiplicity of national policies and measures) through deep FTAs.¹⁷ It substantially constrains regulatory latitude. Taking e-commerce as an example, the CPTPP e-commerce chapter addresses various systematic regulatory issues ranging from the prohibition of data server localization requirements¹⁸ to the equal treatment of digital content.¹⁹ Relatedly, the TPP highlights IP enforcement in the digital context and is the first FTA signed by the US that explicitly requires most enforcement measures to be available “in the digital environment.”²⁰

Third, the effects of regulatory plowing are twofold. Deep agreements promote global value chains (GVCs) by “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”).²¹ If properly managed, deep FTAs also provide public goods (e.g., transparency), many of which may benefit outsiders.²² Publication provides a prime example. Deep FTAs contain requirements on the reasonable time between the publication date and effective date of laws,²³ and requirements on the publication place and timing of the regulation, including its purpose and rationale,²⁴ 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 their low level of breadth, depth, and strength. 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.²⁵ An early harvest approach is also reflected in shallow agreements under which states are permitted greater leeway in setting domestic policy only subject to

¹⁴ Ernst-Ulrich Petersmann, *CETA, TTIP, and TiSA: New Trends in International Economic Law*, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TiSA 34, (2017).

¹⁵ 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, 189, (Jean-Frédéric Morin, et al. eds., 2015).

¹⁶ Mattoo, et al., 3. 2020.

¹⁷ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 55 (2016).

¹⁸ CPTPP Article 14.13.2.

¹⁹ *Id.* at, Article 14.4.

²⁰ TPP Article 18.71.2; Gina M. Vetere, et al., *What’s New in the TPP’s Intellectual Property Chapter*(2015), available at <https://www.globalpolicywatch.com/2015/11/whats-new-in-the-tpps-intellectual-property-chapter/>.

²¹ Pauwelyn, 188. 2015.

²² *Id.* at, 189-194.

²³ TPP Article 26.2.3.

²⁴ *Id.* at, Article 26.2.4, 26.2.5.

²⁵ Pauwelyn, 187. 2015.

limited overriding rules.²⁶ The Phase One agreement reflects selective engagement that focuses on market access (measurable target outcome and targeted regulatory discipline) and delegatized implementation.²⁷ China's FTAs are conservative in ambition and coverage.²⁸ They often provide for non-discrimination treatment and reciprocity, but do not "interven[e] in domestic economic policies beyond this requirement."²⁹ The new development of China's FTAs is softened by weak obligations. China's FTAs contain "chapters of a regulatory nature but solely with 'best endeavours' and mere cooperative intentions" beyond WTO rules.³⁰ 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).³¹

E-commerce provides a good example. China's FTAs do not address many major regulatory issues provided for in deep FTAs, including 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; amongst others.³² For crucial four 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 US and EU FTAs.³³ 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).³⁴ 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.³⁵

Second, early harvest essentially involves standard forms of coordination under shallow agreements to address terms-of-trade externalities,³⁶ which means states use restrictions (particularly tariffs) to "shift the cost of protecting a domestic industry onto foreign producers

²⁶ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 38 (2016).

²⁷ Wang, JOURNAL OF WORLD TRADE, (2021 forthcoming).

²⁸ Dilip K. Das, *Ripening Regional Economic Architecture in Asia*, CSGR WORKING PAPER 277/13, 9 (2013).

²⁹ World Trade Organization, 110 (2011).

³⁰ JACQUES PELKMANS, et al., TOMORROW'S SILK ROAD: ASSESSING AN EU-CHINA FREE TRADE AGREEMENT 9 (Rowman & Littlefield International. 2016).

³¹ Henrik Horn, et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 THE WORLD ECONOMY 1565, 1580 (2010).

³² Ines Willemyns, *Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, JOURNAL OF INTERNATIONAL ECONOMIC LAW 1, 5, 10 (2020).

³³ Id. at, 19-20.

³⁴ Id. at, 21.

³⁵ Jie Huang, *Comparison of E-commerce Regulations in Chinese and American FTAs: Converging Approaches, Diverging Contents, and Polycentric Directions?*, 64 NETHERLANDS INTERNATIONAL LAW REVIEW 309, 323, 332, footnote 113 (2017).

³⁶ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 55 (2016).

by altering the terms of trade.”³⁷ Trade agreements remove trade barriers to internalize externalities that states impose on each other.³⁸ 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.³⁹ 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.”⁴⁰

The Phase One agreement also reflects efforts to mitigate prisoner’s dilemma, and features short-term objectives and short-form rules. 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). It addresses prioritized market access issues, instead of addressing long-term regulatory issues and setting systematic rules. The early harvest approach can be compared with Mexico, which provides a good example. As a developing country, Mexico has four principles in its USMCA negotiations with the US: (i) enhanced regional competitiveness through trade barrier reduction, investment promotion, regulatory improvements, and preferred market entry; (ii) improved rule inclusiveness and sustainability (through new generation rules on labor, environment, small and medium size enterprises (SMEs), anti-corruption, and so on); (iii) technology-friendly rules (e.g., new rules on IP, digital trade, and financial technologies); and (iv) enhanced predictability of the business environment (through strengthened dispute settlement processes and rules on state-owned enterprises (SOEs), competitiveness and government procurement).⁴¹ 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.

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.⁴² Compared with deep FTAs, this effect is more obvious under early harvest given its focus on selective market access. This explains the concerns about possible trade diversion under the Phase One agreement.⁴³ Early harvest often cannot fully address policy substitution in shallow agreements whereby states retract the effects of negotiated tariff concession by

³⁷ Rodney D. Ludema & Anna Maria Mayda, *Do Terms-of-Trade Effects Matter for Trade Agreements? Theory and Evidence From WTO Countries*, 128 THE QUARTERLY JOURNAL OF ECONOMICS 1837, 1838 (2013).

³⁸ Asrat Tesfayesus, *Liberalization Agreements in the GATT/WTO and the Terms-of-trade Externality Theory: Evidence from Three Developing Countries*, 24 REVIEW OF INTERNATIONAL ECONOMICS 1000, 1000, 1022 (2016).

³⁹ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 49 (2016); Tesfayesus, REVIEW OF INTERNATIONAL ECONOMICS, 1002, 1006, 1007, 1022 (2016).

⁴⁰ Qingjiang Kong, *China’s Uncharted FTA Strategy*, 46 JOURNAL OF WORLD TRADE 1191, 1196 (2012).

⁴¹ Amrita Bahri & Monica Lugo, *Trumping Capacity Gap with Negotiation Strategies: the Mexican USMCA Negotiation Experience*, 23 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1, 4 (2020).

⁴² Pauwelyn, 187. 2015.

⁴³ See, e.g., Naomi Powell, *‘Canada Should Be Worried’: Canadian Exporters May Become Collateral Damage of U.S-China Trade Deal*, Financial Post(2020), available at <https://business.financialpost.com/news/economy/canada-should-be-worried-canadian-exporters-may-become-collateral-damage-of-u-s-china-trade-deal>.

“utilizing alternate policies as a secondary trade barrier”, as seen with NTMs.⁴⁴ The three fundamental differences between regulatory plowing and early harvest will be further explored under the tripartite framework in the following sections: breath, 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. Regulatory outreach is the “extensive” margin and reflects the policy areas covered by trade agreements.⁴⁵ WTO agreements provide a useful threshold. Regulatory outreach could be measured in two dimensions: (i) WTO-plus provisions (also termed as “WTO+”⁴⁶) that are stricter commitments than or add to WTO obligations, like enhanced transparency rules; and (ii) WTO-beyond obligations (also termed as “WTO-extra” or “WTO-X”)⁴⁷ that address issues not dealt with under the WTO and outside the WTO aegis, like those on labor market regulations, the environment and measures on asylum.⁴⁸ Featuring these rules, deep FTAs address “a larger set of policy areas, at the border and behind the border”,⁴⁹ and have much broader breadth than China’s agreements. The China-Korea FTA, as probably the most developed Chinese FTA, meanwhile, is “far from best” regarding the scope of its obligations.⁵⁰ Moreover, China’s FTAs contain “many carve-outs for sensitive sectors and are characterized by a low level of legal obligations.”⁵¹

Breadth and depth are two inter-related sides of one coin. Extended outreach may also demand creating new and more sophisticated regulatory mechanisms.⁵² WTO-plus and WTO-beyond obligations (e.g., enhanced transparency rules) also quantify the depth of agreements.⁵³ To illustrate, regulatory coherence is provided in the CPTPP but not China’s trade agreements, reflecting the former’s broader breadth. Meanwhile, regulatory coherence deepens the CPTPP through, inter alia, the adoption of good regulatory practices that profoundly affect domestic regulation. Not surprisingly, an FTA could be broad and deep. For instance, the USMCA and Australia–Singapore FTA are both the “deepest and most comprehensive” e-commerce FTAs to date.⁵⁴

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. Deep FTAs set rules at a higher level across WTO-covered areas and go substantially beyond WTO law. Deep FTAs drive down trading costs by

⁴⁴ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 34 (2016).

⁴⁵ World Trade Organization, 9 (2011).

⁴⁶ Horn, et al., THE WORLD ECONOMY, 1567 (2010).

⁴⁷ Id. at.

⁴⁸ World Trade Organization, 11 (2011).

⁴⁹ World Bank. 2018.

⁵⁰ Jeffrey J. Schott, et al., An Assessment of the Korea-China Free Trade Agreement 1 (The Peterson Institute for International Economics 2015).

⁵¹ Ka Zeng, *Introduction to the Handbook on the International Political Economy of China*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA (Ka Zeng ed. 2019).

⁵² World Trade Organization, 110 (2011).

⁵³ Horn, et al., THE WORLD ECONOMY, 1569 (2010).

⁵⁴ Willemyns, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 21 (2020).

“limiting or coordinating” NTMs through at least two types of WTO-plus rules: (i) rules on behind-the-border measures (e.g., regulations and standards on financial services and telecommunication, IP), and (ii) “good governance-type” requirements in areas like transparency, customs administration, and trade facilitation.⁵⁵ To illustrate, the US and EC FTAs have a high degree of similarity regarding the coverage of WTO plus areas,⁵⁶ going beyond China’s trade agreements. These deep FTA rules range from those on sanitary and phytosanitary (SPS) issues (e.g., streamlined approval processes,⁵⁷ 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).

China’s FTAs are WTO-style agreements in WTO-covered areas, and spill much more ink over traditional trade of goods and services than other areas.⁵⁸ There is path dependence in China’s FTAs, which closely follow WTO law. 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.⁵⁹ To illustrate, the WTO system takes a shallow integration approach to product standards featured predominantly by the national treatment principle.⁶⁰ China’s FTAs have a limited number of WTO-plus disciplines that clarify or develop targeted WTO rules. 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).⁶¹ Concerning anti-dumping investigations, often faced by Chinese exports, the China-Korea FTA calls for no use of surrogate price or surrogate cost in determining normal value and export price.⁶²

The Phase One agreement contains more sectoral WTO-plus rules than China’s FTAs. For technology transfer, it goes beyond China’s WTO accession commitment that “any other means of approval for importation . . . or investment” shall not be conditioned on technology transfer.⁶³ China agrees to prohibit forced technology transfer as a precondition of administrative approvals, market entry, or receiving advantages from the government.⁶⁴ The Phase One agreement prohibits the support of outbound investments aimed at acquiring foreign technology pursuant to industrial plans that create distortion.⁶⁵ Both provisions are unprecedented in international agreements signed by China.⁶⁶ Due process and transparency

⁵⁵ Pauwelyn, 188. 2015.

⁵⁶ Horn, et al., *THE WORLD ECONOMY*, 1575 (2010).

⁵⁷ CETA – Summary of the Final Negotiating Results. (2016).

⁵⁸ Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?* at https://www.die-gdi.de/uploads/media/DP_7.2013.pdf.

⁵⁹ Bernard Hoekman & Petros C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, 1 (2015).

⁶⁰ Ederington & Ruta, *POLICY RESEARCH WORKING PAPER* 7661, 52-53 (2016).

⁶¹ Willemyns, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 7, 16, 20 (2020).

⁶² China-Korea FTA Article 7.7.4 (2015).

⁶³ World Trade Organization, *Protocol on the Accession of the People's Republic of China* Section 7.3 (2001).

⁶⁴ US-China Economic and Trade Agreement Article 2.3.2. 2020.

⁶⁵ *Id.* at, Article 2.1.3.

⁶⁶ Jyh-An Lee, *Shifting IP Battlegrounds in the U.S.–China Trade War*, 43 *THE COLUMBIA JOURNAL OF LAW & THE ARTS* 147, 174-175 (2020).

are required for the enforcement of laws, regulations and administrative proceedings.⁶⁷ In agriculture, the Phase One agreement provides for China's increased acceptance of international standards.⁶⁸ It also provides for streamlined procedures and improved efficiency regarding audits and inspections for dairy products and infant formula.⁶⁹ However, the coverage of the WTO-plus rules in the Phase One agreement is limited to selective areas (particularly IP, agriculture and technology transfer) and much narrower than deep FTAs. Outside these prioritized narrow areas, the Phase One agreement contains few WTO-plus obligations.

2. Case study: E-commerce, trade facilitation and IP

E-commerce, trade facilitation and IP provide key illustrations of the differences between Chinese 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. IP is a major issue in both Chinese and deep trade agreements.

China has cautiously adopted e-commerce-related FTA rules since 2003, in contrast with considerable WTO-plus rules in US FTAs' e-commerce chapters.⁷⁰ 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. China's FTAs focus on trade facilitation instead of strict regulatory disciplines, and lack many WTO-plus rules in deep FTAs (e.g., the CPTPP, KORUS FTA and Australia-US FTA (AUSFTA)). The three-page China-Korea FTA e-commerce chapter only addresses five major issues (the support of electronic authentication and signatures,⁷¹ and non-imposition of duties on electronic transmissions,⁷² paperless trading,⁷³ personal information protection,⁷⁴ and regulatory cooperation⁷⁵). Most of these rules, like electronic authentication and signatures, and paperless trading, fall within digital trade facilitation.⁷⁶

The Phase One agreement lacks e-commerce rules except for several IP-related aspects (online infringement and infringement on e-commerce platforms⁷⁷). It 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.⁷⁸ The lack of e-commerce rules is partially due to the gap between the US and China on crucial issues like data flow.

Even in customs administration, an area in which China's FTAs are close to deep FTAs, the rules are rather different. Deep FTAs and the China-Korea FTA provide for simplified

⁶⁷ US-China Economic and Trade Agreement Article 2.4. 2020.

⁶⁸ See, e.g., *id.* at, Chapter 3, Annex 4, paragraph 5.

⁶⁹ *Id.* at, Chapter 3, Annex 2, paragraph 4(b).

⁷⁰ Willemyns, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 5, 7 (2020).

⁷¹ China-Korea FTA Article 13.3. 2015.

⁷² *Id.* at, Article 13.4.

⁷³ *Id.* at, Article 13.6.

⁷⁴ *Id.* at, Article 13.5.

⁷⁵ *Id.* at, Article 13.7.

⁷⁶ Willemyns, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 3 (2020).

⁷⁷ US-China Economic and Trade Agreement Article 1.14. 2020.

⁷⁸ *Id.* at, Article 1.13.2.

customs procedures for the efficient release of goods.⁷⁹ The Phase One agreement does not contain such provisions on customs administration. Deep FTAs develop new rules on trade facilitation,⁸⁰ 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 (USMCA 24 pages and CPTPP 10 pages) contain more detailed and stringent obligations than the China-Korea FTA with its 7 pages. 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.⁸¹ 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),⁸² a mechanism to regularly communicate with traders on the procedures related to the importation, exportation, and transit of goods,⁸³ and uniform procedures throughout its territory for the issuance of advance rulings, including a detailed description of the information required to process a ruling application.⁸⁴

Concerning IP, China's FTAs have weaker coverage than deep FTAs, or follow the features of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁸⁵ China's FTAs make limited progress in respect of TRIPS-plus obligations. The WTO-plus rule on genetic resources, traditional knowledge and folklore in the China-Australia FTA (ChAFTA) is one example. The possible measures on genetic resources, traditional knowledge and folklore are subject to both international obligations and domestic law.⁸⁶ Regulatory latitude is nearly unaffected as the obligation is subject to domestic law.

Regarded as representing high standards,⁸⁷ the TRIP-plus provisions of the Phase One agreement narrow the differences with deep FTAs and go far beyond China's FTAs in length and magnitude.⁸⁸ IP rules probably represent the deepest disciplines within the Phase One agreement, and provide an excellent example to compare with deep FTAs. On the one hand, the Phase One agreement substantially expands the coverage of IP issues to include new issues (like electronic intrusions⁸⁹ and the permission of patent applicants to rely on

⁷⁹ *China-Korea Free Trade Agreement Officially Signed*(2015), available at http://big5.mofcom.gov.cn/gate/big5/fta.mofcom.gov.cn/enarticle/enrelease/201506/21934_1.html; CPTPP Article 5.10.1; CETA Article 6.3.1.

⁸⁰ Caroline Freund, *Other New Areas: Customs Administration and Trade Facilitation, Anticorruption, Small and Medium-Sized Enterprises, and More*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 67-68, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

⁸¹ CPTPP Article 5.7.1.

⁸² *Singapore Fintech Fest Showcases Innovations in Payments*(2018), available at <https://www.finextra.com/newsarticle/32959/singapore-fintech-fest-showcases-innovations-in-payments>.

⁸³ *Id.* at, Article 7.3.2.

⁸⁴ *Id.* at, Article 7.5.5.

⁸⁵ Schott, et al., 13. 2015.

⁸⁶ ChAFTA Article 11.17.1 (2015).

⁸⁷ USTR, Fact Sheet of US-China Economic and Trade Agreement: Intellectual Property (2020).

⁸⁸ Pratyush Nath Upreti & María Vásquez Callo-Müller, *Phase One US-China Trade Deal: What Does It Mean for Intellectual Property?*, 4 (on file with author) (2020).

⁸⁹ US-China Economic and Trade Agreement Articles 1.4.2(a), 1.8.2. 2020.

supplemental data⁹⁰), and broadens the scope of liability (so that any natural or legal persons could be liable for trade secret misappropriation,⁹¹ and assumed by e-commerce platforms for IP infringement⁹²). In particular, its IP rules go far beyond the TRIPS in respect of issues like trade secrets protection.⁹³ They go a long way toward transplanting the US rules, especially enforcement norms, into China.⁹⁴ Some of these provisions, such as criminal procedures and penalties for trade secret misappropriation, resemble the counterparts in US FTAs.⁹⁵

On the other hand, with some exceptions,⁹⁶ the Phase One agreement is distinct from deep FTAs. The IP criminal and civil enforcement rules in the TPP⁹⁷ are much more detailed than in the Phase One agreement.⁹⁸ Many deep IP rules are adopted in a shortened version or are absent in the Phase One agreement. As an example, the Phase One agreement is observed to be still “short” on specifics about the size and application of penalties for IP infringement.⁹⁹ Notice and takedown against online infringement provisions in the Phase One agreement are similar to those in the US Digital Millennium Copyright Act, but are a “a much shorter version” of the US counterpart.¹⁰⁰ Various key TPP IP provisions that are absent in the Phase One agreement are suspended in the CPTPP,¹⁰¹ including the extended terms of protection for copyright,¹⁰² inventions derived from plants,¹⁰³ technological protection measures,¹⁰⁴ rights management information,¹⁰⁵ as well as legal remedies and Safe Harbours.¹⁰⁶

B. WTO-beyond rules

Deep FTAs regulate trade and investment to an extent far beyond WTO rules.¹⁰⁷ They are much more comprehensive than China’s trade agreements in WTO-beyond areas. The WTO-beyond rules in deep FTAs range from SOEs, competition, anti-corruption, to currency and social matters.

⁹⁰ Id. at, Article 1.10.

⁹¹ Id. at, 1.3.1; USTR, 1 (this scope goes beyond "entities directly involved in the manufacture or sale of goods and services" and covers former employees and cyberhackers). 2020.

⁹² US-China Economic and Trade Agreement Article 1.14. 2020.

⁹³ Upreti & Callo-Müller, 4 (on file with author) (2020).

⁹⁴ Id. at, 9 (on file with author).

⁹⁵ Id. at, 4 (on file with author).

⁹⁶ 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 US trade agreements. Id. at.

⁹⁷ TPP Chapter 18, Section I.

⁹⁸ Upreti & Callo-Müller, 9 (on file with author) (2020).

⁹⁹ Michael Collins, et al., *What's in Trump's 'Phase One' trade deal between the U.S. and China?* (2020), available at <https://www.usatoday.com/story/news/politics/2020/01/15/trump-trade-agreement-china-what-in-phase-one-agreement/4434624002/>.

¹⁰⁰ Upreti & Callo-Müller, 5-6 (on file with author) (2020).

¹⁰¹ Id. at, 8 (on file with author).

¹⁰² TPP Article 18.63(a).

¹⁰³ Id. at, Article 18.37.4.

¹⁰⁴ Id. at, Article 18.68.

¹⁰⁵ Id. at, Article 18.69.

¹⁰⁶ Id. at, Article 18.82.

¹⁰⁷ Petersmann, 34. 2017.

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 and regulations”).¹⁰⁸ To illustrate, rules on competition policy protect business interests through the promotion of a level playing field.¹⁰⁹ In the same vein, deep FTAs start to develop increasingly strong rules on currency. The TPP is the first FTA to be explicitly connected to exchange rate and macroeconomic policies.¹¹⁰ 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.¹¹¹

Chinese trade agreements adopt a cautious and selective approach to WTO-beyond issues, except for investment.¹¹² These WTO-beyond rules are generally far from fully-fledged. China’s FTAs eschew many new issues (like competition, SOEs, and substantive rules regarding digital sphere¹¹³). 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.¹¹⁴ 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.¹¹⁵ These rules increase the transparency of foreign exchange and prohibit competitive devaluations.¹¹⁶ They require the disclosure of monthly data on foreign exchange reserves, quarterly exports and imports of goods and service, and balance of payments.¹¹⁷ Notably, the USMCA impose more obligations than the Phase One agreement in respect of publishing monthly interventions in spot and forward foreign exchange markets.¹¹⁸

¹⁰⁸ Pauwelyn, 188. 2015.

¹⁰⁹ Asif H Qureshi, *International Legal Aspects of Free Trade Agreements in Northeast Asia*, 16 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 2, 8 (2019).

¹¹⁰ C. Fred Bergsten & Schott Jeffrey J., *TPP and Exchange Rates*, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 115, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

¹¹¹ David A. Gantz, *The United States-Mexico-Canada Agreement: Overview and Analysis*, BAKER INSTITUTE REPORT, 3 (2018).

¹¹² Ganeshan Wignaraja, *PRC and India: Pursuing the Same Approach to Free Trade Agreements?*, Asia Pathways(2012), available at <https://www.asiapathways-adbi.org/2012/10/prc-and-india-pursuing-the-same-approach-to-free-trade-agreements/>.

¹¹³ Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order?*, UC IRVINE SCHOOL OF LAW RESEARCH PAPER NO. 2019-21, 32 (2019).

¹¹⁴ China-Singapore FTA Upgrade Protocol Appendix 4, Article 21 (2019).

¹¹⁵ USMCA Article 33.5; David Lawder, et al., *What's in the U.S.-China Phase 1 Trade Deal*(2020), available at <https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-us-china-phase-1-trade-deal-idUSKBN1ZE2IF>

¹¹⁶ US-China Economic and Trade Agreement Article 5.2.3. 2020.

¹¹⁷ Id. at, Article 5.3.

¹¹⁸ USMCA Article 33.5.1(b).

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 a very 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 protection,¹¹⁹ and often use some more ambiguous conflicts clauses that confirm the rights and obligations under other agreements like those on the environment.¹²⁰ The issue of human rights was raised by Australia in the ChAFTA negotiations but the final ChAFTA text avoids mentioning it.¹²¹

Given that China and the US have both concluded FTAs with Chile and Peru, they provide excellent illustrative examples. 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.¹²² The US' FTAs with Chile and Peru are more regulation-oriented, and directly tackle issues not considered in Chinese FTAs.¹²³ They set out strict compliance requirements within three key areas: labour, the environment, and transparency.¹²⁴

This selective approach is reflected in the forms of rules on social issues. China's FTAs often adopt Memorandums of Understanding (MOUs) or side agreements. If demanded by trading partners, China prefers to address labour issues in standalone side agreements or MOUs.¹²⁵ 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 not impose stringent binding obligations.¹²⁶ In contrast, labor and environment rules appear as part of the CPTPP and are subject to dispute settlement. 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 penetration¹²⁷ of trade agreements into domestic regulatory practice primarily through reduced regulatory barriers. The content of FTAs is becoming increasingly deep: deep agreements move beyond "a simple free trade area", and contain deeper policy commitments (such as the harmonization of domestic

¹¹⁹ China-Korea FTA Article 14.6.2 (cooperation on competition law), Annex 9-A, paragraph 1 (assistance to the other party to enhance consumer protection in financial services) 2015.

¹²⁰ Lorand Bartels, *Social Issues: Labour, Environment and Human Rights*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 374, (Simon Lester, et al. eds., 2016).

¹²¹ Sheng Zhang, *Human Rights and International Investment Agreements: How to Bridge the Gap?*, 7 *THE CHINESE JOURNAL OF COMPARATIVE LAW* 457, 472 (2019).

¹²² Nargiza Salidjanova, *China's Trade Ambitions: Strategy and Objectives behind China's Pursuit of Free Trade Agreements*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 31 (2015).

¹²³ *Id.* at.

¹²⁴ *Id.* at.

¹²⁵ Henry Gao, *China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements*(2017), available at <https://www.ictsd.org/opinion/china-3>.

¹²⁶ *China-Switzerland Agreement on Labour and Employment*, (2013).

¹²⁷ Jale Tosun & Christoph Knill, *Economy and Sustainability—How Economic Integration Stimulates Stringent Environmental Regulations*, 1 *SUSTAINABILITY* 1305, 1313 (2009).

regulation of financial services, and environmental standards).¹²⁸ This is because behind-the-border measures have become a topic of increasing concerns over the years. Two major indicia enable the evaluation of such depth: (i) regulatory cooperation and coherence, and (ii) 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).¹²⁹

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.¹³⁰ They are intended to reduce the spillover effects of regulatory measures through steps like mutual recognition agreements.¹³¹

Regulatory coherence and cooperation of deep FTAs¹³² usually involve three types of rules: (i) regulatory coherence across regulatory regimes, which adopts good regulatory practices relating to domestic processes for the adoption, enactment, and administration of regulatory measures (e.g., the call for regulatory measures that are “plainly written... clear, concise, well organised and easy to understand”¹³³); (ii) loose forms of regulatory cooperation that establish procedural or institutional frameworks to enhance regulatory collaboration (like the sharing of information used in risk assessment, or Regulatory Cooperation Forum under CETA¹³⁴); and (iii) 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 processes¹³⁵ (like in CETA protocol on the mutual acceptance of the results of conformity assessment).¹³⁶ 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

¹²⁸ World Trade Organization, 3, 8, 9, 110 (2011).

¹²⁹ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 43 (2016).

¹³⁰ Hoekman & Mavroidis, 8 (2015).

¹³¹ *Id.* at, 2.

¹³² For the differences between the US and EU approaches, see, e.g., Simon Lester & Inu Barbee, *Will Regulations Sink EU-U.S. Free Trade?*(2013), available at <http://www.cato.org/publications/commentary/will-regulations-sink-eu-us-free-trade>.

¹³³ TPP Article 25.5.4.

¹³⁴ CETA Article 21.6.

¹³⁵ Elizabeth Golberg, *Regulatory Cooperation – A Reality Check*, M-RCBG ASSOCIATE WORKING PAPER SERIES NO. 115, 6 (2019).

¹³⁶ Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?*, 15 WORLD TRADE REVIEW 587, 595, 596 (2016); Hoekman & Mavroidis, 2-3 (2015).

recognition, equivalence arrangements, and regulatory compatibility) and often proceed to substantive issues.¹³⁷

Deep FTAs highlight regulatory cooperation and coherence. The TPP and CETA have “a similar basic structure” regarding regulatory coherence or cooperation.¹³⁸ Featuring the hallmarks of US administrative law, regulatory coherence has been hardened by the US from non-binding instruments in trans-governmental networks (e.g., OECD and APEC) into a core part of the TPP.¹³⁹ The CPTPP is the first mega FTA containing all regulatory coherence elements, which include transparency and public consultation, regulatory impact assessment, inter-agency coordination and compatibility, and accountability based on administrative and judicial review.¹⁴⁰ The CETA is the first FTA that contains a chapter on regulatory cooperation.¹⁴¹ Later, the USMCA’s good regulatory practices chapter (15 pages) doubles the rules compared with its CPTPP counterpart (7 pages), and introduces more stringent disciplines. The new regulatory coherence rules in the USMCA range from retrospective review to decide the need for modification or repeal¹⁴² to information quality (e.g., “reliable and of high quality”)¹⁴³ and the publication of regulatory processes (like information about mechanisms employed by regulators to prepare, evaluate, or review regulations).¹⁴⁴

More broadly, deep FTAs aim to bring regulatory harmony by affecting different countries’ regulatory regimes. Regulatory harmony here 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.¹⁴⁵ 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.¹⁴⁶ A variety of specific issues in domestic regulation are affected, including trademark law,¹⁴⁷ workplace safety communication rules,¹⁴⁸ and domestic regulation of product safety, environmental and social

¹³⁷ Junji Nakagawa, *Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges*, in INTERNATIONAL ECONOMIC LAW AND GOVERNANCE 392-393, (2016); Hoekman & Mavroidis, 2-3 (2015).

¹³⁸ Joana Mendes, Participation in a new regulatory paradigm: collaboration and constraint in TTIP’s regulatory cooperation 6, footnote 19 (2016).

¹³⁹ Ching-Fu Lin & Han-Wei Liu, *Regulatory Rationalisation Clauses in FTAs: A Complete Survey of the US, EU and China*, 19 MELBOURNE JOURNAL OF INTERNATIONAL LAW 149, 160 (2018).

¹⁴⁰ *Id.* at, 153-155, 163.

¹⁴¹ Sheargold & Mitchell, WORLD TRADE REVIEW, 596 (2016).

¹⁴² USMCA Article 28.13.

¹⁴³ *Id.* at, Article 28.5.

¹⁴⁴ *Id.* at, Article 28.15.

¹⁴⁵ Hoekman & Mavroidis, 2 (2015).

¹⁴⁶ *Id.* at, 4.

¹⁴⁷ Roberta L. Horton, *Harmonizing Trademark Laws: Changes at the Heart of the USMCA*(2018), available at <https://www.arnoldporter.com/en/perspectives/publications/2018/10/harmonizing-trademark-laws>.

¹⁴⁸ Sharon Treat, *FAQ—Regulatory Cooperation, Harmonization and “Good Regulatory Practices” in USMCA*(2019), available at <https://www.iatp.org/new-nafta-grp>.

conditions.¹⁴⁹ These domestic regulatory practices are affected in various ways, for example through consultations between USMCA parties' regulators to narrow differences between their regulations,¹⁵⁰ and regulatory reforms under the NAFTA to harmonize North American law, at least to some degree.¹⁵¹ 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.¹⁵²

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 very 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. 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."¹⁵³ 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."¹⁵⁴ It mentions "best practices" three times, and is usually limited to the information exchange of best practices,¹⁵⁵ instead of the adoption of best practices under deep FTAs. In the same vein, China treats good regulatory practices only ambiguously and under the narrow technical barriers to trade (TBT) context in very few FTAs, which reflects complicated social, legal and other underpinnings of China.¹⁵⁶ The China-New Zealand FTA has a kind of side agreement on environment cooperation, and the common cooperation activities appear to be mostly exchange of experience and visits, and joint events (like seminars).¹⁵⁷

¹⁴⁹ Bernard Hoekman & Charles Sabel, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO*, EUI WORKING PAPER RSCAS 2019/10, 1 (2019).

¹⁵⁰ Treat. 2019.

¹⁵¹ Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 401, 402 (1995).

¹⁵² Lester & Barbee. 2013.

¹⁵³ New Zealand Ministry of Foreign Affairs and Trade, *Using the New Zealand-China FTA*, available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/using-nz-china-fta/>.

¹⁵⁴ China-Korea Free Trade Agreement Officially Signed Article 17.2.3. 2015.

¹⁵⁵ Id. at, Articles 13.7, 17.2.3, 17.23.2.

¹⁵⁶ Lin & Liu, MELBOURNE JOURNAL OF INTERNATIONAL LAW, 166-167 (2018).

¹⁵⁷ China-New Zealand Environment Cooperation Agreement Article 2.3 (2008).

Second, China's FTAs eschew regulatory rights, and choose a "developing country" FTA pattern.¹⁵⁸ The lax and aspirational regulatory cooperation rules in China's FTAs are provided in loosely worded obligations or hortatory statements. Like most other developing countries in the region, China's regulatory disciplines are more geared towards trade development capacity needs, and therefore prefer shallow regulatory cooperation over more onerous regulatory disciplines generally.¹⁵⁹ For e-commerce, China's FTAs contain only some, less structured cooperation rules (e.g., cooperation on addressing spam) than those of the US and EU.¹⁶⁰ In some settings, China prefers maintaining national frameworks instead of regulatory cooperation. This is the case with online consumer protection in e-commerce, which contrasts with EU FTAs' regulatory cooperation provisions.¹⁶¹

Third, China's regulatory cooperation often targets prioritized areas. It is not common to find detailed and across-the-board regulatory cooperation rules in China's FTAs. To illustrate, the China-ASEAN FTA identified a number of prioritized cooperation areas, including agriculture, information and communications technology, human resources development, investment, and Mekong River basin development.¹⁶²

3. *The Phase One agreement*

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

The Phase One agreement provides for select deep forms of regulatory cooperation, including the recognition of the equivalency of US regulations and the adoption of international standards. This is particularly the case with agriculture in which NTMs are common. Such provisions range from the recognition of the US dairy-safety system as providing the same level of protection as China's counterpart,¹⁶³ and the recognition of inspection of US pork and beef by the Food Safety and Inspection Service of the US Department of Agriculture,¹⁶⁴ to the recognition of the US beef and beef products traceability system.¹⁶⁵ China will also adapt a US automation system for accessing export certificates regarding meat and poultry.¹⁶⁶ For international standards, China commits to adopting maximum residue limits of Codex Alimentarius Commission regarding beef.¹⁶⁷ 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.¹⁶⁸

¹⁵⁸ Christopher M. Dent, *Free Trade Agreements in the Asia-Pacific a Decade On: Evaluating the Past, Looking to the Future*, 10 INTERNATIONAL RELATIONS OF THE ASIA-PACIFIC 201, 231 (2010).

¹⁵⁹ *Id.* at.

¹⁶⁰ Willemys, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 12 (2020).

¹⁶¹ *Id.* at, 19.

¹⁶² China-ASEAN Framework Agreement Article 7 (2002).

¹⁶³ US-China Economic and Trade Agreement Chapter 3, Annex 2, paragraph 2(b). 2020.

¹⁶⁴ *Id.* at, Chapter 3, Annex 4, paragraph 4, Annex 6, paragraph 2

¹⁶⁵ *Id.* at, Chapter 3, Annex 4, paragraph 3.

¹⁶⁶ *Id.* at, Chapter 3, Annex 8, paragraph 1; Fatih Oktay, *The Phase One Trade Deal: What's in It for China?*, *The Diplomat*(2020), available at <https://thediplomat.com/2020/01/the-phase-one-trade-deal-whats-in-it-for-china/>.

¹⁶⁷ US-China Economic and Trade Agreement Chapter 3, Annex 4, paragraph 5. 2020.

¹⁶⁸ Oktay. 2020.

The Phase One agreement calls for other regulatory cooperation in select issues including trade secret protection,¹⁶⁹ measures against counterfeiting and infringement in the e-commerce market,¹⁷⁰ IP border enforcement,¹⁷¹ agriculture,¹⁷² and financial services.¹⁷³ IP protection cooperation refers to information sharing, industry outreach, and regular meetings.¹⁷⁴ Notably, the most detailed regulatory cooperation rules are an 11-paragraph annex on agriculture.¹⁷⁵ Going beyond information exchange, it provides for technical consultations (including on pesticide registration data and pesticide trial data, and 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).¹⁷⁶

Overall, China's FTAs resemble WTO norms that have few obligations imposed for harmonization.¹⁷⁷ The possibility of regulatory harmonization is further constrained by China's lack of consistent FTA practices. China often relies on the FTA proposals of trading partners.¹⁷⁸ The analytical framework will be useful to understand the nuances and complexity of these trade agreements on a case by case basis. 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.

B. Domestic law change

The modification of domestic law is an important indicator of trade agreements' depth: deep FTAs are the deepest, China's FTAs the most shallow, while the Phase One agreement sits in the middle. Deep integration (like deep FTAs) requires states to directly negotiate over and bind domestic policies, while shallow integration (like China's FTAs) provides states with more latitude in domestic policy making (e.g., NTMs), only subject to certain overriding rules to prevent policy substitution.¹⁷⁹ The Phase One agreement is deeper than China's FTAs but still falls within shallow integration.

1. Deep FTAs

Deep FTAs are much more constraining than China's trade agreements. The Phase One agreement is distinct from deep FTAs since it has much less regulatory disciplines that cover narrow issues. To some extent, the Phase One agreement is closer to US-China Joint Commission on Commerce and Trade outcome sheets than FTAs.¹⁸⁰

¹⁶⁹ US-China Economic and Trade Agreement Article 1.4.3. 2020.

¹⁷⁰ *Id.* at, Chapter 1, Section E.

¹⁷¹ *Id.* at, Article 1.21.3.

¹⁷² *Id.* at, Article 3.1(a).

¹⁷³ *Id.* at, Articles 4.1, 4.2.

¹⁷⁴ *Id.* at, Article 1.33.

¹⁷⁵ *Id.* at, Chapter 3, Annex 1.

¹⁷⁶ *Id.* at.

¹⁷⁷ Hoekman & Mavroidis, 3 (2015).

¹⁷⁸ Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 THE JOURNAL OF WORLD INVESTMENT & TRADE 843, 867 (regarding China's investment rules) (2015); Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 22 (2015).

¹⁷⁹ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, Abstract, 38, 39 (2016).

¹⁸⁰ I got this point from Mark Cohen.

Deep FTAs feature often precise binding disciplines governing domestic policies and stricter obligations (like harmonization or mutual recognition).¹⁸¹ Deep FTAs increasingly target NTMs (the substantive chapters of the CETA mostly addressing NTMs¹⁸²) and set stringent regulatory controls for domestic regulation. These pacts (e.g., the TPP and CETA) provide for higher standards than previous trade pacts in respect of crucial issues like labor and the environment.¹⁸³

Deep FTAs, like other deep international agreements, require “extensive changes to existing behaviour.”¹⁸⁴ Deep regulatory rules require institutional development and a high level of policy coordination, which brings major rule changes in developing country parties. These rules directly constrain domestic policy making, since enforceable regulatory obligations could “lock in structural reforms at national-level and promote implementation of second generation reforms.”¹⁸⁵ Deep rules like TPP provisions require “deeper domestic administrative, regulatory, and legal reforms.”¹⁸⁶ To illustrate, the CPTPP IP rules are expected to bring significant changes to Vietnam.¹⁸⁷

2. *China’s trade agreements*

China’s FTAs, including the China-Korea FTA, do not seek to push through significant domestic regulatory reform.¹⁸⁸ They contain traditional rules that often focus on border measures (like tariff cuts), rather than stringent regulatory disciplines on NTMs. China’s FTAs usually can be implemented by administrative agencies. They do not require legal amendments by the legislature, nor a wide-ranging review of domestic law. Put differently, China’s FTAs may bring certain changes, predominantly in the administrative practice sphere. They may thus be considered as shallow FTAs that permit states greater latitude in adopting NTMs.¹⁸⁹

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). The Phase One agreement is likely to impact judicial and administrative practices related to criminal enforcement of IP rules.¹⁹⁰ For instance, the Supreme People’s

¹⁸¹ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 40 (2016).

¹⁸² Hoekman & Mavroidis, 8 (2015).

¹⁸³ Inside CETA: Unpacking the EU-Canada Free Trade Deal. (2014).

¹⁸⁴ Laurence R. Helfer, *Flexibility in International Agreements*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 175, (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

¹⁸⁵ Wignaraja. 2012.

¹⁸⁶ Jing Tao, *TPP and China: A Tale of Two Economic Orderings?*, in MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP 92, (Benedict Kingsbury, et al. eds., 2019).

¹⁸⁷ See, e.g., Linh Duy Mai, *CPTPP Brings Significant and Effective Change to Vietnam’s IP Landscape*(2019), available at https://www.tilleke.com/sites/default/files/2019_JanFeb_MIP_IP_Impact_CPTPP.pdf.

¹⁸⁸ Schott, et al., 4. 2015.

¹⁸⁹ Ederington & Ruta, POLICY RESEARCH WORKING PAPER 7661, 4 (2016).

¹⁹⁰ Hongbin Jiao & Yuxin Liu, *An IP Roadmap for Phase-One Sino-US Economic and Trade Agreement*(2020), available at <https://www.chinalawinsight.com/2020/01/articles/intellectual-property/an-ip-roadmap-for-phase-one-sino-us-economic-and-trade-agreement/>.

Court overruling of two previous lower court judgments concerning the Chinese name of Michael Jordan arguably reflects the commitments under the Phase One agreement.¹⁹¹

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 structural reforms and substantial revisions of China's intellectual property laws that should presumably extend more broadly."¹⁹² Possible domestic law changes include to aspects of the E-Commerce Law (such as the removal of liability for erroneous takedown notices submitted in good faith, 20 working days for right 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).¹⁹³ For instance, the pharmaceutical patent linkage system provided in the Phase One agreement is "totally brand new to 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.¹⁹⁴

Meanwhile, the Phase One agreement has impacts on China's legislative reform particularly concerning IP, but such impacts are not significant.¹⁹⁵ Many obligations of the Phase One agreement have been reflected in Chinese law modification before the conclusion of the Phase One agreement. 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);¹⁹⁶ 2019 Foreign Investment Law (administrative authorities and officers prohibited from force technology transfer by administrative means); and 2019 E-Commerce Law (e-commerce operators to establish rules of IP protection).¹⁹⁷

¹⁹¹ Cissy Zhou, *China Sports Firm Illegally Used Michael Jordan's Name but Did Not Violate Image Rights, Top Court Rules*, South China Morning Post(2020), available at <https://www.scmp.com/economy/china-economy/article/3079028/china-sports-firm-illegally-used-michael-jordans-name-did-not>.

¹⁹² Eugenia Kolivos & Lara Nurick, *Intellectual Property, Technology Transfers and the US-China Trade Deal: Key Takeaways for Australia*(2020), available at <https://corrs.com.au/insights/intellectual-property-technology-transfers-and-the-us-china-trade-deal-key-takeaways-for-australia>.

¹⁹³ Jiao & Liu. 2020.

¹⁹⁴ Id. at.

¹⁹⁵ Feng Wang, et al., *China and the United States Announce "Phase One" Trade Deal - Key Issues and Takeaways for Business*(2020), available at <https://www.kwm.com/en/us/knowledge/insights/china-and-the-us-announces-phase-one-trade-deal-key-issues-and-takeaways-for-business-2020>.

¹⁹⁶ Jiao & Liu. 2020.

¹⁹⁷ Wang, et al. 2020.

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 (i) SSDS rules, including private access, and (ii) the coverage of dispute settlement mechanisms.

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.¹⁹⁸ 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. For the panel functions, the USMCA provides the following functions that 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."¹⁹⁹ Concerning the panel process, deep FTAs provide for the roster or list of the panel²⁰⁰ and submissions of non-governmental entities,²⁰¹ 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,²⁰² the written submissions and final panel being made publicly available²⁰³) to efficiency (e.g., up to 350 days from the consultation request to the issuance of a final panel report under the TPP²⁰⁴). 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.²⁰⁵ 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"²⁰⁶ in the TPP competition chapter, likely a first for an FTA.²⁰⁷

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

¹⁹⁸ USMCA Article 30.6.

¹⁹⁹ *Id.* at, Article 31.13.1.

²⁰⁰ *Id.* at, Article 31.8 (roster of panel chairs); CETA Article 29.8; CPTPP Article 28.11.

²⁰¹ CPTPP Article 28.13(e).

²⁰² *Id.* at, Article 28.13(b).

²⁰³ *Id.* at, Articles 28.13(d), 28.18.

²⁰⁴ Jennifer Hillman, *Dispute Settlement Mechanism*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 101-102, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

²⁰⁵ CPTPP Article 28.20.7, 28.20.8.

²⁰⁶ TPP Article 16.3.1.

²⁰⁷ R. Michael Gadbow, *Competition Policy*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 83, 87, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

why smaller economies are interested in deep FTAs.²⁰⁸ For one thing, deep FTAs often provide for more detailed rules that make it easier to adjudicate on trade disputes. There were three SDDS cases under the NAFTA, although later cases could not proceed largely due to the US delay in panel proceedings (particularly the panel formation) under NAFTA Chapter 20.

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. They often emphasise non-litigious alternative dispute resolution methods (like consultation) over detailed, rigid and compulsory formal dispute settlement rules as in deep FTAs.²⁰⁹ The China-Korea FTA provides that the parties "shall make every attempt through cooperation and consultations" to solve disputes under the FTAs.²¹⁰ As with other Chinese FTAs, disputes under the China-Korea FTA will be addressed by the panellists when consultations fail to resolve the dispute in time.²¹¹ 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 a better position from the perspective of such asymmetry between states.²¹² 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 Korea²¹³ 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 against the other party on the ground that the other Party's measure is incompatible with the FTA.²¹⁴

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

²⁰⁸ Simon Lester, *Mexico's View of the Problems with the NAFTA Panel Appointment Process* (2018).

²⁰⁹ Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 493, 503 (2011).

²¹⁰ China-Korea FTA Article 20.1. 2015.

²¹¹ *Id.* at, Article 20.6.

²¹² MICHAEL J. TREBILCOCK & JOEL TRACHTMAN, *ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW* 56 (Edward Elgar 2nd ed. 2020).

²¹³ Heng Wang, *China-Led RCEP Provides Starting Point for Reducing Tensions and Building New Global Trade Rules*, South China Morning Post(2020), available at <https://www.scmp.com/print/business/article/3086149/china-led-rcep-provides-starting-point-reducing-tensions-and-building-new>; *S Korea complains to WTO about China over Thaad*, BBC(2017), available at <https://www.bbc.com/news/business-39324536>.

²¹⁴ China-Korea FTA Article 20.17. 2015.

and a designated Vice Premier of China, meeting every six months (high level engagement compared with vice-ministerial level consultation under the China-Korea FTA²¹⁵).²¹⁶ If the consultation fails, the complaining party could suspend obligations under the deal or subsequently take remedial action.²¹⁷ This appears to be a kind of self-help measure. The other party could withdraw from the agreement with 60-days written notice if it thinks that the complaining party suspended the obligation or adopted the remedial measure in bad faith.²¹⁸ 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.²¹⁹

However, the Phase One agreement eschews third-party adjudication, which leads to the de-legalization of international economic relations.²²⁰ 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).²²¹ Legal delegation is also measurable in the extent to which private actors are allowed to start a legal proceeding (legalized dispute settlement processes) to enforce the agreement (private access).²²² 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. It eschews third-party dispute resolution, which is particularly strong with deep FTAs.

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.²²³

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,²²⁴ government procurement, financial services and, to a lesser extent, select social issues (labor 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

²¹⁵ See, e.g., China FTA Network, *The 2nd Joint Commission on China-ROK FTA Held in Seoul*(2018), available at

http://fta.mofcom.gov.cn/enarticle/enkorea/enkoreanews/201808/38460_1.html.

²¹⁶ US-China Economic and Trade Agreement Articles 7.4, 7.2, Annex 7-A. 2020.

²¹⁷ *Id.* at, Article 7.4.4(b).

²¹⁸ *Id.* at.

²¹⁹ David A. Gantz, et al., *The Scorecard of the Phase One Trade Agreement* (2020).

²²⁰ Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past Symposium on Linkage as Phenomenon: An Interdisciplinary Approach*, 19 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 513, 531 (1998).

²²¹ Kenneth W. Abbott, et al., *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401, 415 (2000).

²²² *Id.* at, 416.

²²³ Wang, *JOURNAL OF WORLD TRADE*, 333 (2019).

²²⁴ CPTPP Article 17.15.

financial services.²²⁵ The EC and US FTAs used to have quite small number of enforceable WTO-beyond provisions.²²⁶ Government procurement²²⁷ and financial services²²⁸ are subject to dispute settlement under deep FTAs. The TPP subjects rules on anti-corruption to modified dispute settlement provisions,²²⁹ and sets conditional access to dispute settlement for the chapter on the movement of natural persons.²³⁰ Transparency and reporting obligations related to macroeconomic policies and exchange rate matters are subject to USMCA dispute settlement processes.²³¹ For social issues, labor and environment disputes are subject to procedures and rules in CETA labor and environment chapters,²³² and are to be decided by a Panel of Experts.²³³ Commitments under the TPP labor chapter are subject to SSDS mechanisms if labor consultation fails,²³⁴ while its environment chapter is subject to dispute settlement with certain limitations. More broadly, dispute settlement regarding regulatory coherence has been strengthened from the CPTPP's non-application of dispute settlement²³⁵ to the USMCA's limited application of dispute settlement (regarding a sustained course of (in)action).²³⁶

2. *China's trade agreements*

Reflecting a selective approach, China's trade agreements have a much 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. 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 US and EU FTAs.²³⁷ The e-commerce chapter remains non-enforceable in the latest China-Singapore FTA upgrade.²³⁸ This contrasts with the enforceable CPTPP e-commerce rules. 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.²³⁹ This appears to be supported by the statement of the US Treasury Secretary

²²⁵ Victoria Donaldson & Lester Simon, *Dispute Settlement, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 399, (Simon Lester, et al. eds., 2016).

²²⁶ Horn, et al., *THE WORLD ECONOMY*, 1587 (2010).

²²⁷ E.g., CETA Article 19.18.4.

²²⁸ *Id.* at, Articles 13.20.1; TPP Article 11.21.1.

²²⁹ TPP Article 26.12.1.

²³⁰ *Id.* at, Article 12.10.

²³¹ USMCA Article 33.8.1.

²³² CETA Articles 23.11.1, 24.16.1.

²³³ *Id.* at, Articles 23.10.2, 24.15.2.

²³⁴ TPP Articles 19.15.12, 19.15.13.

²³⁵ CPTPP Article 25.11.

²³⁶ USMCA Article 28.20.3.

²³⁷ Willemys, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 11-12 (2020).

²³⁸ China-Singapore FTA Upgrade Protocol Appendix 6, Article 11. 2019.

²³⁹ James Politi, *What's in the US-China 'Phase One' Trade Deal?*, *Financial Times*(2020), available at <https://www.ft.com/content/a01564ba-37d5-11ea-a6d3-9a26f8c3cba4>.

Steven Mnuchin that “China has made enforceable commitments to refrain from competitive devaluation.”²⁴⁰ This reflects a hybrid approach of the formal consultations with the 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 declaration²⁴¹), and are not subject to dispute settlement. In all, currency rules have taken harder forms in the Phase One agreement.

VI. Concluding remarks

Trade agreements are a moving target and increasingly complex. China does not have a model for trade agreements.²⁴² China’s trade agreements develop on an ad hoc basis, and vary according to the situation warranting a trade pact.²⁴³ The Phase One agreement is unprecedented for both China and the US. For FTAs concluded by the US, mini trade agreements are arising (e.g., the 2019 US-Japan Trade Agreement regarded as a “limited” trade agreement,²⁴⁴ and the planned US-India trade deal negotiations²⁴⁵). 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 and promote deep integration. This affects predictability in trade. This challenge is even more significant in the post-COVID-19 era with the rise of deglobalisation 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

²⁴⁰ Thomas Franck, *US Removes China from Currency Manipulator List Ahead of Trade Deal Signing*(2020), available at <https://www.cnbc.com/2020/01/13/us-will-no-longer-consider-china-a-currency-manipulator.html>.

²⁴¹ *Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries*(2015), available at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/Joint-Declaration-by-Trans-Pacific-Partnership-countries>.

²⁴² Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 22 (2015).

²⁴³ Kong, *JOURNAL OF WORLD TRADE*, 1205 (2012).

²⁴⁴ Paul Wiseman & The Associated Press, *Trump Signs Japan Mini Trade Deal With No Change in Auto Tariffs*, *Fortune*(2019), available at <https://fortune.com/2019/10/07/us-trade-deal-japan-auto-tariffs-us-farmers-trump-signs-mini-trade-deal-with-japan/>.

²⁴⁵ Trevor Cloen & Irfan Nooruddin, *The U.S.-India Trade Deal Fell Through. What Happens Now?*, *The Washington Post*(2020), available at <https://www.washingtonpost.com/politics/2020/03/05/us-india-trade-deal-fell-through-what-happens-now/>.

(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 the future of trade law and its implications. The tripartite analytical framework lays a solid foundation for the further measurement of various trade agreements, their actual merits and 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 at 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 trend and 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 us to better understand the increasingly complex trade agreements and rapidly changing trade law landscape.

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JACQUES PELKMANS, et al., TOMORROW'S SILK ROAD: ASSESSING AN EU-CHINA FREE TRADE AGREEMENT (Rowman & Littlefield International. 2016).

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

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