

# AN ANALYSIS OF ESTABLISHING REGIONAL ENVIRONMENTAL GOVERNANCE THROUGH A MEGA REGIONAL TRADE AGREEMENT: THE ASIA-PACIFIC PRACTICE

---

*I-Ju Chen\**

Introduction.....	2
I. The Linkage Between Trade and the Environment .....	4
A. The Debate Between Trade Liberalization and Environmental Protection .....	4
B. WTO Agreements and Case Law Concerning Environmental Protection .....	6
II. The Role of Free Trade Agreements in Environmental Protection in Asia-Pacific .....	7
III. An Overview of APEC .....	11
A. APEC’s Function in Protecting the Environment.....	15
B. Future Goals and Limitations.....	16
IV. RTA’s Significance in Protecting the Environment: The Case Study of CPTPP’s Environmental Chapter .....	18
A. RTA’s Significance in Protecting the Environment .....	18
B. Theory of Regional Environmental Governance .....	20
C. An Analysis of the CPTPP’s Environmental Chapter.....	22
D. Improving the CPTPP for Better Environmental Governance in Asia- Pacific.....	27
Conclusion .....	29

---

\* Ph.D. candidate in law at the University of Birmingham in the UK ([ixc495@bham.ac.uk](mailto:ixc495@bham.ac.uk)).  
Author appreciates Luca Rubini, Rilka Dragneva-Lewers and Yao-Ming Hsu for their feedback on an earlier draft of this article. Author also appreciates the editors of the *Vermont Journal of Environmental Law* for their editing help and insightful comments on this article. All errors and omissions are the author’s.

## INTRODUCTION

Regional environmental governance is essential to remediate transboundary environmental harm.<sup>1</sup> Establishing regional environmental governance abrogates tensions and complexities of harm arising from diverse economic development in Asia-Pacific countries.<sup>2</sup> Additionally, Asia-Pacific countries have unequal environmental standards stipulated in their domestic laws and regulations. Their confusing environmental standards likely result in conflicts across the region. These inconsistent environmental standards, along with potential disputes—such a sensitive field and confrontational phenomenon—further complicate the process to establish regional environmental governance in Asia-Pacific. On a multilateral level, the debate on the linkage of trade liberalization and environmental protection at the World Trade Organization (WTO) continues. In particular, four out of the total nine environmental disputes in the WTO and the General Agreement on Tariffs and Trade (GATT) occurred in Asia-Pacific.<sup>3</sup> These disputes indicate the significance of establishing regional environmental governance in Asia-Pacific, not only to handle transboundary environmental harm but also to prevent environmentally-related trade disputes.

The Asia Pacific Economic Cooperation (APEC) is a regional forum that focuses on trade and economic issues and carries out regional environmental governance. APEC member economies operate on open regionalism. This voluntary and non-binding scheme, however, has caused obstacles for APEC to protect the environment. The main factor underlying this difficulty is the complicated geopolitics in Asia-Pacific. APEC's environmental protection objective derives from the nature of transboundary environmental matters,

---

1. Koh Kheng Lian & Nicholas A. Robinson, *Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model*, in GLOBAL ENVTL. GOVERNANCE: OPTIONS & OPPORTUNITIES 101, 102 (Daniel C. Esty & Maria H. Ivanova ed., 2002).

2. John Davis, *Regional Economic Integration, the Environment and Community: East Asia and APEC*, 17 INT'L REV. OF APPL. ECON. 69, 71 (2003) (listing an array of common transboundary environmental problems including water quality and quantity problems from solid and toxic wastes from industrial, agricultural, and domestic sectors).

3. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS/58 (adopted Nov. 6, 1998) (citing the *Shrimp-Turtle* case brought by India, Malaysia, Pakistan, and Thailand against the U.S.); see also Report of the Panel, *United States—Restrictions on Imports of Tuna*, WTO/DS/21 (circulated Sept. 3, 1991) (citing the *Tuna-Dolphin* case brought by Mexico against the U.S.); Report of the Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 (adopted Mar. 22, 1988) (citing the case concerning measures affecting exports of unprocessed herring and salmon brought by U.S. against Canada.); Report of the Panel, *United States—Prohibition on Imports of Tuna and Tuna Products from Canada*, L/5198 (adopted Feb. 22, 1982) (citing the case concerning prohibition of imports of tuna and tuna products brought by Canada against U.S.).

which requires a regional approach to deal with such matters.<sup>4</sup> As APEC is considered the hub of trade on environmental goods, it recognizes the significant development of trade measures aimed towards environmental protection in Asia-Pacific.<sup>5</sup>

Based on the linkage between trade and the environment in Asia-Pacific, this article argues for the necessity of creating regional environmental governance by a mega-regional trade agreement (RTA).<sup>6</sup> In this article, the countries in Asia-Pacific are those twenty-one member economies in APEC.<sup>7</sup> Besides analyzing the regional environmental governance of APEC, this article explains why environmental governance in other Asia Pacific regional economic forums do not function well. The identified regional economic forums include: Asian Development Bank (ADB), Inter-American Development Bank (IDB), and Asian Infrastructure Investment Bank (AIIB). These members overlap with those in APEC. These regional forums lack sufficient institutional capacity and arrangements, technical expertise, and financial support. Therefore, a mega-RTA is a significant tool to establish regional environmental governance.

This rest of the article is structured as follows. The second section examines the linkage between trade and the environment globally and regionally in Asia-Pacific. The third section analyzes how APEC implements environmental protection. The fourth section evaluates why the environmental chapter in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—the successor of Trans-Pacific Partnership Agreement (TPP)—appears to introduce more effective regional environmental governance than APEC. However, the CPTPP environmental chapter faces rectifiable criticisms. Finally, the article concludes with the contemporary challenges and opportunities in international trade and environmental law, along with the associated policies and governance in Asia-Pacific.

---

4. Davis, *supra* note **Error! Bookmark not defined.**, at 74.

5. Patricia M. Goff, *The Environmental Goods Agreement: A Piece of the Puzzle*, No. 72 CIGI PAPERS 2, 2 (June 2015), [https://www.cigionline.org/sites/default/files/cigi\\_paper\\_no.72.pdf](https://www.cigionline.org/sites/default/files/cigi_paper_no.72.pdf) (last visited Mar. 9, 2019).

6. See *Regional trade agreements and the WTO*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/rta\\_pta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm) (last visited Mar. 9, 2019) (adopting regional trade agreements (RTAs) to describe free trade agreements between more than two signing parties in a specific geographical area. WTO defines RTAs as reciprocal trade agreements between two or more partners, including free trade agreements and customs unions).

7. *Member Economies*, ASIA-PACIFIC ECON. COOPERATION, <https://www.apec.org/about-us/about-apec/member-economies.aspx> (last visited Mar. 9, 2019) (consisting of Australia, Brunei Darussalam, Canada, China, Chile, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippine, Russia, South Korea, Singapore, Chinese Taipei, Thailand, US, and Vietnam).

## I. THE LINKAGE BETWEEN TRADE AND THE ENVIRONMENT

A. *The Debate Between Trade Liberalization and Environmental Protection*

Since the 1990s, the WTO has been criticized for giving little concern to social issues related to non-tariff barriers to trade,<sup>8</sup> including environmental protection.<sup>9</sup> The World Commission on the Social Dimension of Globalization, however, indicated that trade liberalization can improve social protections. Increased trade profits can bring general efficiencies with benefits to the environment.<sup>10</sup>

The WTO's chief objective is to substantially reduce tariffs and non-tariff barriers to promote trade liberalization at a multilateral level.<sup>11</sup> During the final period of the Uruguay Round, between 1986 and 1994, certain member states within the WTO sought to expose numerous environmental issues. However, the linkage between free trade and the environment is complicated. The debate on whether they are mutually beneficial has revolved around particular issues.<sup>12</sup> While one could advocate free trade as a source of economic development, it can also damage the environment through increased pollution.<sup>13</sup> If states focus solely on promoting trade interests, there is a high possibility that their environmental regulatory autonomy could be negatively affected.<sup>14</sup> Moreover, trade-supportive policy can often lead to environmental harms, such as the examples in Hong Kong and the Pearl River Delta during the 1980s and 1990s.<sup>15</sup> The Global

---

8. LORAND BARTELS, SOCIAL ISSUES IN REGIONAL TRADE AGREEMENTS LABOUR, ENVIRONMENT AND HUMAN RIGHTS, in LEGAL STUDIES RESEARCH PAPER SERIES 1, 2–5 (2014), reprinted in BILATERAL AND REG'L TRADE AGREEMENTS: COMMENTARY, ANALYSIS AND CASE STUDIES 364 (Simon Lester, Bryan Mercurio and Lorand Bartels eds., 2<sup>nd</sup> ed. 2015).

9. *Id.* at 3.

10. WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL, 57–58 (2004), <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> (last visited Mar. 9, 2019).

11. Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154, 154 [hereinafter Marrakesh Agreement] (“Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment . . .”).

12. Goff, *supra* note 5, at 2.

13. *Id.*

14. S. Thomas, The Necessity of Trade-Restrictive Measures Aimed at Protecting the Environment 3 (2004) (unpublished master thesis, University of Groningen) (on file with author), cited in Firehiwot Wujira, *Non-Trade Concerns in Interpreting General Exception Clauses of WTO Agreements*, 4 MIZAN L. REV. 164, 164 (2010).

15. See Christine Loh, *Tackling Cross-border Air Quality in Southern China*, China Environment Series, WOODROW WILSON INT'L CTR. FOR SCHOLARS, 64 (2007), <https://www.wilsoncenter.org/sites/default/files/ces9.pdf> (last visited Mar. 9, 2019) (describing how Hong Kong and the Pearl River Delta region experienced environmental issues as industrialization grew).

Commission on the Economy and Climate Change (Commission), a major international initiative, also reported increased pollution after the economic development. In 2014, the Commission asserted that globalization has resulted in both high- and low-carbon growths over the last 25 years. These carbon growths were important economic stimuli for developed and developing countries, including emerging economies. Still, carbon growths have significantly changed production in countries that have coal-based energy systems and less powerful pollution controls. Thus, the trade boom has likely increased the amount of global greenhouse gas emissions.<sup>16</sup>

Nonetheless, free trade can achieve objectives of environmental protection. The “Environmental Kuznets Curve” supports this claim. Kuznets hypothesized that a turning point exists in the relationship between environmental pollution and trade liberalization when economic profits increase to a certain margin.<sup>17</sup> Trade liberalization can also help achieve environmental goals in other ways. For instance, a positive correlation exists between economic development and the responsibility with which states pursue environmental protections. Sallie James argues that because trade leads to wealth with an increased desire and ability to protect the environment, these two areas—trade and environmental protection—are complementary.<sup>18</sup> According to the Commission, trade is important to accelerate the transmission of low-carbon technologies to countries with low-cost manufacturing. Trade both reduces cost and increases the geographic range, within which these technologies circulate.<sup>19</sup> Fundamental economic theories, such as comparative advantage, help explain the role that trade has played in facilitating low-carbon technologies.<sup>20</sup> Economic efficiency gained through liberal economic practices can indeed generate positive environmental results.<sup>21</sup>

---

16. THE GLOB. COMM’N ON THE ECON. AND CLIMATE CHANGE, BETTER GROWTH BETTER CLIMATE: THE NEW CLIMATE ECONOMY REPORT 49 (2014), [http://static.newclimateeconomy.report/wp-content/uploads/2014/08/NCE\\_SynthesisReport.pdf](http://static.newclimateeconomy.report/wp-content/uploads/2014/08/NCE_SynthesisReport.pdf) (last visited Mar. 9, 2019).

17. Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 20 (1955) (describing other trends also, like inequality, that change with economic growth).

18. Sallie James, *Free Trade is a Boon to the Environment*, CATO INST. (Oct. 8, 2009), <https://www.cato.org/publications/commentary/free-trade-is-boon-environment> (last visited Mar. 9, 2019).

19. See GLOB. COMM’N ON THE ECON. AND CLIMATE CHANGE, *supra* note 16, at 49 (increasing global supply chains for solar and wind technology has reduced cost).

20. See ALAN PROFESSOR WINTERS, INTERNATIONAL ECONOMICS 13, 21–26 (4th ed. 1991) (evaluating the Ricardian model of comparative advantage).

21. See generally JENNIFER CLAPP & PETER DAUVERGNE, PATHS TO A GREEN WORLD: THE POLITICAL ECONOMY OF THE GLOBAL ENVIRONMENT 177 (The MIT Press 2005) (showing that companies become more efficient with less waste created, which, in turn, allows for less environmental issues).

Likewise, carefully considering the environment can spur economic profits and trade opportunities.<sup>22</sup> For developing countries, however, green protectionism can prove burdensome. Developing countries must meet higher environmental standards, which makes development gains more difficult to achieve. Thus, the relationship between trade and the environment is complicated, but a positive correlation between these two areas can exist.<sup>23</sup>

Tangible institutional efforts to make this relationship work might come in the form of international environmental treaties and WTO disputes. Whether the WTO retains its bias towards trade liberalization or moves to adopt greater environmental responsibility and justice frames the current debate about the future of this complex linkage between trade and the environment.

### *B. WTO Agreements and Case Law Concerning Environmental Protection*

WTO Agreements are not merely focus on trade liberalization, they also consider environmental protection. Environmental considerations are incorporated into: the preamble of the WTO Agreement;<sup>24</sup> Article 20(b)(g) of the GATT;<sup>25</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);<sup>26</sup> and Agreement on Technical Barriers to Trade (TBT Agreement).<sup>27</sup> Like other WTO rulings, the Appellate Body Report in *Shrimp-Turtle* affirmed that the WTO Agreement explicitly recognizes the objective of sustainable development.<sup>28</sup> The Appellate Body Report also recognized the important social dimension of sustainable development.<sup>29</sup> In the *EC-Tariff Preferences*, the WTO Appellate Body Report referred to its report in *Shrimp-Turtle* and affirmed that sustainable development is a goal of the WTO.<sup>30</sup>

---

22. Goff, *supra* note 5, at 2.

23. *Id.*

24. Marrakesh Agreement, *supra* note 11, at 154.

25. See General Agreement on Tariffs and Trade art. 20, Oct. 30, 1947, 60 Stat. A-11, 55 U.N.T.S. 194, (stipulating exceptions for measures that are: “(b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”).

26. See WTO, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, (May 1998), [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (last visited Mar. 9, 2019) (dealing with the sanitary and phytosanitary measures to ensure food safety and to protect human, animal, and plant health based on the scientific principles and sufficient scientific evidence).

27. Agreement on Technical Barriers to Trade Art 2, Jan. 1, 1995, 1869 U.N.T.S. 299. (serving to consider environmental protection).

28. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

29. *Id.*

30. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 94, WTO Doc. WT/DS246/AB/R (Apr. 7, 2004).

When the WTO interpreted its agreements to settle environmentally-related trade disputes, the WTO panels and Appellate Body illustrated the controversy of free trade and the environment. *Shrimp–Turtle* is the most recognized case to interpret Article 20 of the GATT. The Appellate Body Report explained that, although the contested measure aimed for environmental protection under Article 20(g) of the GATT, the measure unjustifiably discriminated between WTO members. Thus, the US environmental measures in the *Shrimp Turtle* case contradicted the criteria of the chapeau of Article 20 of the GATT.<sup>31</sup>

According to WTO case law, the WTO Appellate Body should not apply Article 20 exceptions to the GATT's substantive rules. Specifically, these exceptions would frustrate or defeat a person's GATT rights. However, the WTO Appellate Body requires reasonable application of trade measures to qualify for an exception. The chapeau—the terms of the headnote—of Article 20 is key to determine whether a measure qualifies. WTO case law implies environment-related trade measures that arbitrarily or unjustifiably discriminate between WTO members will not comply with the WTO rules.<sup>32</sup>

## II. THE ROLE OF FREE TRADE AGREEMENTS IN ENVIRONMENTAL PROTECTION IN ASIA-PACIFIC

The Doha Round in 2001 represented a milestone in reconciling trade liberalization and the environment within the WTO. Doha announced the declaration to support environmental protection in multilateral trade liberalization.<sup>33</sup> Paragraph 31 of the Doha Ministerial Declaration explicitly states how this declaration is a significant step towards a positive relationship between free trade and environmental concerns.<sup>34</sup> Nevertheless, the Doha

---

31. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 28, at ¶ 186.

32. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, 1, 141–43, WT/DS412/AB/R (May 6, 2013) (holding that Canada's Micro Feed-In Tariff Program is inconsistent with WTO principles).

33. World Trade Organization, Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/1 (2001).

34. *See id.* ¶31 (“With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

Round did not resolve environmental issues with trade liberalization.<sup>35</sup>The obstacle resulted from WTO members' attempts to reconcile the interests of developed and developing countries. To solve this deadlock, members in the WTO negotiated bilateral and regional trade agreements.<sup>36</sup>

Article 24 of the GATT, Article 5 of the GATS, and the enabling clause stipulate the legal basis to establish customs unions or free trade areas outside of the WTO.<sup>37</sup> The impact of regional economic integration schemes outside of the WTO is widely debated. "Friends of the WTO" view these schemes as complementary building blocks of multilateral free trade. However, "foes of the WTO" claim that these types of preferential trade arrangements form exclusive trade blocs that will eventually impair trade multilateralism and become "stumbling blocks."<sup>38</sup>

---

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.”).

35. Mark Halle, *Trade and Environment: Looking Beneath the Sands of Doha?*, 3 J. EUR. ENVTL. & PLAN. L. 107, 109 (2006); *see generally* WTO Secretariat, *Developmental Aspects of the Doha Round of Negotiations*, WTO Doc. WT/COMTD/W/143 (Nov. 22, 2005) (including the Doha Round objectives, such as trade and intellectual property, trade and development, and trade and investment).

36. *See generally Regional Trade Agreements*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm#facts](https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts) (last visited Mar. 9, 2019) (evolving RTAs in the world showed a significant growth of RTAs in force after 2008. In 2008, 35 RTAs were in force).

37. *See* The General Agreement on Tariffs and Trade art. 24, July 1986 [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47.pdf) (last visited Mar. 9, 2019) (“[T]he provisions of this Agreement shall not prevent . . . the formation of a customs union or of a free-trade area . . . : (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be; (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be.”); *see also* General Agreement on Trade In Services, art. 5, Jan. 1995, (“This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement. . . .”); *see also Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, WTO, [https://www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm) (last visited Mar. 9, 2019) (“Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.”).

38. SUN-TAIK HAN, *EUROPEAN INTEGRATION: THE IMPACT ON ASIAN NEWLY INDUSTRIALISING ECONOMIES* 29 (OECD 1992).



The factors supporting regional economic integration are as follows.<sup>39</sup> First, regional preferential arrangements could help sustain intra-regional momentum for multilateral trade liberalization.<sup>40</sup> Moreover, regional preferential arrangements could act as a model for the initial processes of significant trade liberalization. Second, regional economic integration will increase the opportunity cost if countries maintain trade barriers vis-à-vis third parties. To the extent that integration arrangements make the partner countries more competitive, regional economic integration could reduce green protectionism between partner countries. This may open partner countries' markets to external producers and drive access to non-partner countries.<sup>41</sup> Last, third parties will try to negotiate bilateral reduction of trade barriers to gain access to the regional market. Third parties will put greater force behind multilateralism to undercut the partner countries' preferences. Additionally, countries might resort to second-best preferential trade arrangements for practical reasons. For instance, the free-rider, least-common-denominator, and "convoy" problems have been stressed in the Uruguay Round negotiations.<sup>42</sup> Despite the constraints that the most-favored-nation clause and a multilaterally-negotiated-trade agenda imposes on the scope, depth, and pace of the negotiations, there are benefits to regional economic integration.

Counter arguments against regional economic integration claim that regional preferential trade arrangements may result in trade blocs without further benefiting multilateral free trade.<sup>43</sup> First, regional preferential trade arrangements may help generate regional champions.<sup>44</sup> This can create problems concerning interventionist policies associated with the standard concepts of strategic trade policy. Moreover, regional economic integration may cripple the free trade coalitions. Multilateral liberalization will eventually disintegrate member countries' preferential trade treatment because advances from further liberalization will be marginal and will leave

---

39. *Id.* at 30.

40. *See, e.g.,* Robert L. Birmingham, *Integration and Economic Development*, 1965 U. Ill. L. F. 781, 811 (1965) (supporting integration of economic co-operation for developing countries to expand intra-regional and extra-regional trade).

41. Lolette Kritzinger-van Niekerk, *Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience 2*, <http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/Kritzinger.pdf> (last visited Mar. 9, 2019).

42. *See generally* RICHARD G. LIPSEY & MURRAY SMITH, MULTILATERAL VERSUS REGIONAL TRADING ARRANGEMENTS: SUBSTITUTES OR COMPLIMENTS 10 (Simon Fraser Univ. Dep't of Econ. Working Paper No. 10-03, 2010) (arguing that developed countries's negotiations are slow moving because of the free-rider problem, non-tariff barriers to trade, and the "convoy" problem).

43. Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?*, 13 J. ON ECON. PERSPECTIVES 105, 119-120 (1999).

44. *Id.* at 119.

regional groups with less impetus for multilateral free trade.<sup>45</sup> Last, recent efforts to formulate regional preferential trade arrangements are partly motivated from frustration with GATT's multilateral trade negotiations. These negotiations can be interpreted to mean that regional economic integration arrangements are not complementary, but rather substitutive for the multilateral approach to trade liberalization.<sup>46</sup>

Free trade agreements (FTAs)<sup>47</sup> in the Asia-Pacific proliferated after the financial crisis of 1997.<sup>48</sup> In response to the crisis, affected states adopted FTAs to stimulate their economies and recover from financial loss. Professor and economist, Jagdish Bhagwati, argues that a "Spaghetti Bowl Effect" occurred when FTAs proliferated in Asia-Pacific.<sup>49</sup> The "Spaghetti Bowl Effect" describes when products are discriminated against based on respective "nationality," which Bhagwati asserts tarnishes trade. Trade experts have long noted these unpreventable costs.<sup>50</sup>

The "Spaghetti Bowl Effect" has both benefits and disadvantages. Benefits include cooperation and competition of market access among states. Economists, including Krugman, Frankel, Stein, and Wei, concur that the incremental FTAs can create trade flows.<sup>51</sup> Disadvantages include trade diversion and increased business transaction costs.<sup>52</sup> Since early FTAs in Asia-Pacific did not focus on economic growth, business costs in turn increased in subsequent FTAs.<sup>53</sup> These disadvantages threaten to complicate

---

45. See *id.* (arguing that previous experiences show that regional economic integration entities rarely initiated further multilateral free trade policies.)

46. HAN, *supra* note 38, at 29.

47. Please note that FTAs in this article directly mean and are restricted to bilateral FTAs.

48. See APEC FTAs Database, APEC SECRETARIAT (2016), <http://fta.apec.org> (last visited Mar. 9, 2019) (showing that only four FTAs were signed before 1997, the majority came after).

49. See Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with FTAs*, 726 COLUM. U. DISCUSSION PAPER SERIES, 1,4-5, 20 (Apr. 1995) (discussing the negative effects on trade from preferential trading agreements).

50. *Id.* at 4.

51. See generally Paul Krugman, *Is Bilateralism bad?* 1, 2-4, 12, 14-15, 17-18 (Nat'l Bureau Econ. Research, Working Paper No. 2972, 1989) (noting how internalizing trade within a country can devastate global trade overall, so incremental FTAs will avoid this situation); Paul Krugman, *The move toward free trade zones*, in Policy Implications of Trade and Currency Zones 7-42, Symposium (The Federal Reserve Bank of Kansas City, Jackson Hole, WY, Aug. 1991); see also Jeffrey A. Frankel, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM 229 (1997) (discussing that regional FTAs are preferable but more needs to be done so that outside members get the benefit of the trading bloc); see also Shang-Jin Wei & Jeffrey A. Frankel, *Open Regionalism in a World of Continental Trade Blocs*, 45 IMF Staff Papers 440, 441 (1998) (noting that continental trade blocs are more adapted to be welfare improving).

52. See *State of the Region Report 2006, Section 2: Regional Dynamics: Challenges for Asia Pacific Cooperation*, PAC. ECON. COOPERATION COUNCIL, <https://www.pecc.org/state-of-the-region-report-2006/224-state-of-the-region/2006-2007/393-section-2-regional-dynamics-challenges-for-asia-pacific-cooperation> (last visited Mar. 9, 2019) (describing positives and negatives of regional integration).

53. Deborah Elms, *The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl*, 18 INT'L NEGOT. 25, 29 (2013).

the international trade system and fracture WTO law. Its preamble designates trade liberalization and a non-discriminatory, multilateral trading regime as its principle objectives.<sup>54</sup> According to one analysis, RTAs demonstrate a broad range of environmental provisions in comparison to WTO agreements.<sup>55</sup> For example, many RTA preambles recognize the necessity of protecting the environment, as such they emphasize the importance of sustainable development during trade liberalization.<sup>56</sup>

One of the major differences between WTO agreements and RTAs are their institutional structures. Environmental measures are incorporated into various WTO agreements. These measures and discussions are also addressed in the Committee on Trade and Environment. Nevertheless, in several RTAs, environmental provisions can only be found in a separate environmental agreement on cooperation.<sup>57</sup> Several RTAs that did not originally contain specific environmental provisions created separate protocols or instruments to deal with environmental issues and problems in general.<sup>58</sup>

### III. AN OVERVIEW OF APEC

Over the past decade, countries in the Asia Pacific region liberalized their trade policies by unilateral, regional, and multilateral approaches. In practice, countries have also undertaken trade liberalization through regional forums, such as APEC, and prospects remain positive for continued trade liberalization in the region.<sup>59</sup>

Asia Pacific regionalism is an intricate phenomenon. It entails regional integration, which leads to considerable interdependence across the region. Regionalism may be market-driven or policy-led, whereas regional integration features interaction through economic activities *and* non-economic channels. Regional integration also involves regional cooperation through official activities. These activities are conducive to regional integration because they contribute to cross-border coordination, plans, and

---

54. *Sustainable Development*, WTO, [https://www.wto.org/english/tratop\\_e/envir\\_e/sust\\_dev\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm) (last visited Mar. 9, 2019).

55. Ronald Steenblik & Cristina Tebar Less, *Chapter 9: Environment, in REGIONALISM AND THE MULTILATERAL TRADING SYSTEM* 139 (OECD 2003).

56. *See generally* North American Free Trade Agreement (NAFTA) Jan. 1, 1994; *see* European Economic Area (EEA) Jan. 1, 1994; *see* Trans-Pacific Strategic Economic Partnership Agreement (P4), July 18, 2005.

57. *See* North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480; *see also* Environment Cooperation Agreement Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement (P4), July 18, 2005.

58. Steenblik & Less, *supra* note 55, at 139.

59. EAST ASIA: RECOVERY AND BEYOND, WBG, 53–55 (May 2000).

response to problems. Such activities include “intergovernmental dialogue, information exchanges, provision of regional public goods, and regional institution building.”<sup>60</sup>

Market force has been considered the most important drive in the regional development in Asia-Pacific.<sup>61</sup> The essence of the Asia Pacific market might lie in trade, and particularly depend on the export-led industrialization strategy in the region.<sup>62</sup> Regional economic integration in Asia-Pacific is determined by the nature of legal and institutional frameworks through the coordination among countries. APEC is the current regional institution in the Asia Pacific rim. It was established in 1989, just five years before the WTO was established in 1994. APEC has twenty-one members operating based on their voluntary scheme. APEC is an emerging regional economic integration and consists of most countries in the Pacific Rim, including dominant and emerging economic powers.<sup>63</sup> The map of APEC-member economies is in figure 1.

---

60. Roda Mushkat, *Creating Regional Environmental Governance Regimes: Implications of Southeast Asian Responses to Transboundary Haze Pollution*, 4 WASH. & LEE J. ENERGY, CLIMATE & ENV'T. 103, 111 (2013) (citing ASIAN DEVELOPMENT BANK, ASIAN REGIONALISM: A PARTNERSHIP FOR SHARED PROSPERITY XIL (2008) (discussing Asia's regionalism and specifically ASEAN's framework for regional cooperation).

61. See Zhang Zhiyoung, *Economic Integration in East Asia: The Path of Law*, 4 PEKING U. J. LEGAL STUD. 262, 264–265 (2013) (discussing market forces driving economic cooperation).

62. See *South-East Asia Regional Economic Integration and Cooperation*, UNDP (Aug. 2006), [http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/human\\_development/RBAP-HDR-2006-SEA-Regional-Economic-Integration.pdf](http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/human_development/RBAP-HDR-2006-SEA-Regional-Economic-Integration.pdf) (last visited Mar. 9, 2019) (discussing that governmental intervention by the Republic of Korea and Taiwan succeeded in stimulating economic benefits).

63. See *Member Economies*, *supra* note 7 (listing the participating countries in the Pacific Rim).

Figure 1: Map of APEC Member Economies



Different from the North American Free Trade Agreement (NAFTA), a formal FTA with binding effects on the signing parties, and the EU, a common market carrying regulatory measures and legal institutions and orders, APEC was established as a less rigid forum and was more a grouping of diverse economies. APEC was established in 1989 in Canberra, Australia with twelve members;<sup>64</sup> there was a risk that it would be viewed as a “vacuous talk-shop.”<sup>65</sup> Yet, APEC pursues the concept of open regionalism<sup>66</sup> and possesses unique features that make it economically and geopolitically significant. For instance, APEC offers a transregional dialogue platform for East and Southeast Asia, North and South America, and the Pacific.

APEC started with a modest program of sectoral and trade negotiations. Its objectives reflect the desire of its founding members: to promote economic growth, foster and strengthen trade, counter terrorism, and improve

64. See *Our Work With APEC*, N.Z. FOREIGN AFF. AND TRADE, <https://www.mfat.govt.nz/en/trade/our-work-with-apec/> (last visited Mar. 9, 2019) (listing the founding members: Australia, Brunei Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States).

65. JEFFREY A. FRANKEL ET AL, *APEC AND REGIONAL TRADING ARRANGEMENTS IN THE PACIFIC* 1 (1994).

66. Despite the various arguments of open regionalism, whether the proliferation of regional economic integration schemes will lead to closed or open regionalism may be influenced by the levels of microeconomic or macroeconomic. Regarding the microeconomic level, it will be influenced by the success in coping with structural adjustment problems with the blocs, and the commitment and willingness of the participating countries to confront the demands for protection and to seek multilateral trade liberalization. On the macroeconomic level, it is determined by the restoration of trade balances among the major trading partners and economic growth of the regions as well as the world. The micro and macroeconomic factors have a linkage about that protectionist demands tend to increase when the regional economy is suffering from inactive growth and increasing trade loss. HAN, *supra* note 38, at 30.

living standards.<sup>67</sup> “While APEC has been criticized for its talk-shop nature, its high-profile dialogue has strengthen APEC’s relevance in global governance.”<sup>68</sup> With regard to its institutional structure, APEC does not contain an organizational structure or a large bureaucracy supporting it. There is only the APEC Secretariat located in Singapore, which includes twenty-three diplomats seconded from APEC-member economies.

APEC consists of three main pillars: (1) trade and investment liberalization; (2) trade facilitation; and (3) economic and technical cooperation.<sup>69</sup> The annual meeting of APEC leaders, held in the U.S.A. since 1993, became a significant feature of APEC. Only one year after the 1993 meeting, APEC leaders created another historic step at their meeting in Bogor, Indonesia. The Bogor declaration set a goal of creating the world’s largest area of free trade and investment by 2020.<sup>70</sup> Under this plan, developed economies would achieve free trade by the year 2010 and developing economies would follow in 2020.<sup>71</sup> The Bogor goals have influenced APEC’s Economic Leaders’ Meeting as well as the domestic economic policies of the member economies. But APEC has functioned as a de facto institution, lacking an establishment treaty conferring international legal personality. Therefore, it has suffered a severe credibility crisis because of “its failure to achieve ‘Early Voluntary Sectoral Liberalization (EVSL),’ compounded by its inability to assist member economies during the Asian financial crisis in the 1990s.”<sup>72</sup>

This failure has been attributed to several reasons. One major reason was the diverse economic scales of the APEC’s twenty-one member economies. These created obstacles for economic integration.<sup>73</sup> The developed countries—U.S., Canada, Australia and New Zealand—believed EVSL was another scheme aimed at reducing tariffs.<sup>74</sup> However, the developing countries, including China and a few members of ASEAN, claimed that EVSL should include measures of trade facilitation, technical assistance, and

---

67. *Mission Statement*, ASIA-PACIFIC ECON. COOPERATION <http://www.apec.org/About-Us/About-APEC/Mission-Statement> (last visited Mar. 9, 2019).

68. Pasha Hsieh, *Reassessing APEC’s Role as A Trans-Regional Economic Architecture: Legal and Policy Dimensions*, 16 J. INT’L ECON. L. 119 (2013).

69. *Id.*

70. Bogor Declaration, Nov. 15, 1994, APEC Economic Leaders’ Declaration of Common Resolve, [http://thetechnocratietyranny.com/PDFS/1994\\_Declaration\\_Bogor\\_Goals.pdf](http://thetechnocratietyranny.com/PDFS/1994_Declaration_Bogor_Goals.pdf) (last visited Mar. 9, 2019).

71. *1994 Leaders’ Declaration*, ASIA-PACIFIC ECON. COOPERATION (Nov. 16, 1994), [https://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994\\_aelm.aspx](https://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994_aelm.aspx) (last visited Mar. 9, 2019).

72. Hsieh, *supra* note 68.

73. *Id.*

74. *See Id.* (discussing how developed countries initiated EVSL to lower tariffs).

economic cooperation.<sup>75</sup> This conflicting understanding and support regarding the EVSL brought about difficulties in the process of deciding which sectors the EVSL should implement.<sup>76</sup>

#### *A. APEC's Function in Protecting the Environment*

John Davis believed that regional economic organizations could create a forum for countries that lack a shared rule of law for cross-border issues, and thus make it possible for the countries in the region to address the severe environmental problems that they face together.<sup>77</sup> In fact, the APEC has been criticized for neither effectively promoting the agenda of trade nor that of the environment and for failing to deal with the environmental problems.<sup>78</sup> It functions as an open and voluntary forum with a shortage of strong political will; “[b]ecause of the difficulty in mobilizing political will to develop norms, APEC’s environmental activities in this period tended to focus on information and capacity building.”<sup>79</sup> Without the solid political power and talk, it is difficult to efficiently solve the environmental problems through international trade.<sup>80</sup> Additionally, many issues involve just as many environmental disputes as scientific controversies. Some issues at stake within environmental disputes are irreversible effects of indeterminate activities, boundaries, and costs. The notion and definition of public interest is also difficult to answer. Consequently, environmental disputes are complicated to resolve.<sup>81</sup>

Theory indicates that “institutions for managing transboundary environmental resources are more effective with their focus on the promotion

75. *Id.*; Mushkat, *supra* note 60, at 111

76. *Glossary*, ASIAN-PACIFIC ECON. COOPERATION (2018) <http://www.apec.org/Glossary> (last visited Mar. 9, 2019) (“EVSL was based on the principle of voluntarism and the establishment of mutually beneficial packages. In 1997, APEC discussed the implementation of the EVSL in 15 potential sectors to positively influence trade, investment and economic growth in both of the individual APEC members and the region. However, EVSL failed because of major conflicts between the participants. The two essential factors – financial crisis of 1997-1998 in East Asia and domestic resistance and lobbying - both decelerated trade liberalization in the affected economies. Currently, Chemicals and Automotive in the EVSL are still being promoted under the APEC Industrial Dialogues.”).

77. Davis, *supra* note 2, at 80.

78. See Lyuba Zarsky, *APEC, Globalization and the “Sustainable Development Agenda”*, NAUTILUS INST. FOR SEC. AND SUSTAINABILITY (1998) (discussing APEC’s dismal record in negotiating environmental treaties alongside trade).

79. NATHAN BADENOCH, *TRANSBOUNDARY ENVIRONMENTAL GOVERNANCE: PRINCIPLES AND PRACTICE IN MAINLAND SOUTHEAST ASIA 19* (World Resources Institute 2002).

80. Astrid Fritz Carrapatoso, *Environmental Aspects in Free Trade Agreements in the Asia-Pacific Region*, 6 *AEJ* 229, 241 (2008).

81. Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 *B.C. ENVTL. AFF. L. REV.* 311, 333-334 (1980).

of principles rather than enforcement.”<sup>82</sup> In the 1990s, APEC attempted to enhance environmental protection results by adopting non-binding norms of environmental governance.<sup>83</sup> The non-binding governing scheme, however, failed in such a sensitive area as environmental protection.<sup>84</sup> Apart from APEC, other methods of regional environmental governance in Asia-Pacific, such as ADB, IDB, and AIIB, all carry limited institutional capacity (lack of technical expertise, insufficient funding, and fragmented institutional arrangements).<sup>85</sup> Moreover, critics observe that these institutions can be “frustratingly bureaucratic,” which may prevent them from successfully integrating environmental standards into institution policies.<sup>86</sup>

Further analysis of this experience suggests four main tasks for regional institutions in improving the interface between the environment and economic development: (1) developing a shared vision of norms and goals; (2) building capacity at the regional level to monitor implementation and raise performance; (3) policy coordinating; and (4) developing effective institutions to implement policy.<sup>87</sup> Additionally, Karapinar proposed alternatives that could achieve objectives of environmental protection, such as regulatory mechanisms that impose stricter environmental standards on production, pollution charges directly based on the polluter pays principle, and promotion of cleaner and more efficient technologies.<sup>88</sup>

### B. Future Goals and Limitations

There are many factors affecting the development of environmental protection in Asia-Pacific. One major factor is the backgrounds of countries

---

82. BADENNOCH, *supra* note 79, at 19 (citing Jutta Brunnee & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91(1) AME. J. OF INT’L L. 26–59 (1997)).

83. *Id.*

84. *Id.*

85. See Hongying Wang, *New Multilateral Development Banks: Opportunities and Challenges for Global Governance*, 8 GLOBAL POL’Y 113, 116 (2017) (“The leniency of the new [regional banks] toward infrastructure projects that may have negative social and environmental consequences could make them more attractive to some borrowers, who prioritize faster and lower-cost financing. This could undermine the ability of other [regional banks], including the World Bank, to uphold their standards.”).

86. Jisan Kim, *Regulating Economic Development: Environmental and Social Standards of the AIIB and the IFC*, HARV. INT’L L. J., (Apr. 21, 2016), <http://www.harvardilj.org/2016/04/regulating-economic-development-environmental-and-social-standards-of-the-aiib-and-the-ifc/> (last visited Mar. 9, 2019).

87. BADENNOCH, *supra* note 79, at 19 (citing Lyuba Zarsky, *Environmental Norms in the Asia-Pacific Economic Cooperation Forum*, in *Commitment and Compliance* 310 (D. Shelton ed., 2000)).

88. Baris Karapinar, *Export Restrictions and Sustainable Management of Natural Resources*, SWISS NAT’L CTR. OF COMPETENCE IN RES., (June 19, 2012), [https://www.wti.org/media/filer\\_public/c0/43/c0435cce-7f87-4a17-a78f-8b94bd7450d1/karapinar-export\\_restrictions-190612-fin.pdf](https://www.wti.org/media/filer_public/c0/43/c0435cce-7f87-4a17-a78f-8b94bd7450d1/karapinar-export_restrictions-190612-fin.pdf) (last visited Mar. 9, 2019).



within Asia-Pacific are extremely diverse, i.e. from developed countries, including globally-dominant economic powers, to developing countries. Due partly to this, there was a resulting gap among the countries in implementing environmental policies. For example, while Western countries such as Australia, New Zealand, and the U.S. intensively regulate environmental policy in international trade law, Asian countries appear to only passively consider the green impacts of the FTAs they negotiated.<sup>89</sup> Such an outcome might be due to various considerations ranging from socio-economic to cultural and political perspectives.<sup>90</sup> For instance, issues of trade and environmental linkage are generally incorporated into the agenda only when Western countries—rather than Asian countries—lead FTA negotiations.<sup>91</sup>

Another significant reason preventing the Asia-Pacific from moving towards a better integration of trade and environmental protection is the Asian countries' fear of green protectionism.<sup>92</sup> In other words, the Asian countries are concerned that environmental policy would become a trade barrier and a legal justification for the trade protection of the developed countries.<sup>93</sup>

Given this fear of green protectionism, it is likely that the adoption of environmental policy as a legal ground for prohibiting trade imports will result in a cautious approach to the issue of environmental exceptions from trade restrictions in a number of Asia-Pacific countries.<sup>94</sup> This cautious approach ultimately will influence the process of how environmental policy is dealt with in the FTAs in Asia-Pacific.<sup>95</sup>

Practically, for instance, New Zealand has successfully incorporated environmental issues in its trade negotiation agenda and made solutions that are acceptable to all its trade negotiating members.<sup>96</sup>

As a result, there is a gap amongst the countries in Asia-Pacific in implementing environmental policies.<sup>97</sup> While developed countries typically have greater environmental regulations, developing countries fear that such regulations would impede their development of trade because developed countries would use the environmental regulations as trade protectionism. Important legal questions arise from this situation: would all the solutions

---

89. Carrapatoso, *supra* note 80, at 230.

90. *Id.*

91. *Id.*

92. DOUGLAS H. BROOKS, CHALLENGES FOR ASIA'S TRADE AND ENVIRONMENT 18 (1998).

93. Gueye Kamal & Kenichi Imai, *Harmonizing Trade and Environment in Recent Free Trade Agreements in the Asia-Pacific Region*, 4 INT'L REV. FOR ENVL. STRAT. 265, 272 (2003).

94. *Id.* at 274.

95. *Id.*

96. Carrapatoso, *supra* note 80, at 237.

97. *Id.* at 230.

that aim to tackle the deadlock of trade and the environment turn out to be mere rhetoric?<sup>98</sup> Do they have a real impact on the trade scheme concerning the environmental protection policy?<sup>99</sup> FTAs represent the opportunity to bridge these difficulties and to strengthen cooperation for environmental protection through trade schemes.<sup>100</sup> The next section focuses on why FTAs are needed as a tool to protect the environment. Furthermore, in Asia-Pacific, an RTA is, and will be, significant in the protection of the environment.

#### IV. RTA'S SIGNIFICANCE IN PROTECTING THE ENVIRONMENT: THE CASE STUDY OF CPTPP'S ENVIRONMENTAL CHAPTER

##### *A. RTA's Significance in Protecting the Environment*

Since environmental problems have transboundary effects, unilateral trade measures responding to the common failure to protect the environment are not adequate solutions.<sup>101</sup> FTAs are recognized as an important economic instrument to connect trade and the environment because of their inter-reliance and cooperation between countries.<sup>102</sup> FTAs deal extensively with non-tariff barriers to trade as well.<sup>103</sup> According to the 2012 report from the United Nations Conference on Development and Trade, “non-tariff measures contribute much more than tariffs to overall trade restrictiveness.”<sup>104</sup> However, since FTAs reduce border barriers among signing states, there will be increased substitution, by means of compensation, to non-tariff barriers to trade.<sup>105</sup> Pursuing deeper integration among FTA members is, therefore,

---

98. *Id.*

99. *Id.*

100. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶ 9.1, WTO Doc. WT/DS58/R (adopted May 15, 1998) (arguing that the best way for parties to contribute to achieving WTO objectives is through cooperative agreements that account for the specific conditions in the geographical areas concerned).

101. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 37 COLUM. J. ENVTL. L. 491, 491 (2002).

102. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 30, at footnote 107. *See also*, JACQUES BOURGEOIS ET AL., A COMPARATIVE ANALYSIS OF SELECTED PROVISIONS IN FREE TRADE AGREEMENTS, 4 (2007), [http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc\\_138103.pdf](http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138103.pdf) (last visited Mar. 9, 2019) (analyzing empirical evidence how FTAs relate to, among other things, trade and the environment).

103. KENNETH HEYDON & STEPHEN WOOLCOCK, THE RISE OF BILATERALISM: COMPARING AMERICAN, EUROPEAN, AND ASIAN APPROACHES TO PREFERENTIAL TRADE AGREEMENTS 47 (United Nations University Press 2009) (analogizing free trade agreements with preferential trade agreements).

104. MARC BACCHETTA ET AL., WORLD TRADE REPORT 2012, 135, 138, [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report12\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf) (last visited Mar. 9, 2019).

105. HEYDON & WOOLCOCK, *supra* note 103, at 47.

likely to reduce reliance on non-tariff barriers to trade.<sup>106</sup> Hence, regional integration is the utmost goal among signing parties of FTAs.

The harmonization of environmental standards and regulations in the regional integration tends to differ based on whether the region's members expect economic integration or merely trade facilitation.<sup>107</sup> A few RTAs include areas that have gone beyond the WTO, consisting of provisions preventing relaxation of domestic environmental laws and enforcement of those laws, which define the relationship between multilateral environmental agreements (MEAs) and the RTAs, and require each party to periodically prepare (and make publicly available) a report on the state of its environment.<sup>108</sup>

Author, Wen-chen Shih, argues that the Asia-Pacific's broad position on environmental protection issues is "unsatisfactory and conservative."<sup>109</sup> Shih, therefore, emphasizes the role of a regional institution in establishing regional environmental laws and regulations, which would promote harmonization.<sup>110</sup> However, we have not seen a binding regional environmental regulation system in Asia-Pacific.<sup>111</sup> In theory, an effective approach for "addressing transboundary environmental harm would establish a system that connects international policymaking with national implementation."<sup>112</sup> The advantages of a regional environmental institution include a harmonized standard that can be predicted and then contribute to a stable development of environmental law. Furthermore, having regional environmental governance would lead to a secured agreement for, and implementation of, an action for coping with environmental problems.<sup>113</sup>

After the Trump administration's decision to withdraw from the TPP on January 23, 2017, the most recent development of a mega RTA in the region is the CPTPP.<sup>114</sup> Its predecessor was the TPP signed on February 6, 2016, and had, in effect, enlarged the Trans-Pacific Strategic Economic Partnership Agreement (SEP) that concluded in 2006 among four countries: Brunei

---

106. *Id.*

107. Steenblik and Less, *supra* note 55, at 139.

108. *Id.*

109. Wen-chen Shih, *Trade and Environment Linkages and Challenges Facing East Asian WTO Members*, 1 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 157, 187 (2006).

110. *Id.*

111. *Id.* at 170.

112. Lian & Robinson, *supra* note 1, at 102.

113. *Id.*

114. Memorandum from the U.S. Trade Representative on Withdrawal of the U.S. from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific> (last visited Mar. 9, 2019); see also *What is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL., (last updated May 15, 2018), <https://www.cfr.org/trans-pacific-partnership-tpp> (last visited Mar. 9, 2019).

Darussalam, Chile, New Zealand, and Singapore.<sup>115</sup> In 2008, the U.S. led TPP “trade talks” after its accession to the SEP.<sup>116</sup> Since then, this mega RTA has drawn a lot of attention and is topical both in the WTO law scholarship and in the public.<sup>117</sup> Compared to the existing FTAs in the region, the CPTPP includes an unprecedented range and scope of chapters in its agreement. The environmental chapter in the CPTPP is considered a golden standard among trade deals.<sup>118</sup>

### *B. Theory of Regional Environmental Governance*

Regardless of the deadlock of the linkage between trade liberalization and environmental protection at a multilateral level,<sup>119</sup> an RTA pertaining to regional environmental governance is essential for dealing with transboundary environmental harm.<sup>120</sup> Two of the most noticeable advantages from connected governance are minimized complexity and hierarchy, as well as facilitating boot-up and delivery times.<sup>121</sup> As a result, well-functioning regional environmental governance is necessary for Asia-Pacific.

Since national-level institutions normally have failures in these particular areas<sup>122</sup> and fail to integrate environmental issues, the environment has suffered. Therefore, the need is pressing for establishing regional governance that maintains a sufficiently wide perspective. Yet, even though others would argue for autonomy of national governments, the impact of regional governance over politics, economics, and the environment has occurred at a striking pace.<sup>123</sup>

With regard to creating regional environmental governance, some suggest that regional institutions that directly represent national governments and interests (e.g. the ASEAN) operate more effectively due to their direct link with national processes shaping governmental interactions.<sup>124</sup> Yet,

---

115. *Id.*

116. *Id.*

117. Elms, *supra* note 53, at 29.

118. Jay Chittooran, *TPP in Brief: Environmental Standards* (Apr. 15, 2016), <http://www.thirdway.org/memo/tpp-in-brief-environmental-standards> (last visited Mar. 9, 2019).

119. *See* discussion *infra* Section II.

120. *See* Lian & Robinson, *supra* note 1, at 102 (discussing the regional level is where states can collaborate to solve ecosystem problems).

121. Daniel C. Esty & Maria H. Ivanova, *Revitalizing Global Environmental Governance: A Function-Driven Approach*, 3 INDIAN. J. ENVL L. 38, 50 (2002).

122. *See id.* (recognizing networked governance and not national-level institutions have strength in boot-up and delivery times).

123. BADENOCH, *supra* note 79, at 9.

124. *See* Le Thac Can et al., *Environmental Governance in Vietnam in a Regional Context*, [http://pdf.wri.org/mekong\\_governance\\_mreg\\_canphanan.pdf](http://pdf.wri.org/mekong_governance_mreg_canphanan.pdf) (last visited Mar. 9, 2019) (discussing

others argue that the interaction of such institutions, along with the specific integration associated with each national actor, offers a large forum on which environmental governance reform can be addressed.<sup>125</sup>

Therefore, intensive institutional components may result in more effective governance of transboundary environmental issues.<sup>126</sup> A good example is the wide range of institutions with overlapping, complementary mandates and multiple channels of communication and accountability. Moreover, the direction this institutional interplay takes is largely determined by the structures and practices of governance and the decision-making process.<sup>127</sup> The principles of the Rio Declaration considerably defined the conditions and principles for multilateral environmental governance.<sup>128</sup> These principles include access to information, participation in decision-making, and accountability in environmental matters.<sup>129</sup> Other principles in international environmental law, such as the precautionary principle, are also important components of environmental governance.<sup>130</sup> “Implementation of these principles will require a thorough rethinking of the ways government interacts with society at large.”<sup>131</sup> These three fundamental principles can provide guidance to analyze regional environmental governance because it can be suggested that these principles are important foundations for good governance. In addition, these principles can serve as catalysts for implementing other principles.

---

regional governments adopting environmental protection through public awareness and including decision makers).

125. See generally Kao Kim Hourn, *The Impact of Regional Integration on the Governance Process in Cambodia: The Environmental Perspective*, in Mekong Regional Environmental Governance Project: Perspectives on Opportunities and Challenges 5 (Nathan Badenoch, 2001) (arguing regional integration occurs in Cambodia and will continue to do so).

126. See BADENOCH, *supra* note 79, at 9 (citing Ronnie D. Lipschutz, *Damming Troubled Waters*, 1 Intermarium (1997)) (discussing how institutional overlap that mandates communication and accountability will result in more effective governance).

127. BADENOCH, *supra* note 79, at 9.

128. See Report of the U.N. Conf. on Env'tl. Dev., *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) [hereinafter *Rio Declaration*] (identifying the goal of establishing international agreements for environmental protection).

129. See *id.* at 2-3 (discussing the role of the government in establishing accountability, public participation, and access to information).

130. See U.N. General Assembly, *Report of the United Nations Conference on Environment and Development*, ¶ 15, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) (discussing how states should use the precautionary approach to protect the environment and not delay environmental protection because of lack of scientific information or serious environmental threats).

131. BADENOCH, *supra* note 79, at 15 (citing ELENA PETKOVA & PETER VEIT, ENVIRONMENTAL ACCOUNTABILITY BEYOND THE NATION-STATE: THE IMPLICATIONS OF THE AARHUS CONVENTION (World Resources Institute 2000)).

The first principle is transparency and access to information.<sup>132</sup> This principle evaluates whether an institution provides the public with reliable, timely information concerning their operational policies and procedures. Additionally, this principle requires access to information concerning environmental status, trends for society, and potential environmental impacts assessments. Second, public participation is necessary regarding the representation and participation of the various interests in their decisions.<sup>133</sup> The final principle examines accountability. This principle examines whether there are mechanisms for institutions to be accountable to affected stakeholders across boundaries.<sup>134</sup>

### *C. An Analysis of the CPTPP's Environmental Chapter*

CPTPP's environmental chapter is considered the high environmental standard in RTAs in the 21st century. The CPTPP is evaluated in this article to explore whether it is more advanced than the existing bilateral FTAs reinforcing environmental protection.<sup>135</sup> This article aims to provide the public with a thorough assessment of the positive and negative effects that CPTPP will have on the environment. Further, this article evaluates whether the CPTPP is a beneficial RTA in Asia-Pacific for environmental protection and governance.

Because of the scope of environmental protection it covers, CPTPP's environmental chapter is particularly novel in regional environmental governance in Asia-Pacific. Its environmental chapter covers and reflects the obligation derived from major Multilateral Economic Agreements (MEAs). Additionally, it provides original policies that aim to protect the oceans by an RTA. Moreover, the chapter has an environmental dispute settlement mechanism.

Specifically, the issues focused on environmental obligations in the CPTPP's chapter can be divided into four areas: maritime protection,

---

132. Michael Johnston, *Good Governance: Rule of Law, Transparency, and Accountability*, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010193.pdf> (last visited Mar. 9, 2019).

133. *See id.* at 5 (discussing the emphasis on participation in liberalized economies after transitions).

134. *See* BADENOCH, *supra* note 79, at 20 (discussing mechanisms to hold the government accountable to the public interest).

135. *See generally* Trans-Pacific Partnership, annex 20--A, Office of the U.S. Trade Representative, Feb. 4, 2016 (listing the 12 countries that signed the TPP in 2016—Australia, Brunei, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, U.S., and Vietnam). *See also* Letter from Maria Pagan, Acting United States Trade Representative, Executive Office of the President (Jan. 30, 2017) (on file at the Office of the United States Trade Representative) (announcing that the U.S. will not be legally bound to the agreement because they do not intend to become a party to the agreement).

reinforcing MEAs, overcoming illegal trade in wildlife and plant products, and promoting biodiversity.<sup>136</sup> First, it offers original policies that aim to protect the oceans.<sup>137</sup> The world's most significant fish exporters are in some of the CPTPP parties. Additionally, the subsidies offered by some of the TPP parties created the overfishing issue.<sup>138</sup> Therefore, owing to the innovation of the environmental chapter in the TPP, the provisions preserving the oceans can assist with mitigating fishery issues. The TPP environmental chapter restricts and attempts to promote sound management of fisheries subsidies.<sup>139</sup> Additionally, one of the TPP's priorities is to counter illegal, unreported, and unregulated (IUU) fishing. This is accomplished by putting restrictions on unlawful trade of reaped fish and at-sea trans-shipment of such products.<sup>140</sup> Effective measures to combat IUU fishing requires international cooperation. The United Nations's Food and Agriculture Organization Agreement of 2009 (FAO) "on Port State Measures to Prevent, Deter, and Eliminate IUU fishing," mandates such cooperation.<sup>141</sup> However, this measure has not yet entered into force. Although TPP members "endeavor to improve cooperation internationally,"<sup>142</sup> the environmental chapter does not require its members to adopt and implement the 2009 FAO.

---

136. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 20, at 4, 6, 12, 18, Feb. 2, 2018 [hereinafter CPTPP].

137. Jeffrey Schott, *Chapter 3: TPP and the Environment*, in 2 *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, INNOVATIONS IN TRADING RULES* 32, 34 (Jeffrey Schott & Cathleen Cimino-Isaacs eds., 2016).

138. *See id.* (discusses how the TPP addresses the problem of subsidies causing adverse effects for fishing policies).

139. *Id.*

140. *See id.* at 35 (describing the TPP provision that bans subsidies to IUU fishing vessels).

141. *Id.*

142. *See generally* Trans-Pacific Partnership, art. 20.12.1-20.12.3, Feb. 4, 2016, Office of the U.S. Trade Representative ("1. The Parties recognize the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits and to strengthen the Parties' joint and individual capacities to protect the environment and to promote sustainable development as they strengthen their trade and investment relations. 2. Taking account of their national priorities and circumstances, and available resources, the Parties shall cooperate to address matters of joint or common interest among the participating Parties related to the implementation of this Chapter, when there is mutual benefit from that cooperation. This cooperation may be carried out on a bilateral or plurilateral basis between Parties and, subject to consensus by the participating Parties, may include nongovernmental bodies or organizations and non-Parties to this Agreement. 3. Each Party shall designate the authority or authorities responsible for cooperation related to the implementation of this Chapter to serve as its national contact point on matters that relate to coordination of cooperation activities and shall notify the other Parties in writing within 90 days of the date of entry into force of this Agreement for that Party of its contact point. On notifying the other Parties of its contact point, or at any time thereafter through the contact points, a Party may: (a) share its priorities for cooperation with the other Parties, including the objectives of that cooperation; and (b) propose cooperation activities related to the implementation of this Chapter to another Party or Parties.").

Second, the CPTPP requires combating the illegal take and trade in wildlife and wild plant products.<sup>143</sup> The commitments under the TPP consist of postponing illegal harvest and trade in logging, wildlife, and plant products. Other commitments include having better cooperation to strengthen environmental management of these resources. MEAs, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), require this.<sup>144</sup> The strongest obligations in the environmental chapter might pertain to the subject of conservation and trade. According to Article 20.17.2 in the TPP,<sup>145</sup> each TPP party shall adopt, maintain, and implement laws, regulations, and any other measures to achieve its obligations under the CITES.

---

143. Trans-Pacific Partnership, art. 20.17.3, Feb. 4, 2016, Office of the U.S. Trade Representative.

144. *Id.* at art. 20.17:

1. The Parties affirm the importance of combating the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.”
2. Accordingly, each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
3. The Parties commit to promote conservation and to combat the illegal take of, and illegal trade in, wild fauna and flora. To that end, the Parties shall:
  - (a) exchange information and experiences on issues of mutual interest related to combating the illegal take of, and illegal trade in, wild fauna and flora, including combating illegal logging and associated illegal trade, and promoting the legal trade in associated products;
  - (b) undertake, as appropriate, joint activities on conservation issues of mutual interest, including through relevant regional and international fora; and
  - (c) endeavor to implement, as appropriate, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade.
4. Each Party further commits to:
  - (a) take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, for example wetlands;
  - (b) maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation, and endeavor to enhance public participation and transparency in these institutional frameworks; and
  - (c) endeavor to develop and strengthen cooperation and consultation with interested non-governmental entities in order to enhance implementation of measures to combat the illegal take of and illegal trade in, wild fauna and flora.

145. See Trans-Pacific Partnership art. 20.17.2, Feb. 4, 2016, Office of the U.S. Trade Representative (“Accordingly, each Party shall adopt, maintain, and implement laws, regulations and any other measures to fulfill its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).”).



Third, the MEAs and their obligations have been well covered and reflected in the TPP environmental chapter.<sup>146</sup> It is worth addressing that the TPP parties' participation in the MEAs varies widely. Article 20.4 affirms the basic commitment of each country "to implement the multilateral environmental agreements to which it is a party."<sup>147</sup> This exemplary provision is intensified with language linked to specific MEAs. This adopted idea came from the US. The US intention was to ratify TPP provisions that would oblige members to pursue domestic policies and enforce MEA commitments where members were a party.<sup>148</sup> If failing to do so, the country would breach CPTPP obligations and possibly make itself liable for a TPP dispute settlement. As a result, the aim was to better enforce existing MEA obligations where a country was already a member. Nevertheless, TPP's approach to cover disciplines that reinforce CITES and other MEAs is not the best to prevent abusive environmental measures or unlawful trade.<sup>149</sup> "[T]he economic incentives to," avoid "governmental measures are too lucrative," for the summarized result in the CPTPP.<sup>150</sup> However, the CPTPP provisions about compliance with the MEA obligations can have a huge impact.<sup>151</sup>

The final area covered in the CPTPP environmental chapter regards biodiversity conservation. CPTPP parties have important objectives yet differing priorities concerning the use and protection of biological diversity. This can also be augmented with some provisions in the bilateral FTAs between some TPP parties. Article 20.13.2 in the TPP requires that each member "shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy."<sup>152</sup> TPP environmental chapter also requires transparency of government programs and activities "related to the conservation and sustainable use of biological diversity."<sup>153</sup> It also establishes commitments to cooperate on "the protection

---

146. See Trans-Pacific Partnership, art. 20.4, Feb. 4, 2016, Office of the U.S. Trade Representative (recognizing that MEAs play an important role in environmental protection).

147. Trans-Pacific Partnership Agreement, art. 20.4.1, Feb. 4, 2016, Office of the U.S. Trade Representative ("The Parties recognize that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.").

148. See Schott, *supra* note 137, at 35 (discussing the value of the TPP in allowing domestic policies that discourage abuse).

149. *Id.* at 38.

150. *Id.*

151. *Id.*

152. The Trans-Pacific Partnership Agreement, art. 20.13.2 Trade and Biodiversity, Feb. 4, 2016, Office of the U.S. Trade Representative.

153. *Id.*

and maintenance of ecosystems” and “access to genetic resources and the sharing of benefits arising from their utilization.”<sup>154</sup> Lastly, this chapter recognizes the importance of “respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles . . . .”<sup>155</sup>

Overall, the CPTPP is unprecedented and the single, greenest free trade agreement. This is because of the important obligations addressed in the CPTPP’s environmental chapter, and because it pertains to a wide scope of the law that discourages abusive environmental practices. Despite these merits of the CPTPP’s environmental chapter, the CPTPP also faces criticisms.

First, during its negotiation, environmental groups in the US protested the CPTPP as a fast track without any transparency and environmental consideration.<sup>156</sup> Among all the environmental groups, the Sierra Club has offered several criticisms.<sup>157</sup> Focusing on the weaker conservation language, the Sierra Club provided some of the suggested texts to be adopted in the CPTPP’s environmental chapter.<sup>158</sup> However, the final version of the environmental chapter does not reflect the suggested contents. For example, the Sierra Club suggested adopting the regulations the regional fishing management organization abided by in the CPTPP. However, the CPTPP fails to do so, and also fails to mention the regulations arising from the fishing MEAs, i.e. FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU fishing in 2009.<sup>159</sup> Another critical issue Sierra Club addressed regards the incorporation of effective enforcement of the rampant,

---

154. See Trans-Pacific Partnership, art. 20.13.6, Feb. 4, 2016, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Mar. 9, 2019), (“6. Consistent with Article 20.12 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest. Cooperation may include, but is not limited to, exchanging information and experiences in areas related to: (a) the conservation and sustainable use of biological diversity; (b) the protection and maintenance of ecosystems and ecosystem services; and (c) access to genetic resources and the sharing of benefits arising from their utilization.”).

155. See The Trans-Pacific Partnership art. 20.13.3, Feb. 4, 2016, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Mar. 9, 2019), (“The Parties recognize the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.”).

156. See *TPP Text Analysis: Environment Chapter Fails to Protect the Environment*, SIERRA CLUB (2015) 1,1 <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPPanalysis.pdf> (last visited Mar. 9, 2019) (arguing the TPP negotiations do not meet the minimum required environmental protection).

157. *TPP Text Analysis: Environmental Chapter Fails to Protect the Environment*, SIERRA CLUB (2015), <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPPanalysis.pdf>. (last visited Oct. 15, 2018).

158. *Id.*

159. *Id.* at 1.

widely-documented environmental violations.<sup>160</sup> Presumably, having effective enforcement should prevent the widely-documented environmental violations.

A final concern is the absence of the climate change legal regime in the CPTPP.<sup>161</sup> The CPTPP failed to adequately address the challenges to trade and economic growth posed by global warming.<sup>162</sup> While the CPTPP, a mega-regional free trade agreement, entails objectives of liberalizing trade in the Asia-Pacific area and facilitating regional economic integration, it has been subject to criticism in terms of considering the environment.<sup>163</sup> In other words, since the fundamental value of free trade and environmental protection appear to be contradictory, the CPTPP is promising as a breakthrough development reconciling these two areas.<sup>164</sup> Nonetheless, there might be severe environmental violations and threats that the CPTPP could cause. The governments in the CPTPP must ensure the consideration of environmental protection has been fully implemented. Further, more extensive prior assessments and environmental reviews need to be conducted as well.

In conclusion, the CPTPP, as a regional level FTA, is expected to do more than the existing FTAs. Assessment of the CPTPP's role in establishing regional environmental governance is in the following section.

#### *D. Improving the CPTPP for Better Environmental Governance in Asia-Pacific*

According to research, the trends of economic, political, and environmental perspectives resulted in some changes in regional governance practices.<sup>165</sup> These trends also resulted in progress addressing transboundary environmental problems within the institutional structure.<sup>166</sup> While transboundary environmental problems have cross-border effects on the environment and affected countries, it is a significant motivator in establishing regional environmental governance. The Asia-Pacific rim has

---

160. *Id.*

161. *Id.* at 7.

162. Schott, *supra* note 137, at 39.

163. Richard Higgott and Richard Stubbs, *The Trans-Pacific Partnership: For, Against and Prospects*, E-INT'L REL., (Apr. 13, 2016), <https://www.e-ir.info/2016/04/13/the-trans-pacific-partnership-for-against-and-prospects/> (last visited Mar. 9, 2019).

164. *Overview and Benefits of the CPTPP*, GOV'T OF CAN., (date modified June, 12, 2018), <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/overview-apercu.aspx?lang=eng> (last visited Mar. 9, 2019).

165. Harriet Bulkeley & Michele Betsill, *Rethinking Sustainable Cities: Multilevel Governance and the 'Urban' Politics of Climate Change*, 14 ENVTL. POL. 42, 44, 47 (Feb. 2005).

166. BADENOCH, *supra* note 79, at 9.

abundant natural resources and has been an important in linking trade and the environment. Therefore, an RTA aimed for well-defined and functioning environmental governance is essential.

Generally, RTAs play a key role in coordinating comparative advantages of each signing party through trade activities beyond bilateralism.<sup>167</sup> This connecting and inter-reliable effect enhances opportunities for signing parties to cooperate in dealing with transboundary issues in a global world.<sup>168</sup> Impacts from RTAs appear to exceed bilateral FTAs, as they involve more countries and the results of negotiations are more complex. To some extent, the results reflect the tension and intentions of signing parties to achieve a solution for some issues. Particularly in Asia-Pacific, RTAs can wield influence in sensitive areas, like protecting the environment.<sup>169</sup>

Indeed, CPTPP covers many environmental issues. The belief is that linking these environmental issues to a broader range of political and economic cooperation trends can increase benefits received from environmental cooperation.<sup>170</sup> This highlights the importance of intensive institutional cooperation. Furthermore, such cooperation is likely to refine environmental governance.

Additionally, a broadly-defined environmental agenda can encourage the shift from a narrow focus on sectoral management to a more encompassing, process-oriented environmental governance.<sup>171</sup> The need for interaction across regional, national, and sub-national levels in transboundary environmental issues is particularly acute.<sup>172</sup> Additionally, in 2006, Shih addressed the challenge facing East Asian countries: the lack of a uniform position regarding the domestic environmental protection policies in the context of international trade.<sup>173</sup> Following this challenge, this article suggests the CPTPP be improved to restructure environmental institutions and the associated setups.

---

167. See HAN, *supra* note 38 (discussing how regional agreements can act as a model and help push for trade liberalism and increased investment).

168. See *id.* ("[R]egional integration arrangements makes the partner countries more competitive, it could make them less protectionist and thus more willing to open their markets to outsiders and to seek greater access to non-partner countries").

169. See *id.* at 7 (arguing that the impact of European economic integration on Asia-Pacific countries helps three ways: trade, foreign direct investment, and the world trading system).

170. BADENOCH, *supra* note 79, at 23 (citing Aaron Wolf, *Transboundary Waters: Sharing Benefits, Lessons Learned* (2001) ("In the case of environmental governance gaps between the ASEAN countries and China, although institutions are not yet up to the region's environmental challenges, increased political and economic cooperation has created a number of opportunities for bridging the gap.")).

171. *Id.* at 22.

172. *Id.*

173. Shih, *supra* note 109, at 160110.

The CPTPP should incorporate, apart from the institutional setup, principles of international environmental law, developed from the Rio Declaration; environmental norms; and justice. Major principles, like the precautionary principle and environmental impact assessments, are important foundations and enshrine the significance of implementing effective governance.<sup>174</sup> Badenoch thought regional institutions, in close collaboration with national governments, should develop a vision for and an approach to institutionalizing transboundary issues within environmental assessments, particularly environmental impact assessments.<sup>175</sup>

Finally, effective regional environmental governance should adopt enforcement measures that ensure accountability. The CPTPP sets up an environmental dispute settlement mechanism, which covers a large scope of environmental issues. Still, the establishment of an appellate body and an assured rule of transparency can improve the mechanism. Specifically, it is necessary to enhance accountability of the governance. Effective public policy and management can enhance accountability if citizens can hold public officials and political delegates accountable for policy and performance.<sup>176</sup> In this regard, East Asia has progressed more slowly than other regions in the world. However, many countries in the region have established the foundations for institutional accountability, such as important political liberalization.<sup>177</sup> Increasing accountability may take several years and involves many related aspects of governance. Attempts to improve accountability must also be built into public management systems. Finally, performance evaluations and citizen–grievance processes are critical to ensure the accountability of the civil service.<sup>178</sup>

#### CONCLUSION

Unilateral trade measures aimed at environmental protection are not an adequate solution for environmental problems pertaining to transboundary issues.<sup>179</sup> Further, the pending progress of the Doha Round, in the WTO, about linking free trade and environmental protection at a multilateral level

---

174. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), principle 15, 17 (Aug. 12, 1992).

175. BADENOCH, *supra* note 79, at 23.

176. *Rio Declaration*, *supra* note 128, at 2.

177. BADENOCH, *supra* note 79, at 20.

178. EAST ASIA: RECOVERY AND BEYOND, *supra* note 59, at 109.

179. Howse, *supra* note 101, at 491.

brought about the urgency of reconciling trade and the environment by means of bilateral or regional trade agreements.<sup>180</sup>

Development of Asia-Pacific and its achievement of long-term social and economic goals depend on how well countries are governed. Governance in the region is undergoing profound change in response to new resource constraints and increased demands for accountability.<sup>181</sup>

This article started with discussing the debate between free trade and environmental protection in terms of the scholarships and WTO Agreements and their disputes. This theoretical discussion demonstrated that free trade and environmental protection can be mutually beneficial. Under Article 20(b)(g) of the GATT, environmental protection measures are recognized exceptions. However, WTO case law implies that if the measures discriminate in favor of principles of free trade, they violate WTO law.

APEC's failure to implement EVSL has left its environmental protection vulnerable. The Asia-Pacific region undoubtedly requires solid and binding regional environmental governance with regulatory effects. While there is a mutually beneficial relationship between trade and the environment, this article argues an RTA is necessary to establish environmental governance in Asia-Pacific. CPTPP and its environmental chapter is an unprecedented example in Asia-Pacific, and such an attempt to establish environmental governance has been recognized. However, its provisions of substance and process can be improved. The substantive issues in the CPTPP's environmental chapter covers suggest the need to incorporate and implement the obligations of the MEAs into the agreement.<sup>182</sup> Moreover, CPTPP does not mention the MEAs that are essential to the fisheries sector management in Asia-Pacific. The climate change legal regime is also not incorporated into the CPTPP.

Apart from the substantive criticisms, the CPTPP is also criticized for its negotiation without transparent and appropriate monitoring.<sup>183</sup> Regarding the procedural aspect and as shown by the range of outputs produced, an elaborate institutional infrastructure appears to work and function

---

180. See generally World Trade Organization, Ministerial Declaration 14 Nov. 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) (recognizing the role of environmental protection in free trade agreements).

181. Elms, *supra* note 53, at 95.

182. See BADENOCH, *supra* note 79, at 19 ("Global norms [along with obligations] might be more relevant if they are modified and adapted to the region's specific needs[. Any approach to regional norms should be accompanied by a process of confidence and consensus building, with the objective of producing not only an acceptable framework but also mechanisms for implementation.").

183. Jane Kelsey, *Submission to the Foreign Affairs, Defence, and Trade Committee on the Revised Trans-Pacific Partnership Agreement, Otherwise Known as the Comprehensive and Progressive Agreement on Trans-Pacific Partnership*, 3-4 (Apr. 17, 2018) (on file with the University of Auckland, Faculty of Law).

adequately.<sup>184</sup> Nevertheless, doubts are continuously expressed about members' strategic commitment, organizational robustness, and policy impact (a broader and more meaningful criterion than output). Additional research is needed to obtain a clearer picture of realities in this particular sphere and their theoretical ramifications.<sup>185</sup> In addition, the provisions of institutional and procedural arrangements in the TPP should pertain to the concept of transparency, since transparency plays an important role in enhancing regional governance.

Regardless of those suggestions for the CPTPP's environmental chapter, the first challenge the CPTPP parties encounter is the agreement's future direction. After the Trump Administration's decision to withdraw, there was a negative view regarding the forthcoming dissolved CPTPP. If dominant economic power proceeds to exit from the CPTPP, international trade will move towards bilateralism and away from multilateralism. Nevertheless, Australia and Japan, two of the remaining parties, still maintain hope and advocate for the CPTPP's importance and benefits for both economic integration and the region's stability.

This article has demonstrated the significance of RTAs in linking trade and the environment. Likewise, transboundary environmental problems require cooperation and governance at a regional level. In Asia-Pacific, this cooperative and governing scheme is particularly crucial, because of the common environmental problems countries face and their inter-reliance on each other for solving the environmental disputes. Presumably, if CPTPP eventually ceases function, what we could reasonably expect as an alternative is the Regional Comprehensive Economic Partnership (RCEP), which is led by China and has some of the ASEAN countries involved. However, RCEP's current negotiations do not show any concern for producing an environmental chapter. RCEP's parties are also from diverse economic backgrounds, which will make negotiations equally complicated and slow in the process. Accounting for these challenges in implementing RTAs in Asia-Pacific, the author claims since the sustainability of the environment is an urgent priority, government officials and policy makers must consider this issue and make cooperative policies between trade and the environment a practical reality. Once policy makers start demanding these cooperative policies, it will attract more attention to the necessity of an RTA with regional environmental governance and will increase the possibility of creating the agreement.

---

184. See generally, Gene M. Grossman & Elhanan Helpman, *The Politics of Free Trade Agreements 2* (Nat'l Bureau Econ. Research, Working Paper No. 4597, 1993) (explaining how to achieve FTA equilibrium to assess FTA efficiency).

185. Mushkat, *supra* note 60, 140.