NOTE

MEGA-TRADE AGREEMENTS: COULD THEY BECOME THE FOREMOST VEHICLE TO UNIFY GLOBAL AND REGIONAL ENVIRONMENTAL LAW?

*Maxwell C. Radley**

I. INTRODUCTION

In this note, I will discuss how mega-trade agreements, like the all-but-defeated Trans-Pacific Partnership ("TPP") and Regional Comprehensive Economic Partnership ("RCEP"), present an opportunity to create binding international environmental law and discuss the evolution of environmental protection provisions in trade deals over time. I will first offer an analysis of the ramifications of developing international environmental law that has been taking shape in the international community and the creation of international customs and norms—primarily through the means of Convention of International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). Second, I will provide an analysis of some of the environmental declarations and goals within the World Trade Organization ("WTO"). Thirdly, I will discuss how regional cooperation has been currently undertaken, providing a look at the North American Free Trade Agreement ("NAFTA") and analyzing its effectiveness. Lastly, I will discuss the TPP and RCEP and current provisions in those agreements, if any, that concern environmental protection and how a concerted effort could be put forth to combat climate change in a particularly environmentally sensitive region.

The recent international interest in pursuing mega-trade agreements like the TPP and the RCEP offer participating states a unique opportunity to enumerate and bring to force environmental protections in a more comprehensive and orchestrated manner.

* J.D. Candidate, Albany Law School of Union University, 2018. I would like to thank Professor Peter Halewood for his advice and assistance in completing this article, as well as my family and friends' support throughout the process.

International norms are the first steps in the creation of international law, and international environmental law is currently seen following this trend,[1] thereby taking the next step to institutionalize environmental law regimes, which currently have limited effect.[2] The regional trade agreements that are currently in place typically have environmental protection provisions incorporated in them. For example, both the Association of Southeast Asian Nations ("ASEAN") and the NAFTA have forms or mechanisms of environmental regulation to provide for concerted environmental efforts.[3] As we will see, the provisions included in these agreements have varying enforceability, and they provide an ability to coordinate their efforts. These provisions provide a more comprehensive and effective approach, rather than the piecemeal approach that is being undertaken in some regions (including the United States as a natural function of federalism)[4] and ensures the undertaking of environmental action, as these agreements are quasi-binding or aspirational with regard to environmental regulations.[5]

Through the examples given by the TPP and RCEP, I aim to show that mega-trade agreements place member states in an awesome and unique position to be able to address climate change and protect their environment, while also increasing their country's prosperity. The crux of my argument is that the binding nature or the availability to provide technical assistance to these mega-trade agreements will provide a forum that will allow international environmental law to gain traction and guide arbiters to heed domestic and regional environmental concerns. Additionally, we will need to consider states' acquiescence in relinquishing some sovereignty to agree to the

[1] *See* Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 NAT. RESOURCES J. 157, 164–65 (2006).

[2] *See* K. Russell Lamotte, *Mechanisms for Global Agreements*, *in* INTERNATIONAL ENVIRONMENTAL LAW: THE PRACTITIONER'S GUIDE TO THE LAWS OF THE PLANET 966 (Roger R. Martella Jr. & J. Brett Grosko eds., 2014), http://www.bdlaw.com/assets/attachments/418.pdf.

[3] *See* Joseph Block & Andrew Herrup, *The Environmental Aspects of NAFTA and Their Relevance to Possible Free Trade Agreements Between the United States and Caribbean Nations*, 14 VA. ENVTL. L. J. 1, 25 (1994); Tarik Abdel-Monem, *Asean's Gradual Evolution: Challenges and Opportunities for Integrating Participatory Procedural Reforms for the Environment in an Evolving Rights-Based Framework*, 29 UCLA PAC. BASIN L. J. 234, 252 (2012).

[4] *See, e.g.*, A. Dan Tarlock, *A National Perspective: Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 657–58 (2007) (discussing how the lack of U.S. Federal Government leadership in implementing comprehensive land use regulations has left local governments at the helm of their own environmental progress, leaving a piecemeal approach that is not effective as a means of facilitating true progress).

[5] *Cf.* Jonathon Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 114 (2007) (discussing how federal and state regulatory schemes may not always work well together).

terms of the agreement. This is no small task, particularly in developing states, because they do not have the standard of living that provides their constituents the ability to focus on protecting the environment.[6]

As mentioned previously, we are taking a piecemeal approach globally, which leaves much to be desired when trying to effectuate progress towards sustaining the environment and combating climate change.[7] This derives from the fact that there is a multitude of ways in which environmental provisions are currently being enforced in bilateral treaties.[8] A 2011 report by the Organization for Economic Co-operation and Development ("OECD") identified the mechanisms that countries use in bilateral treaties, which include:

1. General references to environmental concerns in preambles;
2. Right to regulate—reserving policy space for environmental regulation;
3. Reserving policy space with respect to certain treaty provisions;
4. Precluding nondiscriminatory regulation as a basis for claims of indirect expropriation;
5. Environmental matters and investor-state dispute settlement;
6. Not lowering standards—discouraging relaxation of environmental standards to attract investment; and
7. General promotion of progress in environmental protection and cooperation.[9]

This provides evidence of the tools that may be used to promote environmental law and protections in investment treaties, but that may not be entirely effective. What I set out to show is that mega-trade agreements provide the prime vessel to facilitate the concession of some sovereignty to promote cooperation, as has been done in previous agreements.[10]

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[6] *See* WORLD VISION AUSTL., POVERTY & THE ENVIRONMENT (2006), https://www.worldvision.org.nz/WorldVision/media/media/Resources/Topic%20Sheets/Topic%20Sheet%20Images/Topic%20Sheets%20Downloads/Topic-sheet-poverty_and_the_environment.pdf (discussing how poor people in poor countries typically suffer worse from the effects of environmental damage, because they rely more heavily their environment and have less means to effectuate change).

[7] *See* Tarlock, *supra* note 4, at 664–65.

[8] Lamotte, *supra* note 2, at 969.

[9] Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENVTL. L.J. 102, 122 (2015).

[10] *See, e.g.*, Trans-Pacific Partnership Agreement, ch. 20 (environment), Feb. 4,

II. CREATING INTERNATIONAL ENVIRONMENTAL LAW

A. General Process of Creating International Law

To aid the enforcement of international law, Abbot et al. have argued that the international community has to balance three factors: obligation, precision, and delegation.[11] The balance of these factors creates the "hard" or "soft" nature of the law.[12] Abbott et al. further argue that the growing institutions in the realm of international law allow for an increase in a governing legal structure—"hard" law.[13] Moreover, in the realm of free trade agreements ("FTAs"), these agreements are usually binding, and by their very nature are hard laws because they create precise obligations that the member states must adhere to or be subject to discipline stated in the agreement.[14] The nature of the FTA agreements signals the necessity for firm direction in the world of environmental law, rather than allowing corporations' profit margins to decide matters before them.[15]

B. Ramifications of the Increased Utilization of International Environmental Laws

The inclusion of hard environmental laws in treaties raises an important question: would the parties' interests be best served by allowing the most powerful state party to the treaty the ability to choose the environmental stance other member states should take?[16] Perhaps the same could be said for the business matters of these smaller states. It is difficult to reconcile the leverage that the larger states maintain over the smaller economies of developing states because the smaller countries stand to gain the most from the

2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (archived Feb. 6, 2017) [hereinafter TPP Agreement].

[11] *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000) (noting that *obligation* refers to the legally binding nature of the commitment, *precision* refers to the detail with which the obligated conduct is described, and *delegation* refers to the degree to which third parties have been granted authority to determine and enforce compliance, as well as resolving disputes).

[12] *See id.* at 402.

[13] *See id.*

[14] *See* Condon, *supra* note 9, at 117 (discussing how more types of claims are able to be brought in front of the arbitration panel and punish violators through trade violations).

[15] Aaron J. Lodge, *Globalization: Panacea for the World or Conquistador of International Law and Statehood?*, 7 OR. REV. INT'L L. 224, 249 (2005).

[16] *See* Condon, *supra* note 9, at 138.

liberalization of their economies.[17] Of particular concern is that these states are likely to be highly dependent on natural resource trade for income and bargaining power while negotiating.[18] The biggest concern that has come to light is that implementation of hard environmental laws will likely realize an increase in expenditures by the developing states to cure regulatory and technological shortfalls.[19] These states are subsequently in a less competitive position to be able to pay for timely technological advancements and may not have the political will to pass these laws.[20]

The difficulty comes during the process of negotiating the multilateral trade agreements. In trade negotiations, there are multiple levels at which negotiations are conducted.[21] At the lower levels of negotiation, the smaller nations can align themselves with similarly positioned states and subsequently either force out environmental provisions that are not acceptable, or address other environmental issues that may not be in the forefront of the larger states' agenda, forcing a gridlock.[22] Additionally, though it is difficult to negotiate the wide-ranging interests in multilateral agreements, it is easier to negotiate the interests in multilateral agreements for larger states, which include additional terms that are not particular to trade.[23] As such, this may subject the developing states to a "race to the bottom" situation or may force the developing states to accept terms that may not be adequate for their situation, once a state breaks ranks.[24]

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[17] *See* Sanjay Kathuria & Sohaib Shahid, *Why Do Smaller Countries Benefit from Greater Trade with Their Neighbors?*, WORLD BANK (Feb. 19, 2015), http://blogs.worldbank.org/endpovertyinsouthasia/why-do-smaller-countries-benefit-greater-trade-their-neighbors.

[18] WORLD BANK & INT'L MONETARY FUND, GLOBAL MONITORING REPORT: MDGS AND THE ENVIRONMENT, AGENDA FOR INCLUSIVE AND SUSTAINABLE DEVELOPMENT 181 (2008), https://www.imf.org/external/Pubs/FT/GMR/2008/eng/gmr.pdf.

[19] *See* NITA RUDRA, GLOBALIZATION AND THE RACE TO THE BOTTOM IN DEVELOPING COUNTRIES: WHO REALLY GETS HURT? 2 (2008); Evert-jan Quak, *The Race to the Bottom Explained*, BROKER (Dec. 18, 2015), http://www.thebrokeronline.eu/Blogs/Inclusive-Economy-Europe/The-race-to-the-bottom-explained.

[20] *See* Condon, *supra* note 9, at 121.

[21] *See id.* at 135–37 (discussing in great detail the procedures of the negotiation process while working to create a trade agreement, which, while relevant here, it is not the focus of this article so I will be limiting the discussion to a brief overview).

[22] *See id.* at 138.

[23] *See id.* at 137 (discussing how interest groups negotiating with Peru and the United States were able to use liberalized trade with the United States as leverage to gain binding environmental law provisions that ceded much of Peru's control over the development of their environmental policy).

[24] *See* Ian Sheldon, *Trade and Environmental Policy: A Race to the Bottom?*, 57 J. AGRIC. ECON. 365, 368, 371 (2006).

C. CITES as an Example of Successful Environmental Cooperation

CITES is one of the oldest (established in 1975)[25]—and typically regarded as one of the most successful—international environmental treaties.[26] With approximately 178 member countries currently, CITES is notable because of the institutional framework that enables effective decision-making, namely the requirement of a two-thirds majority vote to adopt a provision,[27] rather than the typical consensus requirement other like institutions require, which causes delay in adopting provisions.[28] However, that is where the differences end. CITES is a voluntary compliance organization, like many others, geared at providing member states guidance on the subject matter as it comes into play with international trade.[29] Agreements passed through CITES do not supersede domestic law, but instead provide guidance for domestic legislation to facilitate implementation at the national level for member states.[30] Admittedly, CITES does work to solve the conflicting interests of multilateral trade rules (issues with most favored nation) because the framework of CITES allows countries to implement provisions as they deem fit.[31]

Although CITES has been deemed a successful international cooperation agreement, it loses the appearance of such when the issue of animals with high commercial value arises.[32] It takes no stretch of the imagination to realize the challenges that developing countries may face in working to protect threatened species of flora and fauna since they must concurrently work to improve their local economy and the standard of living within their own borders.[33] Whenever the stakes are high, economic concerns will take precedent if there are not proper safeguards in place,[34] exemplifying the issues of voluntary compliance and international environmental concerns

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[25] *What is CITES?*, CITES, https://www.cites.org/eng/disc/what.php (last visited Sept. 10, 2017) [hereinafter CITES].

[26] *See* Laura Johnson & Omar Malik, *CITES: 40 Years of Successful International Cooperation*, YALE CTR. ENVTL. L. POL'Y BLOG (Mar. 12, 2013), http://environment.yale.edu/envirocenter/cites-40-years-of-successful-international-cooperation/.

[27] *Id.*

[28] *See id.*

[29] CITES, *supra* note 25.

[30] *Id.*

[31] *See* Duncan Brack, *Commentaries on Article I: The Relationship between MEAs and WTO Rules*, *in* U.N. Conference on Trade and Development, *Trade and Environment Review: Commentaries*, 106, U.N. Doc. UNCTAD/DITC/TED/2003/4 (2003).

[32] *See* Mark Jones, *Has CITES Had Its Day?*, BBC NEWS (Apr. 6, 2010), http://news.bbc.co.uk/2/hi/science/nature/8606011.stm.

[33] *See id.*

[34] *See id.*

because of the necessity to maintain their government's political posture and sovereignty.[35] As one critic points out, CITES and other similar agreements may require more resources, more teeth, or both, in order to successfully operate and provide legally binding resolutions that states will abide by, and progress to a more unified approach to protection of endangered flora and fauna.[36]

III. THE ENVIRONMENT AND THE WORLD TRADE ORGANIZATION

The WTO, created out of the General Agreement on Tariffs and Trade ("GATT"), was established to facilitate the reduction of trade barriers and creating relationships between member states.[37] Although it sits on the periphery of the WTO's mission, the WTO does have sustainability and environmental issues within its scope because it is mentioned in the preamble of the Marrakesh Agreement, which established the WTO.[38] This was later supplemented by the Rio[39] and Stockholm Declarations[40], which address the environment.[41] The WTO restricts a state's ability to protect its environment because in order to enact environmental regulations, the home state must comply with criteria[42] that has been established to disavow a foreign state's fear that they are being discriminated against under the ruse of environmental protection.[43] The criteria set out can be summed up as the "least trade restrictive methods" as a standard of measure for a state's environmental protections and regulations.[44]

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[35] *See id.*

[36] *See id.*

[37] *See Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Sept. 11, 2017).

[38] *See* WORLD TRADE ORG., TRADE AND ENVIRONMENT AT THE WTO 4 (2004), https://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf.

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

[40] U.N. Conference on the Human Environment, Stockholm, Swed., *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

[41] *See* GÜNTHER HANDL, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (STOCKHOLM DECLARATION), 1972 AND THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, 1992 1 (2012).

[42] *See* WORLD TRADE ORG., *supra* note 38, at 15 ([Environmental measures must be] (i) consistent with WTO rules; (ii) inclusive; (iii) takes into account capabilities of developing countries; and, (iv) meets the legitimate objectives of the importing country.").

[43] *See id.* at 6; *An Introduction to Trade and Environment in the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm (last visited Sept. 11, 2017).

[44] David Nelson, *Developing an Environmental Regulatory Model—Piecing Together the Growing Diversity of International Environmental Standards and Agendas*, ROCKY MT. MIN. L.

The provisions set out within the WTO allow for environmental regulation and sustainable development when they seem to be in good faith. There is, however, disagreement on whether these goals are actively pursued, or if they are pursued only when it is economically convenient for the WTO and member states, because environmental regulations that a state will enact in order to better protect their resources may be struck down.[45] Critics argue that some agreements within the jurisdiction of the WTO place the rights and interests of corporations over the protections of the environment.[46] All the while, the WTO has seemingly abandoned its environmental ambitions and is currently working to expand the rights of corporations and its very own policies to provide corporations with more leverage in challenging a state's environmental regulations.[47]

For example, in 2014 the United States brought an action in WTO arbitration against India because India had implemented a "buy-local polic[y]" in regards to solar panels as a part of their responsibilities to the Paris Agreement.[48] The charge was that the policy unfairly discriminated against imported solar components, all the while recognizing that imported solar technology held the majority of India's market.[49] The WTO arbitration panel found against India and rejected their appeal, directing India to alter its solar program in order to avoid damages.[50] Concurrently, India filed suit with the WTO against the United States because the United States had a similar program to India's buy-local program.[51] As a result of this decision, the law struck down some of the United States' provisions in individual states, showing "the biter can be bit."[52]

INST., Feb. 1995, at 13-1.

[45] *See* Saira Bajwa, *The World Trade Organization and the Environment*, GONZ. J. INT'L L. (Jan. 25, 2009), https://www.law.gonzaga.edu/gjil/2009/01/wto-environment/ (discussing how environmental regulations may be struck down by WTO arbitration panels because of the potential creation of a trade barrier and economic considerations).

[46] *See id.*

[47] *See Environmental Requirements and Market Access: Preventing 'Green Protectionism'*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm (last visited Sept. 12, 2017) (discussing that some states place environmental standards that are set too high so that they impede on exporters to meet them and, therefore, should be set at a lower standard so that those exporters can meet them and not be forced out of the market).

[48] Ben Beachy, *Wait, Why Is the World Trade Organization Attacking Renewable Energy?*, SIERRA CLUB (Sept. 30, 2016), http://www.sierraclub.org/compass/2016/09/wait-why-world-trade-organization-attacking-renewable-energy.

[49] *Id.*

[50] *Id.*

[51] *See id.* (discussing that India brought suit against eleven state buy-local programs in the U.S).

[52] Tim Worstall, *India Loses WTO Solar Appeal Against U.S. – As It Should. Next, India's*

This ruling by the WTO was proper under the doctrine of MFN[53] and for the sake of economic stability, it is arguably contrary to the environmental and sustainability goals that the WTO has set out.[54] By shutting down the buy-local programs in the party states, the WTO has effectively delayed India's solar panel production on a large scale,[55] meaning that the countries in close proximity to the Indian subcontinent will likely have to import from countries farther away—such as the United States—and realize a greater impact on long-distance shipping.[56]

This exemplifies a situation where the pro-competitiveness and pro-trade disrupts a state's ability to incentivize an industry in attempts to increase distributed energy production[57] and to reduce carbon emissions or pass policies or regulations that assist fledgling industries.[58] It is not a surprise that national sovereignty is sacrificed when signing into the WTO or any trade agreement, but the decision shows how the competing interests of domestic environmental and energy policy development conflict, and how the WTO is committed to treating every country involved in a domestic market equally, or as close to equally as possible.[59]

A. Rio Declaration

Although both the Stockholm and the Rio Declarations are on point, I will be looking into the latter to show the evolution of international environmental law. The Rio Declaration, which covers

WTO Solar Case Against US, FORBES, (Sept. 17, 2016), https://www.forbes.com/sites/timworstall/2016/09/17/india-loses-wto-solar-appeal-against-us-as-it-should-next-indias-wto-solar-case-against-us/#632d40f87674.

[53] *See id.* (discussing how India was found in violation of discriminatory trade practices as set forth by WTO agreements); *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Sept. 12, 2017).

[54] *See The WTO and the Sustainable Development Goals*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (last visited Sept. 12, 2017).

[55] *See* Tom Miles, *India Loses WTO Appeal in U.S. Solar Dispute*, REUTERS, http://www.reuters.com/article/us-india-usa-solar-idUSKCN11M1MQ (last visited Sept. 12, 2017).

[56] *See* U.S. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2016 83 (May 11, 2016), https://www.eia.gov/outlooks/archive/ieo16/pdf/0484(2016).pdf (discussing that India and China account for sixty-nine percent of the projected coal-fired electricity generation worldwide while OECD nations attempt to reduce reliance on coal; as such, the ambitious solar energy goals set by India are necessary to reduce the reliance on coal).

[57] *What Is Distributed Generation (Also Distributed Energy)?*, BLOOM ENERGY, http://www.bloomenergy.com/fuel-cell/distributed-generation/ (last visited Sept. 12, 2017) (defining distributed energy production as energy produced at the point of consumption, such as a small wind turbine that produces electricity for a house or commercial property).

[58] *Id.*

[59] *See* Alan Oxley, *Commentaries on Article 1: The Relationship Between MEAs and WTO Rules*, *in* U.N. Conference on Trade and Development, *supra* note 31, at 93.

the environment and development, sets forth numerous principles regarding the environment and development. I am going to focus on three that are of considerable interest to the subject of this piece. These principles are: Principle 11 (Treatment of Developing Economies), Principle 15 (Precautionary Principle), and Principle 16 (Polluter Pays).[60]

Principle 11 is the principle closest to the heart of my discussion in this paper. The Principle dictates how states can act and what kind of expectations they should have towards lesser developed or developing states.[61] At the same time, it states how each signatory "shall enact effective environmental legislation,"[62] and the participating parties must recognize that certain standards are inappropriate and should not be forced onto lesser developed or developing countries.[63] This suggests that any efforts of collaboration between developed and developing states should be done in a manner most appropriate for the context of the state in question. Some critics have pointed out how this has not stopped the developed countries from taking advantage of their hegemony, regionally or otherwise, because of the existing negotiation process.[64] This has caused developed states to pressure developing states to be less environmentally minded, in addition to a multitude of other factors that help developed states to assert their influence on developing states.[65]

Principle 15 outlines that where a state is unable to adequately identify the potential of "irreversible damage, [and the] lack of full scientific certainty *shall not* be used as a reason for postponing cost-effective measures . . ." in an attempt to prevent environmental degradation,[66] essentially saying that, if a country knows something is bad for the environment, it should take appropriate measures. Developing states, which may not have the capacity to measure the

[60] Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 197 (1994); Shakha Jha, *The 1992 Rio Declaration on Environment and Development: Impact on Policies and Judgments*, ALEXIS FOUNDATION (Jan. 6, 2015), http://alexis.org.in/the-1992-rio-declaration-on-environment-and-development-impact-on-policies-and-judgements/.

[61] *See* Rio Declaration, *supra* note 39.

[62] *See id.*

[63] *See id.*

[64] *See* Condon, *supra* note 9, at 137; Upendra D. Acharya, *Is Development a Lost Paradise? Trade, Environment, and Development: A Triadic Dream of International Law*, 45 ALBERTA L. REV. 401, 406–07 (2007).

[65] *See* Acharya, *supra* note 64, at 409 (looking to the overall capacity of the more developed states and the infrastructure that they have to meet their environmental goals and maintain their economic competitiveness).

[66] Rio Declaration, *supra* note 39 (emphasis added).

environmental impacts of their actions, cannot use this lack of capacity as an excuse to mitigate any problematic.[67] The issue of disparity of capacity and differing needs of a state needs to be addressed using other means, rather than having agreements that establish broad and potentially demanding environmental standards.

Lastly, Principle 16, which expands upon Principle 11, provides aspirational goals for a state's government to use a market approach to quelling pollution and other environmentally harmful acts,[68] meaning that the individual or corporation who pollutes is the one who will bear the cost of that pollution.[69] Theoretically, this sounds like a remedy that would help to create a market force for industries to reduce their pollution. However, in practice, more so in the short-term, it is unlikely that polluters will stop polluting.[70] Instead, the polluter simply pays the costs and, unless otherwise barred, spreads that cost to the consumer,[71] which may also damage the economic situation in developing states.[72]

IV. A LOOK INTO THE NORTH AMERICAN FREE TRADE AGREEMENT

NAFTA is an agreement that has some binding environmental provisions for member states and provides insight to the ability of a multitude of interests to be considered and acted on. NAFTA is one of the first FTAs to explicitly link trade policy with environmental protection goals identified within the agreement.[73] NAFTA provides an example of an early regional cooperation from states and resembles how mega-trade agreements would likely consider interconnecting environmental provisions.

A. The North American Free Trade Agreement

The ratification of NAFTA created a parallel institution to monitor and help finance environmental developments, which was deemed to be paramount for the passage of NAFTA as a whole by Congress.[74]

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[67] *See id.*

[68] *See id.*

[69] *See* Kennedy, *supra* note 60, at 200.

[70] *See id.*

[71] *See id.*

[72] *See id.* (noting the correlation between market economics and environmental problems).

[73] *See* Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 121, 123 (2012).

[74] *See id.* at 126–27; Kevin P. Gallagher, *NAFTA and the Environment: Lessons from Mexico*

After the successful ratification of NAFTA, the subsequent negotiations later developed the North American Agreement on Environmental Cooperation ("NAAEC"), which was given authority to conduct independent investigations and given the appropriate mechanisms to promote integration of trade and environmental objectives.[75] This later developed into the North American Commission for Environmental Cooperation ("CEC").[76] CEC is funded through voluntary contributions from member states, and although the agreement establishes no mandatory contributions listed, Allen makes clear that each country has customarily contributed approximately $3 million since its inception.[77]

Despite the authority allocated to the CEC and its ability to bring suit against alleged violators, it has become evident that the lack of institutional focus and political will to put environmental concerns before profit maximization for corporations allows the decimation of domestic environmental regulations and safeguards.[78] This breakdown can prove to be environmentally and economically costly.[79] The Mexican government has calculated economic costs attributable to environmental degradation averaging ten percent of its GDP since the ratification of NAFTA.[80] This includes calculations of lost ecological services.[81] Additionally, the lack of resources and "hard" environmental laws through NAFTA run the risk of a chilling effect upon participating states to enact domestic statutes that may be challenged on a claim and may be challenged in arbitration.[82]

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and Beyond, *in* THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 61 (2009), http://www.bu.edu/pardee/files/2009/11/Pardee-Report-NAFTA.pdf.

[75] Allen, *supra* note 73, at 128.

[76] *Id.*

[77] *Id.* at 123 n.3.

[78] *See id.* at 130, 131 (discussing how the organization of the Secretariat—which has representatives from each member state—often conflict and bind up progress and action); *see also* Michael McAuliff, *NAFTA Report Warns of Trade Deal Environmental Disasters*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/03/11/nafta-environment_n_4938556.html (last updated Mar. 12, 2014) (discussing how environmental regulations often conflict with trade agreements and potential benefits of the economy).

[79] *See* Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 512 (2003).

[80] *See* Gallagher, *supra* note 74, at 62.

[81] *See id.*

[82] *Compare* DENCHO GEORGIEV ET AL., INTERNATIONAL TRADE UNDER THE RULE OF LAW: AN AMERICAN SOCIETY OF INTERNATIONAL LAW CENTENNIAL REGIONAL MEETING 46 (2006) (discussing the chilling effect on developing countries of the threat of arbitration because of overreaching laws that may lead such a country to be responsible for potential monetary damages which would drain already stretched treasury coffers), *with* Gallagher, *supra* note 74, at 62 (pointing to the lack of desire of the Mexican government's poor history of environmental protection, effectively leading us to a chicken and the egg scenario).

As time has passed, NAAEC and CEC have turned more to fact-gathering and reporting,[83] which can be crucial tasks when discussing environmental protections because information is pivotal when enacting regulations, despite the increase in information and, therefore, awareness of the environmental protections necessary to ensure that certain actions are not materially harming a state's ecosystems.[84] However, as we will see in the next section, this is not always the case. Some corporations are allowed to profit from doing so and can effectively force a state to accept their environmentally harmful actions.

Essentially, the main issue with the CEC is that they have the authority to bring enforcement actions to oppose alleged violators, either through their own findings or private claims by non-governmental organizations, brought through their arbitration process.[85] However, the CEC is not able to pursue the causes of action either because of the lack of coordination or political will, or both.[86] With that said, it is important to point out that this is a crucial development in the institutional development of supranational regulation and enforcement of domestic environmental regulations to strengthen other less effective environmental regimes.[87]

B. How Dispute Settlement in FTAs Exert Their Authority

Most modern trade agreements are using an increasingly popular and controversial means to settle disputes; this is the Investor-State Dispute Settlement ("ISDS").[88] ISDS is a mechanism that allows those who invest in a foreign state to bypass the domestic court system and bring an action in arbitration.[89] Depending on the guidelines provided for the arbiters in the ISDS, the company can have standing for a claim simply because the investor—typically a corporation—feels that a specific law realizes a loss or threat to the investor's profits.[90] Some agreements do allow others to have standing, such as citizen groups or nongovernmental organizations

[83] *See* Allen, *supra* note 73, at 149–50.

[84] *See id.* at 149.

[85] *See* Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721, 721–22 (1996).

[86] *See* Allen, *supra* note 73, at 134–35.

[87] *See* Raustiala, *supra* note 85, at 723.

[88] *Fact Sheet: Investor State Dispute Settlement (ISDS)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited Sept. 14, 2017).

[89] *Id.*

[90] *See id.*

that feel a party has violated a provision of the agreement, and are known as citizen submissions.[91]

An example of how this can be used to the detriment to a domestic government, and against a locality's interests regardless of who is bringing the action, is the *Metalclad*[92] case. In *Metalclad*, the Mexican government denied a permit to operate a toxic waste dump that was applied for by the Metalclad Corporation, a U.S. corporation.[93] The local government denied the permit because of the risk that the location of the dump would have threatened the locality's water supply.[94] Subsequently, Metalclad Corporation brought suit in NAFTA's ISDS and won against Mexico because of the "fair and equitable treatment" standard used in the arbitration process.[95] This meant that the foreign corporation was deemed by the arbitration panel to have been treated differently than a domestic corporation.[96] Additionally, the court cited Article 102(2) of NAFTA and stated that the goals of substantially increasing investment opportunities of the member states was a provision that Mexico had infringed upon.[97]

Provisions such as these have been measured since the General Agreement on Tariffs and Trade ("GATT") to ensure that the governments use a "least trade restrictive method[]," when implementing domestic regulations, or more specifically environmental regulations.[98] Should a tribunal find that the environmental regulations infringe on a corporation's ability to earn

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[91] *See* E. Lynn Grayson, *NAFTA and the Commission for Environmental Cooperation: Environmental Enforcement*, ENVIRONMENTAL COMMITTEE NEWSLETTER (ABA Bus. L. Sec., Chi. Ill.), Winter 2015/2016, at 3, http://apps.americanbar.org/buslaw/committees/CL400000pub/newsletter/201601/fa_1.pdf; *see also* JANE GARDNER, ANALYSIS ARTICLES 14 AND 15 OF THE NAAEC COUNCIL'S "EMERGING CONFLICT OF INTEREST" 5 (Apr. 28, 2004), http://www.cec.org/sites/default/files/documents/jpac_advice_council/4831_Discussion-paper-28Apr_en.pdf (defining the citizen submission process and discussing how it is losing some of its relevancy).

[92] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 65, 73 (Aug. 30, 2000).

[93] *Id.* ¶ 50; *What Is ISDS?*, AFL-CIO, https://web.archive.org/web/20170128000630/https://aflcio.org/Issues/Trade/What-Is-ISDS (last visited Sept. 15, 2017).

[94] *See Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, ¶¶ 59, 110; *What Is ISDS?*, *supra* note 93.

[95] *See Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, ¶ 100; *What Is ISDS?*, *supra* note 93.

[96] *See Fair and Equitable Treatment Standard in International Investment Law* 2 (OECD Working Papers on International Investment, Working Paper No. 2004/3) (discussing how there is no set definition and varies from treaty to treaty and is governed by the surrounding language).

[97] *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, ¶¶ 71, 72.

[98] *See* Nelson, *supra* note 44.

a profit, the regulations could be stricken from the regulatory books,[99] as shown in *Metalclad* above.

With that said, some professionals feel that strong dispute settlement mechanisms serve to benefit the developing states the most.[100] This is because ISDS give countries the ability to know a certain agreement's jurisprudence, as well as past precedent, giving light as to what kind of laws would potentially offend the provisions of the trade regime and would be challenged.[101] Eduardo Pérez Motta, former Chairman of Mexican Federal Competition Commission, suggests that the negotiations of the trade agreements should take into consideration the trading system in its entirety, not simply their domestic law-making role.[102]

Contrary to that point, Stephen Kho, Associate General Counsel to the United States Trade Representative at the time of the source's publishing, stated that dispute settlement, as it pertains to the WTO, effectively undermines a country's sovereignty and does not allow a country to truly use diplomacy.[103] Mr. Kho continues that there is a chilling effect while developing jurisprudence that domestic lawmakers face when trying to implement potential legislation, as it "forc[es] Members to think twice before implementing laws that are similar to other laws previously found by panels and the Appellate Body to be WTO-inconsistent."[104] Thereby, this made member states hesitant to pursue aggressive and potentially necessary policy changes to combat climate change. Additionally, many environmental protection measures are not in conflict with the WTO provisions,[105] but developing states can be seen as resisting environmental protections that are imposed on them by WTO and agreements with WTO members.[106]

V. THE SHIFT OF INTERNATIONAL LAW IN MEGA-TRADE AGREEMENTS

In this section, I will provide an analysis of the TPP and the RCEP

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[99] *See id.*

[100] *See* GEORGIEV ET AL., *supra* note 82, at 47.

[101] *See id.* at 45.

[102] *See id.* at 47.

[103] *See id.* at 44.

[104] *Id.* at 46.

[105] *See* Kennedy, *supra* note 60, at 199.

[106] *See* Matthias Busse, *Trade, Environment, Regulations, and the World Trade Organization: New Empirical Evidence* 20 (Hamburg Institute of International Economics, Working Paper No. 3361, 2004).

through examining any released legal framework, and how they will likely provide the framework for binding an actionable, environmentally friendly provision. This is arguably because of the latter theory offered by Mr. Kho, and the inability for developing states to afford to stay competitive with the developed states with which they are entering agreements. These agreements are a natural next-step in environmental law, particularly, when considering the development of international law from merely recognizing and later creating international policy with CITES; providing an almost all-encompassing recognition of the importance of protecting natural resources and, at times, affecting how arbitration decisions are rendered in the WTO; and, lastly, providing a fairly active environmental branch with NAFTA.

A. Trans-Pacific Partnership: A Ghost Ship with Some Insights

With the U.S.'s exit from the TPP, the agreement is all but lost;[107] however, it still provides us with insights as to how mega-trade agreements may be organized in the future and seeing broad, binding environmental provisions. What makes the TPP unique and worthy to study? A unique aspect of the TPP is the fact that it was a mega-trade agreement that had been boasted to maintain one of the most stringent labor and environmental regulations that have been placed into a trade agreement.[108] However, this push has not been met without a resounding objection to this claim, coming from multiple groups from many different nations.[109] For instance, the Center for International Environmental Law ("CIEL") has stated that the TPP's environmental chapter is "almost [like] every U.S. free trade agreement ("FTA") formed in the past two decades [and] have similarly promised meaningful and enforceable labor and environmental safeguards."[110]

With that said, the TPP does have ten main subsections where the

[107] *See* Kevin Granville, *What is the TPP? Behind the Trade Deal That Died*, N.Y. TIMES, https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html (last updated Jan. 23, 2017).

[108] *See Trans-Pacific Partnership: Labour and Environment Fact Sheet*, N.Z. FOREIGN AFFAIRS & TRADE, https://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Labour-and-Environment.pdf (last visited Sept. 15, 2017).

[109] *See, e.g.*, CTR. FOR INT'L. ENVTL. LAW, THE TRANS-PACIFIC PARTNERSHIP AND THE ENVIRONMENT: AN ASSESSMENT OF COMMITMENTS AND TRADE AGREEMENT ENFORCEMENT 2 (2015), http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf (discussing shortfalls in the environmental protections provided by the TPP).

[110] *Id.* at 1.

TPP tries to take the offensive on protecting the environment.[111] For the purpose of this paper, I will examine the (seemingly) binding provisions 20.16, 20.17, and 20.18; and, in contrast, look at a non-binding provision, Article 20.15. Of particular interest to the scope of this paper is the portion of the TPP that seeks to facilitate cooperation and enforcement through the Committee on the Environment ("Committee") and the provision relating to dispute resolution with the Environmental Chapter.[112]

Some third-parties have called the TPP's environmental provisions the strongest yet in a trade agreement, commending the U.S. for stronger environmental protections contained in each successive FTA.[113] However, there are still some groups demanding more.[114] CIEL notes that provisions where the environment is spoken of most frequently are in relation to ISDS, which allows a company—or other foreign investor—to sue governments because of their environmental provisions on the books, negatively impacting that investor's ability to maximize their profits.[115] As previously discussed, this provides provisions that will lead to the weakening of domestic laws because of a chilling effect that may be seen as new environmental laws created in pursuit of the environmental goals in the TPP could simply be struck down by the ISDS. However, there is a Public Submission provision that allows for private citizens and organizations to file a claim should they feel that a party has violated an actionable provision of the agreement.[116]

Taking a look at the first legally binding provision to be discussed, Article 20.16 on Marine Capture Fisheries could be binding, up to a point, as it sets out compliance standards and with minimal exceptions to the rule.[117] This is one of the first, if not the first, large trade agreements to address this pressing issue.[118] In this provision, it sets forth fairly pressing provisions that require each party to

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[111] *See* Jay Chittooran, *TPP in Brief: Environmental Standards*, THIRD WAY (Apr. 15, 2016), http://www.thirdway.org/memo/tpp-in-brief-environmental-standards.

[112] *See* TPP Agreement, *supra* note 10, ch. 20.19, 20.23 (environment) (discussing the establishment of the Committee and that each party will have a representative sitting on the Committee to oversee the implementation and enforcement of the environmental provisions).

[113] Chittooran, *supra* note 111.

[114] *See* CTR. FOR INT'L. ENVTL. L., *supra* note 109, at 13.

[115] *See id.* at 9.

[116] TPP Agreement, *supra* note 10, ch. 20.9 (environment); CTR. FOR INT'L. ENVTL. L., *supra* note 114, at 3 n. 15.

[117] *Id.* ch. 20.16.

[118] *See* Rachael Bale, *How the Trans-Pacific Partnership Will—and Won't—Protect Wildlife*, NAT'L GEOGRAPHIC (Nov. 5, 2015), http://news.nationalgeographic.com/2015/11/151105-TPP-free-trade-wildlife-trafficking-conservation-cites/.

manage their wild fisheries in order to "(a) prevent overfishing and overcapacity; (b) reduce bycatch of non-target species and juveniles, . . . and (c) promote the recovery of overfished stocks for all marine fisheries in which that Party's persons conduct fishing activities."[119] This continues to direct the parties to adhere to systems that are founded on "the best scientific evidence available and on internationally recognized [sic] best practices[,]"[120] and the parties must "promote the long-term conservation" of non-target fish and marine mammals by "*effective* enforcement of conservation and management measures."[121]

Essentially, this provision works to ensure that the parties involved adhere to a set of measurable standards that have been recognized as the best way to operate fisheries in a sustainable manner. In doing so, the TPP would have created a minimum baseline for the treatment of fisheries and failure to comply would be actionable in arbitration.[122] Lastly, the provision addresses the issue of disparity of capacity to implement and enforce the provision because of the inability for some states to devote their resources to become compliant with the provision.[123] Although it is not mandated that the parties cooperate, the provisions seems to state that a party may set out to help other parties to implement and enforce these provisions.[124]

In addition to that provision, Article 20.17 concerning Conservation and Trade starts with aspirational language stating "[t]he 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, . . . reduc[ing] the[ir] economic and environmental value.[125] While this appears nonbinding, the second provision expands on this and binds each party to "adopt, maintain and implement laws, [and] regulations" that will fulfill the party's obligations under CITES.[126] By doing that, it brings the parties into

[119] TPP Agreement, *supra* note 10, ch. 20.16 (environment).

[120] *Id.*

[121] *Id.* (emphasis added) (providing guidelines that the measures must adhere to and species that the measures must protect).

[122] *See id.*

[123] *Id.*

[124] *See id.* (discussing the manner in which the parties support in efforts to combat any illegal fishing practices and identifies specific areas for the parties to assist— most are found in section (14)(b) of article 20.16).

[125] *Id.* at ch. 20.17.

[126] *Id.* The author finds it prudent to note, as it will be relevant later in this paper, that CITES commitments also provide for technical assistance and cooperation of parties. This was

compliance with the first provision and affirms their commitment to take steps to stop the illegal trade in wild flora and fauna. Considering that the TPP parties are all involved with CITES,[127] it makes that provision much more powerful, however misleading. As discussed earlier, states participating in CITES are free to voluntarily choose to which resolution passed by the Conference of Paris they wish to adhere,[128] meaning that if a party does not wish to abide by a certain resolution, then they are not bound to, and that party will not be forced to be responsible to get back into compliance through commitments made through the TPP.[129] Additionally, this provision directs the parties to pass laws that will result in punishments (in the form of both criminal and civil penalties),[130] and, in a confusing line of language, this same provision directs the parties to "endeavour to take measures to combat the trade of wild fauna and flora," essentially asking the parties to use their best efforts to take the appropriate measures.[131] This falls short of the most stringent provisions as CIEL has brought to our attention and may not be much progress at all in terms of international environmental law.

In contrast, Article 20.15, concerning the transition to a low emission economy, is an aspirational provision,[132] and I bring it to the reader's attention in order to strengthen my argument that the provisions I have described above and many like them throughout the TPP are meant to, and will be, enforceable. The provision leads parties to simply acknowledge that a transition to a low emission economy will require collective action and continues to state that a party's action to make the transition must be individualized to reflect "domestic circumstances and capabilities."[133] However, section 2

spoken of earlier in this paper, but not truly explored as it is out of the scope of the purpose of this paper.

[127] *Compare* Lydia DePillis, *Everything You Need to Know About the Trans Pacific Partnership*, WASH. POST (Dec. 11, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/?utm_term=.358c993566c7 (listing the countries that are currently a party to the TPP agreement), *with List of Contracting Parties*, CONVENTION INT'L TRADE ENDANGERED SPECIES, https://www.cites.org/eng/disc/parties/chronolo.php (last visited Sept. 16, 2017) (listing the contracting parties to CITES and, *inter alia*, the respective dates).

[128] *See* Brack, *supra* note 31.

[129] *See* Elisabeth M. McOmber, *Problems in Enforcement of the Convention on International Trade in Endangered Species*, 27 BROOK. J. INT'L L. 673, 690 (2002) (noting how penalty proceedings may be brought when there is a violation of CITES, and how there are no actual enforcement provisions included in CITES).

[130] *See* TPP Agreement, *supra* note 10, ch. 20.17 (environment).

[131] *See id.*

[132] *See id.* at ch. 20.15.

[133] *Id.*

then attempts to require cooperation "to address matters of joint or common interest."[134] There is a wide breadth of possible ways to satisfy this aspiration, but the Article is void of anything that truly mandates action by the parties. With that said, it is possible that this will develop into voluntary action and cooperation, just as we saw in NAFTA in terms of the CEC. Although this is purely speculative, it becomes a little more realistic considering that the OECD has stated that the transition to a low emission economy is vital to fighting climate change and quell the threats that a changing climate offers the global population.[135]

Lastly, Article 20.23 regards dispute resolution as a last resort reached when none of the other resolution mechanisms are successful.[136] Essentially, a party must exhaust their administrative remedies before filing a claim. This provision, however, merely describes that before an action is commenced in dispute settlement, the party must consider "whether it maintains environmental laws that are substantially equivalent in scope to the environmental laws that would be the subject of the dispute."[137] A clause such as this will probably deter many developing states from pursuing dispute resolution because they will likely determine that their laws are out of scope, because that is why they are at issue in the matter, realizing a chilling effect for those states.[138] This is particularly true if that state's coffers are not bountiful, and the state does not want the risk of paying damages that they cannot afford,[139] thereby running the risk of initiating a race-to-the-bottom situation by the developing states.[140]

Despite the arguments that even the seemingly enforceable provisions will not be actionable, the enforceability of these provisions is a tale that can only be told after seeing a party in the matter try to enforce these provisions. However, even though some

[134] *Id.* (listing examples of what may be considered as areas for cooperation).

[135] ORG. FOR ECON. COOPERATION & DEV., ALIGNING POLICIES FOR A LOW-CARBON ECONOMY 23 (2015), https://www.oecd.org/environment/Aligning-Policies-for-a-Low-carbon-Economy.pdf.

[136] *See* TPP Agreement, *supra* note 10, ch. 20.23 (environment) (requiring the parties to attempt to settle their dispute only after failing to resolve the dispute under Chapter 20.20 (Environmental Consultations), Chapter 20.21 (Senior Representative Consultations), and Chapter 20.22 (Ministerial Consultations)).

[137] *Id.*

[138] *See* Ashley Wagner, *The Failure of Corporate Social Responsibility Provisions Within International Trade Agreements and Export Credit Agencies as a Solution*, 35 B.U. INT'L L.J. 195, 206–07 (2017).

[139] *Id.* at 207–08.

[140] *See* Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1006 (2017).

points seem weak, the points that *are* vague could simply become points of contention either in arbitration or through other dispute resolution procedures. Despite this, public interest groups who have commented on the agreement have cast doubt upon whether a party would actually be sanctioned or otherwise punished for failing to live up to their environmentally charged agreements.[141]

B. The Regional Comprehensive Economic Partnership

The current status of the TPP has allowed the RCEP to assume the foremost position in the international community.[142] Talks regarding its passage have gained momentum.[143] In terms of environmental law, the RCEP may be poised as the vehicle to deliver the change because of the players helping shape the agreement.[144] Further, it may have mechanisms that provide it with an opportunity to implement environmental provisions, enumerated or not.

The ASEAN and China have taken a number of steps to show that both parties are cognizant of the problem of a changing climate and a need to enact regulations to combat the issue.[145] Additionally, China and ASEAN have a free trade agreement between themselves,[146] which includes cooperation on the environment; therefore, environmental considerations may come to fruition because of ASEAN and Chinese leadership.[147] However, at the time of the writing of this paper, the RCEP does not currently have much disclosed to the public in terms of environmental provisions, and

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[141] *See* Bale, *supra* note 118 (discussing how the TPP's language is too vague to be actionable, but does discuss that there is potential for a country to initiate an action against a country that is allegedly not living up to its commitments).

[142] *See* Banten Serpong, *RCEP Talks Speed up amid TPP Failure*, JAKARTA POST (Dec. 7, 2016), http://www.thejakartapost.com/news/2016/12/07/rcep-talks-speed-up-amid-tpp-failure.html.

[143] *See id.*

[144] *See* Isabel Hilton, *China Emerges as Global Climate Leader in Wake of Trump's Triumph*, GUARDIAN (Nov. 22, 2016), https://www.theguardian.com/environment/2016/nov/22/donald-trump-success-helps-china-emerge-as-global-climate-leader (discussing China's current leadership on climate policy and efforts to restrict their pollution, including installment of the world's largest array of solar panels and wind turbines).

[145] *See* CTR. FOR CLIMATE & ENERGY SOLUTIONS, CHINA'S CLIMATE AND ENERGY POLICIES 1, 2 (2015), https://www.c2es.org/docUploads/china-factsheet-formatted-10-2015.pdf (discussing reductions of coal consumption and meeting emissions and consumptions targets); *see also Overview of ASEAN Cooperation on Environment*, ASEAN COOPERATION ON ENV'T, http://environment.asean.org/about-us-2/ (last visited Sept. 16, 2017) (discussing the accomplishments of ASEAN Cooperation on the Environment).

[146] *See ASEAN – China Free Trade Agreements*, ASEAN, (Oct. 12, 2012), http://asean.org/?static_post=asean-china-free-trade-area-2.

[147] *See id.*

negotiations are coming to an end.[148]

1. Background of the Agreement

The RCEP is an ASEAN-centered proposal regarding a regional free trade area, which initially included ten ASEAN member states, and was later expanded to included non-ASEAN members.[149] The non-ASEAN countries that are involved currently have free trade agreements with ASEAN, including Australia, China, India, Japan, South Korea, and New Zealand.[150] Considering that, the countries involved in the RCEP are Australia, Brunei, Cambodia, China, India, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand, and Vietnam.[151] Many of the states involved currently have FTAs with one another.[152]

2. ASEAN and Chinese Influence in the Region

As stated before, the main driving force behind the RCEP is the influence of the ASEAN states and China; however, both of these actors have been very active in increasing cooperation and relations with states in the region.[153] With that in mind, it is not absurd to suggest that the RCEP is being used as a tool for the Chinese to spread their influence throughout the region,[154] similar to how the U.S. was able to establish a command over how the TPP was negotiated and instilled in it some of the most stringent standards for environmental practice that have been seen within a mega-trade agreement.[155]

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[148] *See RCEP: Status Update*, ASIAN TRADE CTR., (July 19, 2016), http://www.asiantradecentre.org/talkingtrade//rcep-status-update (discussing the slowing progress of negotiations and stating that negotiations will not be concluded at the end of 2016 as planned).

[149] *See Regional Comprehensive Economic Partnership*, AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx (last visited Sept. 16, 2017).

[150] *Id.*

[151] David A. Gantz, *Simplified Company: The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 63 (2016).

[152] *See, e.g.*, PTI, *Next Round of RCEP Negotiations in Jakarta from Dec 5*, ECON. TIMES (Nov. 30, 2016), http://economictimes.indiatimes.com/news/economy/foreign-trade/next-round-of-rcep-negotiations-in-jakarta-from-dec-5/articleshow/55705122.cms (noting India's free trade agreement with ASEAN, Japan, and South Korea, and similar negotiations with Australia and New Zealand).

[153] *See* H.E. Liu Zhenmin, Vice Foreign Minister of China, Speech at the Boao Forum for Asia Annual Conference (Mar. 26, 2017), http://me.chineseembassy.org/mon/wjbxw/t1448887.htm.

[154] Jun Zhao & Timothy Webster, *Taking Stock: China's First Decade of Free Trade*, 33 U. PA. J. INT'L L. 65, 89–90 (2011).

[155] *See Trans-Pacific Partnership: Environment*, OFF. OF THE U.S. TRADE REPRESENTATIVE,

There is an inkling of hope that the Chinese will push for environmental standards within the RCEP, because it is proven that they are aware of the threat of a changing climate.[156] This hope is derived from China's more recent efforts and their leadership in promoting environmental protections.[157] China has also used such an outlet as a means for prosperity, investing more than $102.9 billion in renewable energy and installing half of the globe's new wind power.[158] Additionally, a World Bank Policy Note has described that the integration of environmental issues has been an irreversible trend, and discussed that given China's position, it may prove more prudent for the Chinese to continue this trend and be more flexible with their trading partners.[159] The Policy Note continues to state that China needs to show "strong political commitment," essential to ensuring that environmental provisions are included.[160] China may be at the helm of a domestic trend to curb pollution, including cutting coal consumption by thirty percent in 2017,[161] and investing in renewable technology, cleaner gas, and diesel initiatives implemented in February 2017.[162] As it currently stands, the RCEP does not entail any provision that would bind member countries to certain environmental standards.[163]

It does not stretch the imagination that participating countries, namely China, could export sound environmental policy and technological assistance to the benefit of the member states of the RCEP. However, the question then becomes whether the ASEAN,

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https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-5 (last visited Sept. 17, 2017).

156 *See* CTR. FOR CLIMATE & ENERGY SOLUTIONS, *supra* note 145, at 1.

157 *See* Nikolaeva Kamila Sergeevna, *China: International Cooperation in Environmental Protection*, 3 J. GEOSCIENCE & ENV'T PROTECTION 28, 28, 29 (2015); *see also* Michael Forsythe, *China Aims to Spend at Least $360 Billion on Renewable Energy by 2020*, N.Y. TIMES (Jan. 5, 2017), https://www.nytimes.com/2017/01/05/world/asia/china-renewable-energy-investment.html (discussing China's plan to spend at least $360 billion on renewable energy by 2020, pushed by public unrest by air pollution).

158 Hilton, *supra* note 144.

159 *See* World Bank, *Environment Provisions in Regional Trade Agreements: Lessons for China*, at 1, 2, 7, THE WORLD BANK POLICY NOTE 2 (June 30, 2009), http://documents.worldbank.org/curated/en/217811468011419020/pdf/513160v20white1nt1Policy1Note1final.pdf (discussing the viability for environmental law to be implemented in free trade agreements, but must be crafted carefully and denotes the necessity for technical assistance).

160 *See id.* at 3.

161 *China to Launch 'Environmental Police' Force* (Jan. 8, 2017), AL JAZEERA, http://www.aljazeera.com/news/2017/01/china-launch-environmental-police-force-170108155055619.html.

162 *Id.*

163 *See* Viola Zhou, *TPP, Unlike China's RCEP, has Goals on Worker Protection, Corruption, Environment*, CNBC (Nov. 24, 2016), http://www.cnbc.com/2016/11/23/tpp-unlike-chinas-rcep-has-goals-on-worker-protection-corruption-environment.html.

Chinese, and other participants find it fruitful to negotiate for strong environmental provisions as seen in the TPP.

Although specifics are not yet available to the public, the RCEP sets out to establish economic and, more importantly, technical assistance to member states.[164] Speculating upon the technical assistance to be provided, one facet of that assistance could easily prove to include assistance that is environmental in scope, as this is something that the ASEAN Cooperation on the Environment already is providing technical assistance and facilitating cooperation, lending it to be a logical transition.[165] Technical assistance or cooperation is a typical strategy that is involved in environmental provisions in CITES,[166] WTO,[167] and NAFTA agreements.[168] However, in this instance, it will take a considerable amount of time to realize effective technical assistance that will help to develop environmental protections suitable for the capabilities of the developing states.[169]

C. Bridging the Gap

The TPP and the RCEP are very different agreements in terms of secondary objectives of the agreements themselves. The TPP more formally looks to address environmental issues along with human rights issues,[170] while the RCEP, on its face, looks solely to develop a regional free trade area.[171] However, the inclusion of technical assistance, a very broad term, leaves one to consider the possibilities of the areas in which technical assistance could be used.[172]

The RCEP may be trying to assist environmental regulation development for underdeveloped countries.[173] This would allow those

[164] *See* Karlis Salna & Isabel Reynolds, *Art of the Trade Deal: China-Championed Pact Faces Tricky Talks*, BLOOMBERG, https://www.bloomberg.com/politics/articles/2017-02-26/art-of-the-trade-deal-china-championed-pact-faces-tricky-talks, (last updated Feb. 26, 2017).

[165] *See* ASEAN COOPERATION ON ENV'T, *supra* note 145.

[166] *See Resolution Conf. 3.4: Technical Cooperation*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES, https://cites.org/eng/res/03/03-04.php (last visited Sept. 16, 2017).

[167] *See WTO Technical Assistance and Training*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (last visited Sept. 16, 2017) (discussing the trade related technical assistance offered through the WTO, albeit different than environmental technical assistance, this only further proves the point that technical assistance is flexible and can be tailored to the goals of the agreement).

[168] *See* Gary Clyde Hufbauer & Diana Orejas, *NAFTA and the Environment: Lessons for Trade Policy*, PETERSON INST. FOR INT'L ECON. (Feb. 28, 2001), https://piie.com/commentary/speeches-papers/nafta-and-environment-lessons-trade-policy.

[169] *See* Salna & Reynolds, *supra* note 164.

[170] *See id.*; Zhou, *supra* note 163.

[171] *See* Zhou, *supra* note 163.

[172] *See* Salna & Reynolds, *supra* note 164.

[173] *WTO Technical Assistance and Training, supra* note 167.

underdeveloped states to progress towards more "advanced" environmental regulations, but without the fear of being brought to arbitration and facing debilitating sanctions or fines for the violation of non-tariff trade barriers.[174] This would reduce the chilling effect that may be experienced by those underdeveloped states and will allow for enough flexibility for each state to address their own issues maintaining a grasp of their sovereignty and autonomy.

Additionally, this would fall in line with Principle 11 of the Rio Declaration,[175] as it would help to assist these developing countries increase their capacity and manage their objectives as to their specific, unique situation,[176] allowing these countries to maintain sovereignty over the use and protection of their environmental resources.[177] This would also reduce risk exposure during negotiations because they will not be directly serving the interests of the more powerful states, but instead, these developing states will receive the technical knowhow of the best ways to identify, manage, and protect their environment,[178] alleviating the disconnect between developed countries imposing their policies on developing states that do not have the capacity to enforce those policies at the time of ratification.[179] Without a doubt, this would take time to develop, but it may be the path necessary at this moment to create binding environmental provisions, doing so in a manner that allows states to have self-determination in how to reach their environmental goals.

CONCLUSION

After reviewing the developments of some of the more well-known agreements and how they have successively promoted the development of international environmental law, it seems that mega-trade agreements should provide the essential next step to answering one of the most pressing questions that we currently face: namely, climate change and how collective action can be achieved to address it. Through my analysis of the TPP and RCEP, I have shown their potential to promote binding provisions to ensure compliance with said provisions and ensure that developed states are not only helping other less developed states, but also leading in the development and

[174] Condon, *supra* note 9, at 107.
[175] *See* Rio Declaration, *supra* note 39.
[176] *See id.*
[177] *See id.*
[178] *See WTO Technical Assistance and Training*, *supra* note 167.
[179] Condon, *supra* note 9, at 150–51.

promotion of environmental law in lesser developed states. Both of those agreements have the potential to bind the participating parties to develop more stringent environmental protections.

Despite the current lack of awareness about the RCEP, it seems that through providing technical assistance, parties will at the very least have the tools to promote environmental protection and develop environmental law. This solution comes through different means than we are familiar with. The future may not be one where we try to force compliance through provisions entailed in the RCEP, itself, but compliance may be simply more economically viable for the parties over time. As the Secretary of the United Nations Framework Convention on Climate Change has stated, "[c]limate change increasingly poses one of the biggest long-term threats to investments."[180] It is crucial to protect the environment in order to increase prosperity and take the proper steps to combat poverty. The two goals have the potential to work together.

[180] José Santiago, *15 Quotes on Climate Change by World Leaders*, WORLD ECON. FORUM (Nov. 27, 2015), https://www.weforum.org/agenda/2015/11/15-quotes-on-climate-change-by-world-leaders/ (quoting Christiana Figueres, secretary of the UNFCCC, discussing climate change).