Asian Journal of International Law (2025), 1–25
doi:10.1017/S2044251325000013

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

The CPTPP "Lab" for Enhancing Climate-Related Civil Society Involvement: The Case of China and Beyond

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(Received 9 April 2024; revised 11 October 2024; accepted 14 November 2024)

Abstract

Joining the line of free trade agreements involving civil society in climate change-related commitments, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) installs a public submissions and referral procedure (SRP) under its environmental chapter. China's application to join the CPTPP and the peripheral role of civil society in its climate decision-making furnish a curious opportunity to contemplate dynamics between the SRP and domestic regimes with historically limited civil society involvement.

The article cites China as an illustrative case to show how a state-centric approach to climate change, lacking civil society engagement, may render mitigation efforts unreliable, unsustainable, and inequitable. It argues that the submissions and referrals procedure (SRP)'s unique procedural features offer potential as a testing ground for building up previously constrained civil society involvement in climate decision-making. It also exposes the design flaws in the SRP that require reform to uphold its identified experimental value, regarding which several proposals are put forward.

Keywords: climate change; free trade agreement; civil society; CPTPP; trade and sustainable development

Two and a half years after the Intergovernmental Panel on Climate Change urged immediate and intensified climate action,[1] extreme weather reports continue to sweep news headlines. The urgent need to combat the climate crisis has never been clearer. The Paris Agreement, as the principal instrument within the current United Nations Framework Convention on Climate Change (UNFCCC) regime, adopts a bottom-up approach that allows Contracting Parties to define their own Nationally Determined Contributions (NDCs).[2] Articles 13 through 15 of the Paris Agreement provide for transparency and compliance mechanisms regarding the implementation of NDCs, which appear rather loose when it comes to monitoring the Parties' individual progress. Although the Enhanced Transparency Framework requires each Party to furnish information "necessary to track

[1] Intergovernmental Panel on Climate Change, "Climate Change 2021: The Physical Science Basis" (2021) at 14.
[2] *Paris Agreement*, 12 December 2015, 3156 U.N.T.S. 79 (entered into force 4 November 2016).

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https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

progress made in implementing and achieving [its NDCs]",[3] the degree of scrutiny that such information would come under is another story.[4] The technical expert review mandated by Article 13 involves "consideration" of each Party's implementation of NDCs, but could do so only in a "facilitative, non-intrusive, and non-punitive" manner "respectful of national sovereignty", inviting questions to its effectiveness in bringing about adequate and appropriate implementation efforts;[5] the "Global Stocktake" process established by Article 14 assesses implementation only on a collective basis; and the Implementation and Compliance Committee, instituted pursuant to Article 15,[6] can review only a Party's record of transparency and information provision, rather than substantive progress, when acting upon its own initiative.[7] State-specific climate action is therefore subject to limited multilateral surveillance. Against this backdrop, attention towards individual States' climate mitigation efforts has expanded beyond the UNFCCC regime into other policy domains in the international arena, such as human rights, international finance, and economic cooperation.[8]

In recent years, the subject has gained prominence in the context of international trade with the proliferation of environmental provisions in free trade agreements (FTAs). While disagreement persists over the appropriate approach to giving effect to these provisions, especially whether trade sanctions should be adopted as a last resort for compelling compliance, scholars on both sides of the debate share the view that civil society involvement is an important means of implementation.[9] Parallel to this is another stream of literature, spanning an extended period of time and speaking to related but varying contexts that seeks to justify why international instruments or intergovernmental organizations should open up to non-State stakeholders.[10] In practice, mechanisms for civil society involvement have been incorporated into the environment chapters of several major US FTAs since the 1990s and more recently in the "Trade and Sustainable Development" (TSD) chapters of EU FTAs.[11]

In the meantime, China – another key player in the global fight against the climate crisis – appears contrastingly indifferent about civil society involvement in climate matters.

[3] Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement [COP], *Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement*, Decision 18/CMA.1 (2018) [COP Article 13 Decision] at paras. 59–103.

[4] For a different view that approves of the effectiveness of the listed arrangements in enhancing compliance, see Caroline FOSTER, "Lessons from the Paris Agreement for International Pandemic Law and Beyond" in Christina VOIGT and Caroline FOSTER, eds., *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press, 2024) 15 at 30–7. However, it should be noted that the focus of this paragraph is on the degree of monitoring afforded by these arrangements in relation to *individual* progress.

[5] COP Article 13 Decision, *supra* note 3 at paras. 148–9.

[6] COP, *Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement*, Decision 20/CMA.1 (2018).

[7] *Ibid.*, at 22–3.

[8] Eric DANNENMAIER, "The Role of Non-State Actors in Climate Compliance" in Jutta BRUNNÉE, Lavanya RAJAMANI, and Meinhard DOELLE, eds., *Promoting Compliance in an Evolving Climate Regime* (Cambridge: Cambridge University Press, 2011) 149 at 149.

[9] See, for example, Marco BRONCKERS and Giovanni GRUNI, "Retooling the Sustainability Standards in EU Free Trade Agreements" (2021) 24 Journal of International Economic Law 25 at 34; Denise PRÉVOST and Iveta ALEXOVIČOVÁ, "Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements" (2019) 6 International Journal of Public Law and Policy 236 at 251–5.

[10] See, for example, Joost PAUWELYN, "Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening Up?" (2023) 26 Journal of International Economic Law 51 at 54; Peter Van den BOSSCHE, "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11 Journal of International Economic Law 717 at 748. See further discussion in Section II, in particular texts accompanying notes 43 to 47.

[11] See discussion in Section III, in particular texts accompanying note 66 and notes 86 to 88.

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Although its domestic environmental laws have been revised to enhance public participation, channels for citizens and environmental non-governmental organizations (NGOs) to challenge State decision-making remain considerably limited.[12] In parallel, the FTAs concluded by China to date, while exhibiting an increasing tendency to incorporate environmental clauses in recent years, have consistently excluded reference to civil society involvement.[13]

China submitted in September 2021 its request to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[14] which is a recent addition to the line of FTAs that incorporate formal mechanisms for engaging civil society in environmental matters. The application remains pending at the time of writing. Should it eventually accede to the agreement, China would be subject to the CPTPP's civil society involvement mechanism, namely the environmental SRP under Article 20.9, as a matter of FTA obligation.

The lack of civil society involvement with regard to climate decision-making by the Chinese government, which is becoming increasingly visible for its discordance with recent developments in China's international and domestic law-making, has not been adequately appreciated in scholarly writings.[15] And as a rather nascent mechanism, the SRP has thus far received scant attention in academic and non-academic discussions.[16] In this regard, the confluence of developments sketched above furnishes a valuable opportunity to contemplate the impact that the SRP may exert on a regime where civil society involvement has been consistently lacking. Taking China as a representative case, this article engages with three sets of inquiries: to date, how has civil society been involved with respect to monitoring China's climate mitigation efforts? Why is it necessary to engage civil society in this issue area? Could the SRP bring change to the status quo, and how? The main argument advanced in the article is that the unique procedural design of the SRP holds experimental potential for building up previously lacking civil society involvement in climate matters, especially when its absence thereof has been a result of government preference for State-centric decision-making.

While a substantial portion of this article will closely examine China as an illustrative case, it seeks a wider audience in academics and practitioners interested in the role of civil society in climate and environmental decision-making. For academics, this article calls for greater scholarly interest in the SRP as a new model for facilitating civil society involvement through international agreements. The SRP's rather modest formulation, as compared to its counterparts in existing EU and US bilateral FTAs (discussed in Section III), might have resulted in its yet low profile in scholarly works. But as argued in this article, its implications on systems with historically suppressed or rather nascent civil society structures deserve closer attention. For policymakers and civil society actors like NGOs, especially those from CPTPP parties, this article not only affords one of the first detailed analyses on the nature and scope of civil society involvement achievable through the SRP, but also points out the SRP's design defects that need to be cautioned and rectified in future rule-making and application.

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[12] See discussion in Section I.A.

[13] See discussion in Section I.B.

[14] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018, [2018] A.T.S. 23 (entered into force 30 December 2018) [CPTPP].

[15] But see Haifeng DENG and Jie HUANG, "What Should China Learn from the CPTPP Environmental Provisions?" (2018) 13 Asian Journal of WTO and International Health Law and Policy 511 at 528–9 and 530–3; Dan WEI and Ângelo Patrício RAFAEL, "China's Approach to Sustainable Development in Free Trade Agreements" (2023) 16 Law and Development Review at 10–13.

[16] But see Deng and Huang, *supra* note 15 at 528–9.

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The rest of the article proceeds as follows. It begins with an overview of the space for climate change-related civil society involvement in China (Section I), before surveying general and case-specific justifications for involving civil society in climate decision-making (Section II). It then elaborates the distinctiveness of the SRP in juxtaposition with its counterparts in other existing FTAs (Section III) and argues why and how the SRP could help expand previously hindered civil society involvement in the policy domain of climate change (Section IV). Section V concludes.

Before commencing the main discussion, a few lines are warranted on the concept of "civil society involvement" and its relationship with the mechanisms to be addressed. For the purpose of this article, "civil society" is broadly perceived to comprise diverse entities who do not exercise governmental authority, are not of for-profit nature, and take part in public life by expressing interests and values of their own or those they represent.[17] Though this definition covers both individuals and organizations, the discussion below will from time to time centre around environmental NGOs – a natural result of the their essential role in environmental decision-making.[18] With respect to "involvement", the term can be approached from two dimensions. One is the target of civil society involvement, or the processes on which civil society actors seek to exert influence. This dimension is denoted by the generic term "climate decision-making" in this article, which encompasses not only rule-making decisions to establish laws or policies or undertake international obligations concerning climate change, but also, and perhaps more significantly, processes through which a government considers whether and in what way those laws, policies, and obligations are to be implemented. The other is the venue of civil society involvement, or the processes through which civil society actors exercise agency and carry out relevant activities. The venue of involvement may overlap squarely with the target in some cases, such as the notice and comment period commonly seen in most countries' legislative practice. They may also be entirely separate, a prominent example being any international dispute initiated by citizens or NGOs that seeks to challenge the implementation of national climate laws. With respect to mechanisms covered in this article, Section I aims to present a relatively comprehensive overview and, therefore, takes account of both domestic and international venues for involving civil society in China's climate decision-making. The SRP, on the other hand, consists of various stages where civil society involvement is envisaged in different venues (domestic or international) with varying targets (the implementation of FTA obligations or enforcement of domestic environmental laws), as will be detailed in Section III.

I. China's State-centric approach to climate change

To understand whether and how civil society has been engaged in China's climate decision-making, this section investigates the status quo through the lenses of international and domestic legal systems. Two cases in point are addressed below, beginning with an analysis of the room for civil society involvement when climate change issues arise in China's bilateral or international relations. As a number of recent trade agreements concluded by China appear to have become more receptive to non-trade matters, including environmental protection, the discussion focuses on FTAs to shed light on this aspect. The section

[17] See Jean-Baptiste VELUT, "What Role for Civil Society in Cross-Regional Mega-Deals? A Comparative Analysis of EU and US Trade Policies" (2016) 55 Revue Interventions économiques 1 at 4.

[18] The widely recognized role of NGOs in environmental decision-making is confirmed in Article 2.5 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), which explicitly includes environmental NGOs in its definition of "the public concerned". *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 U.N.T.S. 447 (entered into force 30 October 2001), art. 2.5.

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then reviews the existing mechanisms for civil society involvement in China's domestic environmental laws. Overall, the substantially limited institutions and procedures for civil society involvement across international and domestic arenas represent China's State-centric approach to climate change, exemplifying its reluctance to tolerate immediate challenge to governmental authority in climate decision-making.

A. Civil society involvement in FTA environmental chapters

Until recently, environmental concerns had remained at best anomalous to Chinese FTAs. The FTA between China and Switzerland, concluded in 2013, was the first to include environmental provisions. The agreement marks a significant departure from previous Chinese FTA practice, a result of Switzerland's insistence that environmental protection, among other issues, be integrated into the trade negotiations.[19] The incorporation of environmental chapters, as part of a package of "non-trade concerns", was tested again in 2015 in the FTA between China and South Korea.[20] In the ensuing years this approach proved an outlier in China's trade negotiations, as a few subsequent agreements signed with major trade partners, such as the 2015 China-Australia FTA and the 2020 Regional Comprehensive Economic Partnership agreement, refrain from addressing environmental issues. However, several recent "upgrades" of existing agreements, namely those with Chile,[21] Singapore,[22] and New Zealand,[23] seem to indicate that standalone environmental chapters have become standard in the new generation of bilateral Chinese FTAs.

Despite progress in substantive clauses, the procedures and institutions for implementing and enforcing environmental provisions remain systematically limited, if not weak, in the previous and the new generations of Chinese FTAs alike. It should be noted that mixed empirical evidence exists as to whether traditional enforcement tools, such as binding dispute settlement and sanction-based enforcement, are more effective than cooperative approaches in giving effect to sustainability-related FTA obligations. This is reflected in scholarly debates around paired terminologies denoting different means of implementation and enforcement – "conditional" versus "promotional" approaches,[24] and "sanctions-based" versus "cooperative" approaches.[25] Put differently, the adoption of promotional or cooperative approaches does not presuppose a weaker implementation structure and vice versa. But promotional approaches should not be equated with a monitoring vacuum. As a representative illustration of promotional approaches, the majority of post-2010 European Union (EU) FTAs, while precluding the applicability of regular dispute settlement and trade sanctions, establish extensive and formal intergovernmental

[19] Marc LANTEIGNE, "The Sino-Swiss Free Trade Agreement" (2014) CSS Analyses 1 at 2.

[20] Heng WANG, "The Differences Between China's Recent FTA and the TPP: A Case Study of the China-Korea FTA" in Julien CHAISSE, Henry GAO, and Chang-fa LO, eds., *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?* (Singapore: Springer, 2017), 293 at 294.

[21] *Protocol to Amend the Free Trade Agreement and the Supplementary Agreement on Trade in Services of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile*, 13 November 2017 (entered into force 1 March 2019) [*Upgraded China-Chile FTA*], Chapter 6.

[22] *Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore*, 14 November 2018 (entered into force 16 October 2019) [*Upgraded China-Singapore FTA*], Appendix 8: New Chapter 17 (Environment and Trade).

[23] *Protocol to Upgrade the Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand*, 26 January 2021 (entered into force 7 April 2022) [*Upgraded China-New Zealand FTA*], Appendix 9: New Chapter 22 (Environment and Trade).

[24] International Labour Organization and International Institute for Labour Studies, "Social Dimensions of Free Trade Agreements" (2015) at 31 and 70.

[25] Prévost and Alexovičová, *supra* note 9 at 252.

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oversight bodies and civil society mechanisms to bring about compliance.[26] In marked contrast, the means of implementation and enforcement applicable to the environment clauses under Chinese FTAs remain ad hoc in nature and restricted in scope. Not only has the availability of binding dispute settlement procedures and sanctions been ruled out, but inter-governmental, environment-specific monitoring bodies are likewise frequently absent.[27] Instead, the standard implementation structures comprise governmental contact points for day-to-day communications and case-specific consultations, on the one hand, and pledges to review the FTAs' environmental impact, which often lack explicit time frames, on the other hand.[28] Compared to the institutions and procedures adopted by EU FTAs to materialize the promotional approach,[29] the effectiveness of mechanisms for monitoring and detecting non-compliance with environmental provisions in Chinese FTAs seems doubtful, and it is likely that questionable environmental practices could easily slide under the radar.

Against this backdrop, it may not be surprising that civil society inclusion has been given little attention in the environmental chapters of Chinese FTAs. While only a handful among the myriad of FTAs worldwide have institutionalized environmental or sustainability-related civil society involvement, relevant declaratory language and ad hoc arrangements honouring public participation can be frequently seen.[30] But no such references, either by formal mechanisms or by informal indications, can be found in the five Chinese FTAs that have incorporated environmental components to date. It therefore seems that civil society is considered irrelevant to the operation of those FTAs' environmental provisions. Admittedly, China may not play a decisive role in the drafting of every FTA to which it is a signatory, especially in circumstances where it exerts relatively limited influence over treaty design as compared to its trade partners.[31] However, the consistent absence of relevant treaty language from *all* of its FTAs can at least indicate that recognizing and empowering the legitimate role of civil society in environmental issues is not a matter of prominence on China's FTA negotiating agenda. This reflects an understanding of international trade relations – even when what is at issue are non-trade matters that have far-reaching impacts on and arguably more immediate connections with civil society actors – as a concern of and by the State.

[26] For long, the European Commission explicitly endorsed promotional approaches as a matter of principle for the implementation of TSD chapters. See Commission Services, "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements" (2018) at 3. However, a few post-2020 EU FTAs adopt binding dispute settlement procedures and sanctions for limited TSD provisions. See Gracia MARÍN DURÁN, "The EU's Evolving Approach to Environmental Sustainability in Free Trade Agreements", UCL Legal Studies Research Paper Series No 3/2023 7–11, 7 March 2023.

[27] With the exception of the China-South Korea FTA and the upgraded China-New Zealand FTA, each of which establishes a Committee on Environment and Trade comprising senior government officials to meet "when deemed necessary" to oversee the implementation of the respective environment chapter. See *Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Korea*, 1 June 2015 (entered into force 20 December 2015) [*China-South Korea FTA*], art. 16.8; Upgraded China-New Zealand FTA, *supra* note 23 art. 22.8.

[28] See Free Trade Agreement Between the Swiss Confederation and the People's Republic of China, 6 July 2013 (entered into force 1 July 2014), arts. 12.7 and 12.8; China-South Korea FTA, *supra* note 27 arts. 16.6 and 16.8; Upgraded China-Chile FTA, *supra* note 21 arts. 73 and 75; Upgraded China-Singapore FTA, *supra* note 22 art. 17.6; Upgraded China-New Zealand FTA, *supra* note 23 arts. 22.6 and 22.8.

[29] For a comprehensive review of the compliance mechanisms in EU FTAs' trade and sustainable development chapters, see Prévost and Alexovičová, *supra* note 9 at 244–51.

[30] See, for example, *Free Trade Agreement Between New Zealand and the Republic of Korea*, 23 March 2015 (entered into force 20 December 2015), arts. 16.5, 16.7.6 and 16.7.7.

[31] See Julien CHAISSE, Manfred ELSIG, Sufian JUSOH, and Andrew LUGG, "Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)" (2022) 25 Journal of International Economic Law 110 at 126.

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B. Civil society involvement in domestic environmental laws

It would be unfair to characterize China's approach to climate change as State-centric on the sole basis of observations from the international plane, as domestic channels may have afforded room for civil society scrutiny in governmental decision-making. This proposition, however, finds little evidence in China's national laws and practices in relation to climate change.

Within the body of Chinese laws regulating environment-related civil society involvement, the revised Environmental Protection Law (EPL) sits at the centre. Through legislative amendments in 2014, a new chapter titled "Information Disclosure and Public Engagement" was introduced into the EPL. While the majority of public engagement mechanisms specified in that chapter are limited to transparency and the right to information,[32] the revised EPL does establish two avenues for more active forms of participation. First, Article 57.2 affirms the right of citizens and organizations to report to a higher-level oversight authority that a local environmental agency has failed to fulfil its "supervising and administrative responsibilities". The Article stops short of spelling out any procedural guarantee, including whether the reported local agency or the oversight authority is required to take follow-up actions.

Theoretically, if the oversight body does not respond, such inaction constitutes a "specific administrative act" under China's Administrative Reconsideration Law and Administrative Procedure Law.[33] In turn, the reporting citizen or organization may initiate a procedure against the oversight body within the administrative system (administrative reconsideration) or through judicial means (administrative litigation). However, the inaction of the oversight body concerns its failure to provide a response, not its supervision of the local authority. Therefore, even if the oversight body subsequently responds by simply declining to investigate the matter or stating that no issue has been found regarding the local authority's performance of mandate, it would be deemed to have adequately remedied its inaction. Alternatively, the reporting person or entity may directly target the reported local authority in a reconsideration or litigation procedure. In that case, however, the reporting party must demonstrate that they "have interests" in the administrative act at issue.[34] This element has been narrowly interpreted by Chinese courts as requiring that the concerned administrative act particularly affect the interests of one or more *specific* persons or entities (i.e. the applicant or plaintiff), as opposed to the interests of the non-specific, general public.[35] The impact of climate change, on the other hand, is comprehensive and global in scale. While climate change may give rise to geographically limited, localized environmental issues that affect a specific, identifiable population, such as air pollution, the burden to establish that a citizen holds specific individual interests in an authority's failure to carry out established climate mitigation commitments per se is almost insurmountable.

The difficulty of proving specific individual interests is not the only obstacle that dampens the prospect of harnessing the reporting mechanism for civil society involvement in

[32] Environmental Protection Law of the People's Republic of China (revised 2014) [EPL 2014], arts. 53–6.

[33] Administrative Reconsideration Law of the People's Republic of China (revised 2017) [*Administrative Reconsideration Law 2017*], art. 2; Administrative Procedure Law of the People's Republic of China (revised 2017) [*Administrative Procedure Law 2017*] art. 2.

[34] Administrative Reconsideration Law 2017, *supra* note 33 at art. 9; Administrative Procedure Law 2017, *supra* note 33 at art. 25.

[35] Yu HONG and Wang SHU, "An Analysis of the Relevant Issues Related to the Qualification of the Plaintiffs of the Competition Right in the Administrative Agreement" (2020) 20 Journal of Legal Application 87. See also Interpretation of the Supreme People's Court on Application of the Administrative Procedure Law of the People's Republic of China, Judicial Interpretation 1 [2018], art. 12.

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climate matters. It is clear from the wording of Article 57.2 that the reporting mechanism is directed at failures to perform environmental mandates by *local* authorities. This is somewhat paradoxical as climate decision-making in China exhibits a top-down character. Research has shown that China's policy orientations regarding climate change are contemplated and determined by central-level decision-makers, which then go through a process of "State-signalling", where the "signals" of policy objectives defined by the central government are conveyed down the administrative hierarchy for local authorities to operationalize.[36] When it is the central administration that decides to deviate from its climate mitigation commitments, challenging local authorities that are simply observing instructions from above would be futile. In this regard, the pathway offered by Article 57.2 of the EPL and the two administrative laws is hardly useful when it comes to addressing questionable climate decision-making rooted at the central level.

The second and rather high-profile mechanism for active public participation is predicated on the right of environmental NGOs to initiate environmental public interest litigation (EPIL) proceedings, embodied in the new Article 58 of the revised EPL. This revision is often cited as a salient example of expanded environmental public participation in China, as it indeed eliminated various legal hurdles that were previously faced by environmental NGOs in climate litigation. Prior to 2012, the former Civil Procedure Law stipulated that only persons or entities with "immediate interests" in a lawsuit may qualify as plaintiffs.[37] Similar to the obstacles confronting citizens in environmental administrative litigation, the burden to establish direct, specific interests in a global-scale environmental and socio-economic issue like climate change proved onerous, not to mention that environmental NGOs were often bringing lawsuits in the place of affected local communities that lacked the resource or motivation to engage in lengthy legal proceedings. The EPIL system was introduced with a view to tackling this very problem. A relevant provision was first pinned down in the 2012 Civil Procedure Law, which specified that "relevant organizations" may initiate proceedings against "acts that harm social public interest, such as environmental pollution".[38] Article 58 of the revised EPL then spells out the definitional elements of "relevant organizations", including one requiring that any such organization must "have been dedicated to public interest activities to promote environmental protection for more than five consecutive years".[39] Taken together, the two provisions expressly confer upon environmental NGOs the legal standing as EPIL plaintiffs.[40]

Much applauded as this reform may be, the very nature of the EPIL as a civil procedure mechanism limits its relevance to involving civil society in relation to governmental decision-making. It is evident from existing practice that the EPIL is intended for targeting corporate polluters and does not involve public authority defendants.[41] As such, it is simply impossible to utilize the EPIL to directly impact on State decision-making processes. Some scholars have gone further to suggest that given the subordinate role of the judiciary to the executive in China, it is unlikely that any form of climate litigation would ever leave space for holding the government accountable.[42]

[36] Tom HARRISON and Genia KOSTKA, "Balancing Priorities, Aligning Interests: Developing Mitigation Capacity in China and India" (2014) 47 Comparative Political Studies 450 at 458.

[37] Civil Procedure Law of the People's Republic of China (revised 2007) at art. 108.

[38] Civil Procedure Law of the People's Republic of China (revised 2012) at art. 55.

[39] EPL 2014, *supra* note 32 at art. 58.

[40] Additional revisions to the Civil Procedure Law in 2017 further specifies that the Procuratorate may bring a EPIL lawsuit only when no eligible environmental NGOs exist or no such organizations have instituted EPIL proceedings. See Civil Procedure Law of the People's Republic of China (revised 2017) at art. 55.

[41] See Supreme People's Court, *Environmental Resources Trial in China* (2019) at 26.

[42] Yue ZHAO, Shuang LYU, and Zhu WANG, "Prospects for Climate Change Litigation in China" (2019) 8 Transnational Environmental Law 349 at 365; Jacqueline PEEL and Jolene LIN, "Transnational Climate Litigation: The Contribution of the Global South" (2019) 113 American Journal of International Law 679 at 719.

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II. Why civil society should be involved in climate decision-making

Rationales justifying the involvement of civil society in international policymaking and decision-making processes have captured scholarly interest in the fields of international law and international relations. Generally, three streams of arguments can be discerned from the extensive corpus of literature. The first rationale regards civil society as a source of apolitical, expert knowledge.[43] This role serves to aid evidence-based decision-making by enriching the information base with specialist and impartial input, which is more likely the province of certain non-State actors (i.e. experts) rather than government officials. The second rationale portrays civil society actors as watchdogs, contending that they have informational and motivational advantages in monitoring the implementation of established obligations. To start with, on-the-ground information about State practice, which is essential for identifying non-compliance, is more often the province of directly affected local communities and those who can readily gather such information through close connections with local communities, such as NGOs.[44] Moreover, civil society is less likely than governments to be caught in political concerns and subject to the disincentives that may stop States from taking action when their counterparts fail to honour prior commitments.[45] The third rationale highlights the procedural values of civil society involvement, such as enhancing transparency, representation, inclusion, and accountability.[46] The existing scholarship particularly underscores civil society actors' representation and empowerment of marginalized communities, which enable the latter to voice their concerns that may otherwise remain unheard.[47] NGOs operating at grass-roots level and community organizations are frequently associated with such a role.

China's case highlights additional justifications for civil society involvement in a system that maintains, as a deliberate choice, a State-centric structure in terms of climate decision-making. Section II.A first discusses the motives underlying China's State-centric approach to climate change and how they overshadow the credibility and sustainability of its climate mitigation efforts. Section II.B proceeds to argue that the severely limited space for civil society involvement in China's domestic laws and international instruments, as addressed in Section I, is but a concomitant of such motives. Figuratively speaking, in a policy sphere dominated by the logic of "governing" rather than "governance", civil society is destined for a position at the periphery.

A. The dual motives underlying China's climate decision-making

As this subsection will proceed to demonstrate, China's climate decision-making is primarily and profoundly shaped by two interrelated considerations: to maintain competitiveness in green industries and to prevent social unrest that may arise from politically disruptive

[43] Naghmeh NASIRITOUSI, Mattias HJERPE, and Karin BÄCKSTRAND, "Normative Arguments for Non-State Actor Participation in International Policymaking Processes: Functionalism, Neocorporatism or Democratic Pluralism?" (2016) 22 European Journal of International Relations 920 at 925; Peter WILLETTS, "The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?" (2006) 12 Global Governance 305 at 312.

[44] Thomas PRINCEN and Matthias FINGER, *Environmental NGOs in World Politics: Linking the Local and the Global* (London; New York: Routledge, 1994) at 223.

[45] Andrea K. SCHNEIDER, "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations Symposium on Linkage as Phenomenon: An Interdisciplinary Approach" (1998) 19 University of Pennsylvania Journal of International Economic Law 587 at 594; Glen T. SCHLEYER, "Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System Note" (1996) 65 Fordham Law Review 2275 at 2276–7.

[46] Nasiritousi, Hjerpe, and Bäckstrand, *supra* note 43 at 926.

[47] Willetts, *supra* note 43; Nasiritousi, Hjerpe, and Bäckstrand, *supra* note 43 at 925–6; Lore VAN DEN PUTTE, "Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the Case of South Korea" (2015) 6 Global Labour Journal at 222.

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issues like energy security.[48] Climate change is not viewed in itself as a matter of environmental imperative whose cause, effect, and solution entail intricate distributive and socio-economic implications, but rather an opportunity for industrial leadership and an insidious threat to political stability.

The objectives of industrial growth and political stabilization are amply reflected in China's domestic policies and practices. Regarding the former, one illustration can be found in the State Council's first Industry Development Plan regarding electric vehicles (EVs), which characterizes supports for promoting the EV industry as "a strategic initiative … to cultivate a new point of economic growth and advantages in international competition".[49] In relation to the latter, the significance of political stability and security is visible from the mixed signals in the policy realm of climate change in recent years: amid international commitments from the Chinese leadership to "strictly control" the production and consumption of fossil fuel and carbon-intensive products,[50] the latest Five-Year Plan on energy identifies security as the ultimate basis for modernizing the energy system and explicitly endorses the promotion of oil and gas production capacity.[51]

It should be stressed that placing climate protection among several and possibly competing policy objectives is commonly seen in the domestic policy-making of various States and regions,[52] and perhaps inevitable for a developing country confronted with various intractable socioeconomic issues. However, at the heart of the present discussion are not multipurpose policies per se. As will be argued below, what makes China's case distinctive is twofold: on the one hand, the regard given to climate change not as a self-standing issue in its own right, but rather as an instrumental discourse that can be deployed for the pursuit of industrial leadership and prevention of social disruptions; and on the other, the State-centric approach that provides little room for civil society involvement, as discussed in Section I, which leaves decisions based on pro-growth and instability-averse considerations insulated from stakeholder scrutiny. This, in turn, puts a question mark on the reliability and sustainability of China's mitigation efforts.

To start with, the underlying and ultimate goals of industrial growth and political stabilization place climate objectives in a precarious state, where in times of collision the latter can be readily sacrificed in pursuit of the former. China's capability of organizing efficient climate mitigation efforts is undeniable, as demonstrated by its government-led creation and shaping of renewable energy and EV markets.[53] What is problematic is that

[48] For a similar characterization, see Harrison and Kostka, *supra* note 36 at 459. For a more nuanced picture regarding the interaction between environmental, social, and economic objectives in China's environmental decision-making, see Kevin LO, "Ecological Civilization, Authoritarian Environmentalism, and the Eco-Politics of Extractive Governance in China" (2020) 7 The Extractive Industries and Society 1029.

[49] See State Council of the People's Republic of China, "Energy-Saving and New Energy Automotive Industry Development Plan (2012-2020)" (28 June 2012), online: The Central People's Government of the People's Republic of China https://www.gov.cn/zwgk/2012-07/09/content_2179032.htm.

[50] See State Council of the People's Republic of China, The Action Plan for Carbon Dioxide Peaking by 2030 (2021), Section III(3)(b)–(e); "China to Control, Phase Down Coal Consumption in Next Decade: Xi" (22 April 2021), online: China Daily https://global.chinadaily.com.cn/a/202104/22/WS608194eba31024ad0bab9b51.html.

[51] National Development and Reform Commission and National Energy Administration, "The Fourteenth Five-Year Plan for a Modern Energy System" (29 January 2022), online: National Development and Reform Commission https://www.ndrc.gov.cn/xxgk/zcfb/ghwb/202203/t20220322_1320016.html at 6 and 8–9.

[52] For example, border carbon adjustment measures are considered to serve various functions: economically, to level the playing field; environmentally, to prevent carbon leakage; and politically, to compel and augment climate action by other jurisdictions. See Michael A. MEHLING, Harro VAN ASSELT, Kasturi DAS, Susanne DROEGE, and Cleo VERKUIJL, "Designing Border Carbon Adjustments for Enhanced Climate Action" (2019) 113 American Journal of International Law 433 at 440–2.

[53] International Energy Agency, *Global EV Outlook 2023: Catching up with Climate Ambitions* (Paris: International Energy Agency, 2023) at 66–7.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

a government that can wield a unified, top-down approach on industrial and political grounds can also, based on the same rationales, swiftly shift its policy priorities when climate mitigation has little to do with economic gains or social stability. This propensity is particularly notable in China's outbound investments under the Belt and Road Initiative (BRI). Despite its pledge in 2021 to refrain from building new coal-fired power projects overseas,[54] China's investments in fossil fuel projects in BRI countries have yet to take a downward turn.[55] While this trend may appear puzzling from an environmental standpoint, the dual economic-political incentive holds much explanatory power: "grey" investments abroad are economically profitable, while the ensuing environmental effect of globally increased greenhouse gas (GHG) emissions is often not immediately felt and the social repercussions have little impact back home.[56] In parallel, it is worth noting that the scenario where promoting green industries no longer makes economic sense is not merely hypothetical. With public incentives to advance green supply chains sweeping major and emerging economies,[57] China's current leadership in the global renewable energy and EV markets does not promise a secured future.

In addition to denting the credibility of China's mitigation efforts, treating climate protection as a secondary instrument at the service of economic and political objectives entails equity concerns. While tackling the climate crisis is of salience for the entire humankind, climate mitigation and green transition do not impact all stakeholders in the same fashion. For China, decarbonization is likely to cause layoffs in carbon-intensive sectors and engender increase in energy prices, which can be detrimental to poor households.[58] But these two groups of stakeholders – traditional polluting companies and low-income households – are markedly distinct in terms of visibility and resources. Carbon-intensive industries in China, including coal, electricity, oil, gas, steel, and cement, are dominated by State-owned enterprises (SOEs),[59] which are not only entities of commercial purposes but also instruments for implementing national policies.[60] Such strategic importance has brought to SOEs decades of government financial support and preferential regulatory treatment,[61] and consequently conduits and leverages to influence governmental decision-making processes.

Marginalized communities, in contrast, are far less visible and frequently underrepresented. Empirical records have showed how this procedurally disadvantaged stance in climate decision-making can give rise to substantive harm. China's top-down approach to climate change, under which the central government directs and determines objectives to be carried out by lower-level authorities, is operationalized by a bureaucratic performance evaluation system within the administrative hierarchy. As the system sets quantified targets (for example, energy intensity standards) to measure the performance of officials in conducting State-set climate policies and promotes or demotes them accordingly,[62] local bureaucrats are captured by a strong incentive to "hit the numbers", sometimes to

[54] UN Affairs, "China Headed Towards Carbon Neutrality by 2060; President Xi Jinping Vows to Halt New Coal Plants Abroad" (21 September 2021), online: UN News https://news.un.org/en/story/2021/09/1100642.

[55] Christoph NEDOPIL, "China Belt and Road Initiative (BRI) Investment Report 2022" (2023) at 13–14; Christoph NEDOPIL, "China Belt and Road Initiative (BRI) Investment Report 2023 H1" (2023) at 12–13.

[56] Tom WILSON, Christian SHEPHERD, and Donald MAGOMERE, "Kenyan Court Blocks China-Backed Power Plant on Environment Grounds" (27 June 2019), online: Financial Times https://www.ft.com/content/9313068e-98dc-11e9-8cfb-30c211dcd229.

[57] International Energy Agency, *supra* note 53 at 67–72.

[58] World Bank Group, *China: Country Climate and Development Report* (2022) at 4.

[59] *Ibid.*, at 27

[60] Henry GAO and Weihuan ZHOU, *Between Market Economy and State Capitalism: China's State-Owned Enterprises and the World Trading System* (Cambridge: Cambridge University Press, 2022) at 5–7.

[61] *Ibid.*

[62] Harrison and Kostka, *supra* note 36 at 461–2; Peter DRAHOS, *Survival Governance: Energy and Climate in the Chinese Century* (New York: Oxford University Press, 2021) at 52.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

the detriment of certain stakeholders. The relatively vulnerable population, being often more diffuse, less resourceful, and thereby less capable of triggering social disruptions, is therefore placed in a more susceptible position. Indeed, certain regional authorities in China were reported to have cut off electricity to hospitals, homes, and rural villages as a last-minute measure to meet energy efficiency targets imposed by higher-level governments.[63]

B. *Climate "governing" and civil society at the periphery*

The preceding discussion showcases the precarious reliability and equitability of China's climate mitigation efforts. Exposing the questionable policies to the watchful eyes of civil society would likely spark opposition from negatively implicated citizens that seek their removal, which clearly contradicts the pro-growth and instability-averse motives that give rise to these policies in the first place. The limited room for civil society to contest State decision-making is, therefore, arguably a concomitant effect and external manifestation of the deep-rooted considerations that underlie China's climate policies.

In that regard, it seems that the regulations and instruments analyzed in Section I represent a deliberate choice by Chinese legislators to preserve the centrality and unquestionability of (central level) government authority on the issue of climate change. Civil society actors are moulded into a given role, with their participation permitted only insofar as they advance the climate policies pre-defined by the government. It is then only logical that civil society structures to enable stakeholder discussion and deliberation of FTA implementation have been constantly absent from the environmental chapters of Chinese FTAs. Overall, since the authority to determine whether and how to carry out China's climate commitments lies with central-level authorities, allowing civil society to interfere with State decision-making through "monitoring, exposing, criticizing, and condemning"[64] is out of the question.

At this point, it seems clear that for China, climate change is a matter of *governing* rather than of *governance*. Its climate decision-making is addressed in a strict hierarchical structure where the administrative State maintains absolute authority, whereas the space for non-State actors to play a role is at best limited, which, according to Fisher's conceptualization,[65] amounts to a mode of governing as opposed to governance. The aforementioned fundamental motives further demonstrate the State-centric trait ingrained in China's climate decision-making. As the centrality of government authority is deemed incontestable and deliberately preserved, civil society remains at the periphery of China's governing of climate change.

III. The environmental submissions and referral procedure under the CPTPP

With regard to environmental matters, primarily two types of mechanisms for civil society engagement can be found in existing FTAs worldwide. An involvement mechanism may institute a regular venue for collectively soliciting inputs from civil society actors, which is often termed an "advisory" or "consultative" group.[66] Alternatively, a formal procedure

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[63] Harrison and Kostka, *supra* note 36 at 462; Genia KOSTKA, "Command Without Control: The Case of China's Environmental Target System" (2016) 10 Regulation & Governance 58 at 68.

[64] Princen and Finger, *supra* note 44 at 224.

[65] Elizabeth FISHER, "Risk and Governance" in David LEVI-FAUR, ed., *The Oxford Handbook of Governance* (Oxford; New York: Oxford University Press, 2012) 417 at 420–1.

[66] See, for example, *Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part*, 15 October 2011, [2011] OJ L127/6 (entered into force 13 December 2015), art. 13.12.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

may be created for civil society to raise case-specific petitions against alleged breaches of FTA environmental provisions. Under a typical petition mechanism, civil society actors file written submissions to a designated domestic or international authority, arguing for the case to be elevated to the inter-State level and addressed through available enforcement tools.[67]

The CPTPP's environmental SRP mechanism exhibits features of a petition mechanism. In the meantime, its substantive scope and procedural design demonstrate unique characteristics, especially when the SRP is put in perspective with other existing models of petition mechanisms. This section first examines the legal instruments pertaining to the SRP, before introducing comparative lenses to illustrate its distinctiveness.

A. The substantive scope and procedural design of the SRP

The SRP is given shape by two instruments: the CPTPP, in which Article 20.9 forms the legal basis of the SRP and frames its substantive and procedural aspects; and the Procedures for Considering Submissions and Responses adopted by the CPTPP's Environment Committee ("Committee Procedures")[68] – an FTA body composed of senior government representatives from each party's relevant trade and environment authorities[69] – which further details the functioning of the SRP and clarifies its relationship to other FTA procedures and institutions. Overall, the SRP mechanism comprises three processes, operating across national and international arenas.

The first process may be termed "domestic self-evaluation". Specifically, an individual or organization of a CPTPP party may file a submission to *that party* (the respondent party) with respect to *its* implementation of the environment chapter.[70] The CPTPP imposes only minimal procedural constraints at this stage: while the parties are required to respond timely to the received submissions and make their evaluation criteria publicly available,[71] each party maintains full discretion to establish its own criteria for evaluating submissions.[72] Although Article 20.9.2 does lay down a set of factors that may play a part in measuring the merit of a submission, such as whether the submitted matter affects trade or investment between the parties, whether it is subject to ongoing domestic judicial or administrative proceedings, and whether it has been previously referred to other domestic authorities for remedy, it clearly indicates that those factors are non-exhaustive and non-binding.[73]

The second process is referral. According to Article 20.9.4, any other party "may" refer the published submission and response to the Environment Committee and request that

[67] For examples of petition mechanisms, see further discussion in Section III.B. It should be noted that limited research has been done on the degree of civil society involvement achievable through consultative mechanisms as compared to that through petition mechanisms; but see Jan ORBIE, Lotte DRIEGHE, Diana POTJOMKINA, and Jamal SHAHIN, "Participation of Civil Society in EU Trade Policy Making: How Inclusive Is Inclusion?" (2022) 27 New Political Economy 581. As such, consultative and petition mechanisms may be more aptly understood as parallel modalities rather than representing a hierarchy of degrees of civil society involvement, although petition mechanisms can more often operate in an adversarial setting and may therefore be perceived by States as more "intrusive". See Environmental Law Institute, "Submissions on Enforcement Matters: What Have We Learned?" (2022) at 47.

[68] *CPTPP Environment Committee, Procedures for Considering Submissions and Responses*, 13 July 2021, CPTPP/ENV/2021/D001 [*Committee Procedures*].

[69] CPTPP, *supra* note 14 at art. 20.19.2.

[70] *Ibid.*, at art. 20.9.1.

[71] *Ibid.*, at arts. 20.9.1 and 20.9.2.

[72] *Ibid.*, at art. 20.9.2.

[73] *Ibid.*

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the Committee discuss the submitted matter. As such, the referral process is not automatic and depends on another party's decision to actively intervene.

It should be noted that the scope of referable matters differs from the substantive confines of domestic self-evaluation, as referrals can only be made with respect to submissions that allege failures of respondents to "effectively enforce [their] environmental laws".[74] "Environmental law" is a defined term under the CPTPP, conditioned by elements of form and objective. In terms of form, an "environmental law" denotes a statute or regulation of a party, including "any that implements a [p]arty's obligations under a multilateral environmental agreement".[75] Regarding objectives, an environmental law should maintain its "primary purpose" in the achievement of "the protection of the environment" or "the prevention of a danger to human life or health" through one of three means: the control of the emission of pollutants or environmental contaminants, the control of environmentally hazardous or toxic chemicals, or the conservation of biological diversity.[76] As the reduction of GHG emissions falls under the scope of the first means, climate change-related statutes and regulations, including those intended for giving effect to the Paris Agreement, should qualify as "environmental laws" under the CPTPP.[77]

While this is not prescribed in Article 20.9 per se, an additional requirement is imposed by the Committee Procedures that a referring party should provide justifications alongside its referral request. The exact wording specifies that the referring party "will" explain and justify its referral "with reference to" Article 20.9.2 of the CPTPP,[78] which, as discussed above, is an enabling clause that grants parties the authority to adopt their own criteria for evaluating submissions. Read in conjunction, it appears that those respondent-defined criteria serve as one key point of reference for determining the justifiability of referrals.

Following the referral, the request and the justifications would be circulated to the respondent for provision of additional information. If the referring party so requests, the SRP would proceed to the third phase, where the Committee decides whether the referred submission merits its consideration.[79] Again, the respondent-defined evaluating criteria have considerable weight in the Committee consideration process: while the Committee is not strictly bound by those criteria, the conformity of a submission to the applicable respondent-defined criteria constitutes one of the grounds on which the Committee "may" deny consideration.[80]

The objectives of the Committee consideration process are stipulated by the CPTPP as "further understanding the [submitted] matter" and "consider[ing] whether the matter could benefit from cooperative activities".[81] As further spelled out in the Committee Procedures, these objectives may be advanced by developing through experts or existing institutional bodies "a formal written report based on facts relevant to the submissions

[74] *Ibid.*, at art. 20.9.4.

[75] *Ibid.*, at art. 20.1.

[76] *Ibid.*

[77] In a recent case filed by 49 individuals and 4 organizations under the environmental petition mechanism of the US-Peru Trade Promotion Agreement (TPA) (namely, the "Submissions on Environmental Enforcement Mechanism"), the reviewing authority confirmed that the Peruvian climate emergency regulation, adopted for the purpose of implementing Peru's NDCs, qualifies as "environmental laws". The definition of "environmental laws" under the US-Peru TPA is largely identical to that under the CPTPP. See "Air Quality and Climate Emergency: Secretariat Determination in Accordance with Article 18.8(1) and (2) Regarding Submission SACA-SEEM/PE/003/2023" (16 July 2023) SACA-SEEM/PE/003/2023/D1 at paras. 22–4; *US-Peru Trade Promotion Agreement*, 12 April 2006 (entered into force 1 February 2009) at art. 18.14.

[78] Committee Procedures, *supra* note 68 at para. 2.

[79] *Ibid.*, at para. 4.

[80] *Ibid.*, at para. 5. Other grounds include a lack of factual basis or bona fide intent in the referred submission.

[81] CPTPP, *supra* note 14 at art. 20.9.4.

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and responses", utilizing the respondent's available domestic channels, and facilitating cooperation between the respondent and other CPTPP parties.[82]

All of these follow-up actions are facilitative in nature, with no express connection to the inter-State consultation and dispute settlement procedures applicable under the environment chapter.[83] In fact, the Committee Procedures have clarified that the two sets of mechanisms – the SRP, on the one hand, and inter-State consultation and dispute settlement, on the other – are independent from each other.[84] Moreover, if the same matter is raised in inter-State consultation after it is referred to the Committee, the SRP would be given priority.[85] This effectively introduces, in circumstances where a related environmental submission has been made, an additional step preceding the initiation of formal inter-State dispute settlement. Considering that the SRP pursues more cooperative solutions, this seems to signify the Committee's preference for less adversarial approaches to the implementation and enforcement of environmental provisions. The same feature emerges when the SRP is juxtaposed with other representative petition mechanisms, which the next subsection now turns to.

B. The significance of respondent discretion in the SRP: a comparative analysis

Including petition mechanisms in the implementation and enforcement structures of environmental provisions has been a prominent feature of several US FTAs dating back to as early as the 1990s and, more recently, adopted by the European Commission in relation to the TSD chapters of EU FTAs. The petition mechanisms under US FTAs, first introduced in the 1994 North American Agreement on Environmental Cooperation (the NAAEC), have maintained an FTA-specific and international model. Five of the existing US FTAs have created their respective "Submissions on Environmental Enforcement Matters" (SEEM) procedures[86] with largely identical institutional structures: a Secretariat is established to receive and review petitions by nationals from any FTA party, while a Council comprising government officials from each FTA party has the authority to appoint the head of the Secretariat and instruct the Secretariat to take certain actions in SEEM reviews.[87] The EU's petition mechanism, namely the "Single Entry Point" (SEP) system administered by the European Commission, is shaped as a centralized, domestic-level procedure applicable to all EU FTAs, accepting complaints from EU-based stakeholders that assert breaches of TSD provisions by the EU's FTA partners.[88] That is, the SEP targets alleged violations by third countries but not by the EU itself.

Several important distinctions set the SRP apart from both models. First, the domestic self-evaluation and referral processes are a unique invention of the SRP. Under both the SEEM and the SEP, authorities that are entrusted with the mandate to consider alleged

[82] Committee Procedures, *supra* note 68 at para. 6.

[83] CPTPP, *supra* note 14 at arts. 20.20–20.23.

[84] Committee Procedures, *supra* note 68 at Preamble.

[85] *Ibid.*

[86] *North American Agreement on Environmental Cooperation*, 14 September 1993 (entered into force 1 January 1994) [*NAAEC*], arts. 14 and 15, superseded by *United States-Mexico-Canada Free Trade Agreement*, 30 November 2018 (entered into force 1 July 2020) [*USMCA*], arts. 24.27 and 24.28; *US-Peru Trade Promotion Agreement*, 12 April 2006 (entered into force 1 February 2009), arts. 18.8 and 18.9; *US-Colombia Trade Promotion Agreement*, 22 November 2006 (entered into force 15 May 2012) at arts. 18.8 and 18.9; *Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004 (entered into force 1 March 2006), arts. 17.7 and 17.8; *United States-Panama Trade Promotion Agreement*, 28 June 2007 (entered into force 31 October 2012), arts. 17.8 and 17.9.

[87] *Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada*, 18 December 2018 (entered into force 1 July 2020), arts. 4–5.

[88] European Commission, "Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements" (22 June 2022) [SEP Operating Guidelines].

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violations are external to the responding parties, which technically prevents the latter from wielding control over submitted matters from the outset. In contrast, the SRP allocates that authority across two levels, commencing with the respondent's assessment of its own record. Where no other CPTPP party chooses to make a referral request, the process of Committee consideration would not be triggered at all.

Second, respondents are authorized to establish their own evaluating criteria, regarding which the CPTPP merely offers several non-binding considerations that each party is free to adopt, modify, or dispose of. This approach is markedly different from the models adopted by the SEEM and the SEP, under which the criteria for determining the merit or priority of submissions are pre-defined in FTA texts[89] or by the reviewing authority.[90] Moreover, as the Committee Procedures set consistency with respondent-defined criteria as one of the grounds for justifying referrals and denying Committee consideration, their legal weight extends beyond the self-evaluation process to subsequent phases.

Third, the SRP exhibits a clearly cooperative character in its independence from and priority over formal dispute settlement procedures. The EU model marks a notable difference here, as it expressly recognizes the SEP as a precursor to a range of actions, including the invocation of inter-State dispute settlement mechanisms.[91] The SRP shares relatively greater commonality with the US SEEM procedures in terms of follow-up actions, as both models put emphasis on devising cooperative activities and make no explicit reference to FTA dispute settlement procedures.[92] Moreover, the development of "a formal written report based on facts relevant to the submissions and responses", as envisaged by the SRP, bears evident resemblance to the preparation of "factual records" under the SEEM, which are intended to present relevant facts in a detailed and objective manner without making findings on the FTA consistency of the measures submitted.[93] Still, prioritizing pre-existing submissions over inter-State consultation and dispute settlement is a feature specific to the SRP, as there is no explicit requirement under any SEEM mechanism that inter-State procedures give way to prior SEEM reviews. In practice, the US indeed requested environmental consultation on certain species conservation matters with Mexico under the United States–Mexico–Canada Agreement (USMCA) one year after four environmental NGOs submitted the same issue to the corresponding SEEM Secretariat.[94] The relevant SEEM procedure is still ongoing.[95]

These differences highlight a defining feature of the SRP, namely the considerable degree of discretion enjoyed by responding parties. By virtue of self-evaluation and the legal

[89] See, for example, USMCA, *supra* note 86 at art. 24.27.3.

[90] SEP Operating Guidelines, *supra* note 88 at 5, 12 & 13.

[91] *Ibid.*, at 4.

[92] See, for example, USMCA, *supra* note 86 art. 24.28.7. However, it should be noted that the US has enacted a domestic statute, the USMCA Implementation Act, that establishes and authorizes a domestic monitoring agency to review factual records produced from the USMCA's SEEM procedure. Where it determines from such review that Canada or Mexico has acted inconsistently with its USMCA environmental obligations, the agency may request that the US Trade Representative initiate consultations with the concerned trade partner, a precursor to the interstate dispute settlement procedures under the USMCA. See United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, §§ 813(b)(1) and 814(1).

[93] Commission for Environmental Cooperation, "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (February 2013) at para. 12.2.

[94] "USTR Announces USMCA Environment Consultations with Mexico" (10 February 2022), online: United States Trade Representative http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/ustr-announces-usmca-environment-consultations-mexico; Center for Biological Diversity and Others, "Submission on Enforcement Matters to the Commission on Environmental Cooperation Pursuant to Article 24.27 of the United States-Mexico-Canada Agreement Mexico's Failure to Enforce Its Environmental Laws for the Critically Endangered Vaquita Porpoise" (11 August 2021) A24.27/SEM/21-002/01/SUB.

[95] See "Vaquita Porpoise", online: Commission for Environmental Cooperation http://www.cec.org/submissions/registry-of-submissions/vaquita-porpoise/.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

weight accorded to respondent-defined criteria, the SRP permits a responding government to maintain substantial control over the impact of civil society submissions. Where a submission is subject to Committee consideration, the cooperative character and procedural priority of the SRP further afford a useful buffer against formal and more confrontational inter-State procedures. Overall, the SRP provides civil society with a venue to expose questionable State practice, while limiting the possibility that civil society submissions would actually result in curbing the government's decision-making authority.

IV. The SRP as a testing ground for climate-related civil society involvement

Having analyzed its substantive scope and procedural design, this section expounds the experimental potential of the SRP for building up previously constrained civil society involvement in climate matters, again using China as an illustrative case. At the same time, recognizing the likelihood of abuse that stems from the magnitude of respondent discretion, it contemplates modifications to the SRP's existing structures, with a view to mitigating the risks of abuse while upholding the mechanism's value as a testing ground for civil society involvement.

A. Substantive fit and procedural compatibility

To claim that the SRP may bring change to China's climate governing approach, one must first establish that the relevant policies and practices fall within the substantive scope of the SRP. As discussed in Section III, the domestic self-evaluation process addresses the implementation of CPTPP environmental obligations, whereas the subsequent phases of referral and Committee consideration are only relevant when the submission concerns the effective enforcement of domestic "environmental laws", including those that implement the Paris Agreement. It is therefore necessary to examine the scope and content of environmental clauses under the CPTPP, on the one hand, and existing Chinese environmental laws as per the CPTPP's definition, on the other hand.

Among the substantive commitments under the CPTPP's environment chapter, two provisions are of particular relevance. To start with, each party "affirms" under Article 20.4 "its commitment to implement the multilateral environment agreements to which it is a party". While specific indication of the UNFCCC and the Paris Agreement is absent, the reference to multilateral environment agreements (MEAs) in this provision (which may be conveniently termed the MEA consistency provision) renders it a medium for assimilating commitments existent under multilateral climate instruments.[96] Actions and omissions in relation to climate matters that appear contradictory to the Paris Agreement may therefore provide grounds for an SRP submission alleging breaches of Article 20.4. Alternatively, questionable practices concerning climate mitigation may fall within the ambit of Articles 20.3.4 through 20.3.6, which dictate that no party shall "fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the [p]arties" or "waive or otherwise derogate from … its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the [p]arties". As such, these so-called "effective enforcement" and "non-derogation" provisions operate, in circumstances where

[96] See Trade and Agriculture Commission, "Advice to the Secretary of State for Business and Trade on the UK's Accession Protocol to CPTPP", CP 982 (December 2023) at 36; "Joint Statement on Climate Change, the Environment, and Sustainable Trade" (16 July 2023), online: GOV.UK https://www.gov.uk/government/publications/cptpp-joint-statement-on-climate-change-the-environment-and-sustainable-trade/joint-statement-on-climate-change-the-environment-and-sustainable-trade-sunday-16-july-2023.

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trade and investment interests generate incentives for backsliding, to anchor each party's environmental regulatory standards at the level existing when the agreement enters into force.

One might question the relevance of these obligations to the present discussion based on their nature and content. First, the wording of the MEA consistency provision, which speaks of "affirming" existing commitments, is not strictly obligatory. Second, the effect on FTA trade or investment or the intent to exert such an effect, as a constituent element of the effective enforcement and non-derogation provisions, may be difficult to demonstrate.[97] Both can result in high evidentiary thresholds for establishing breaches of the two provisions. However, it is not the purpose of the SRP and its initial phase of domestic self-evaluation – being non-judicial processes – to *legally establish* FTA violations. The inceptive stage of the SRP seeks to enhance transparency regarding the parties' implementation of the environment chapter, with a view to exposing problematic on-the-ground practices through the input of civil society submissions. It is then up to another party to consider whether a plausible case exists for a referrable submission, the scope of which, as expressly demarcated by the CPTPP, stops at failures to effectively enforce domestic environmental laws. In other words, as long as some connections can be made between a party's action or inaction and its CPTPP obligations to initiate the SRP, what is more salient for the substantive relevance of the mechanism henceforth is not proving an FTA violation in the legal sense, but rather the relation of the practice at issue to the concerned party's environmental laws.

To recapitulate Section III.A, the definitional clause in Chapter 20 of the CPTPP limits the form of an "environmental law" to a "statute or regulation" of a party or a provision thereof, including "any that implements a [p]arty's obligations under a multilateral environmental agreement".[98] The two questionable instances in China's climate mitigation practices exemplified in Section II – providing continued investments to fossil fuel-related industries and implementing low-carbon policies in a manner that may be detrimental to marginalized stakeholders – seem both to be in collision with major Chinese laws and regulations that fit this definition. With respect to the latter example, the invisibility of marginalized communities in China's implementation of climate measures runs counter to the principle of public participation enshrined in the revised EPL. As Article 53 of the EPL obligates governments and environmental agencies to "disclose environmental information" and "facilitate public participation and monitoring in environmental protection",[99] a failure to consult implicated stakeholders prior to implementing a climate change-related measure arguably constitutes a non-enforcement of the EPL.

The case with the former is relatively less straightforward, as there is no existing Chinese law that directly and explicitly prohibits or regulates investments to fossil fuel industries. However, Article 7 of the Energy Conservation Law stipulates that China "implements industrial policies favourable to energy conservation and environmental protection" and

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[97] While environmental effective enforcement provisions have not been the subject of any FTA dispute to date, their labour counterpart, which adopts highly similar phrasing, has been reviewed by an FTA panel in a dispute between the US and Guatemala. See Dominican Republic–Central America–United States Free Trade Agreement Arbitral Panel Established Pursuant to Chapter 20, In the Matter of Guatemala – Issues Relating to the Obligations Under Art. 16.2.1(a) of the CAFTA-DR, Final Report of the Panel (14 June 2017). Whether the panel's ruling, which interpreted "in a manner affecting trade" as "confer[ring] some competitive advantage on an employer or employers engaged in trade" (at para. 175), implies a relatively high or low evidentiary bar for effective enforcement provisions remains a subject of scholarly debate. See Bronckers and Gruni, *supra* note 9 at 31; Gracia MARÍN DURÁN, "Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues" (2020) 57 Common Market Law Review 1031 at 1065.

[98] CPTPP, *supra* note 14 at art. 20.1.

[99] EPL 2014, *supra* note 32 at art. 53.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

"restricts the development of high-energy-consuming and high-polluting industries"; the same article further provides that the State Council and local governments "shall promote energy conservation and reasonably adjust industrial structures".[100] In construing this Article, there may be an argument that the policy commitments made by China to implement the Paris Agreement, though not in the strict sense "environmental laws" under the CPTPP, can provide important interpretative context. According to China's NDC implementation report, its climate regime has as its centrepiece a State Council instrument titled "The Action Plan for Carbon Dioxide Peaking by 2030".[101] The Action Plan provides explicitly that to promote industrial carbon peaking, "additional production capacity" should be prohibited or strictly controlled in the steel, non-ferrous metals, building materials, and petrochemical sectors.[102] Investments in new fossil fuel-related projects in these industries might, therefore, be challenged as inconsistent with the spirit of Article 7 of the Energy Conservation Law as informed by the Action Plan.

Overall, "hooks" relating to the concerns identified in Section II seem more or less recognizable in China's domestic environmental laws; hence the substantive fit of the SRP. One may find the hooks somewhat frail or propose alternative interpretations of the cited provisions.[103] It should be reiterated, however, that the claim above is a modest one. It pertains solely to the applicability of the SRP and, in contrast to typical discussions surrounding inter-State dispute settlement, is not concerned with advancing a formal legal assertion that China has failed to effectively enforce its environmental laws. Rather, it simply examines the pertinence of the SRP by discussing if the issues undermining China's climate mitigation efforts can be framed in the substantive matrix of this mechanism. The analysis above answers in the affirmative.

Having demonstrated its substantive fit, what remains to be explicated is why the procedural design of the SRP embodies potential for experimenting with civil society involvement in China's case. As delineated in Sections I and II, the pro-industry and instability-averse motives that underlie China's climate decision-making perpetuates a State-centric approach to administering climate change, which in turn begets substantial restrictions over civil society involvement. Against that backdrop, an international instrument that seeks to furnish room for involving civil society may, in theory, resort to one of two pathways: drastically reforming the State-centric approach to create extended spaces for civil society actors, or taking the political-economic structures as given and cutting a limited opening for civil society to exert some impact. To realize the fundamental changes required by the former is exceedingly arduous if not implausible, especially when the country in question has plainly stated its understanding of climate change as a domestic policy issue exempt from international influence.[104] It is therefore only sensible to consider that the deeply ingrained pro-industry and instability-averse mentality and the resultant State-centric approach are likely to persist in the foreseeable future.

[100] Energy Conservation Law of the People's Republic of China (revised 2018) at art. 7.

[101] "Progress on the Implementation of China's Nationally Determined Contributions" (2022) at 4.

[102] State Council of the People's Republic of China, The Action Plan for Carbon Dioxide Peaking before 2030 (2021), Section III(3)(b)–(e).

[103] For instance, it may be argued that China's overseas investments in fossil fuel-related industries do not constitute a matter of enforcing its own environmental laws, but rather a matter of enforcing the environmental laws of host States.

[104] China's President Xi Jinping stated at the 2023 National Conference on Ecological Protection that "China's pathways, methods, pace and intensity of work to reach carbon goals should and must be determined by the country itself and be free from outside interference". See "Highlights of Xi's Remarks at National Conference on Ecological Protection" (19 July 2023), online: China Daily https://www.chinadaily.com.cn/a/202307/19/WS64b79276a31035260b8174f8.html.

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In that regard, any involvement mechanism that may be acceptable to China must uphold the centrality of government discretion. Procedures whereby civil society submissions can automatically trigger review by an external authority, such as the models adopted by the SEEM and the SEP, do not seem to satisfy this prerequisite. In contrast, through its unique procedural design that accords greater discretion to responding parties, the SRP largely retains government authority as the locus of power in climate decision-making. China may therefore anticipate less impact on its State-centric approach to climate governing and be willing to tolerate the introduction of the SRP; indeed, its application to accede to the CPTPP may be understood as a readiness to do so. Recalling the discussion in Section I that neither China's domestic laws nor the international agreements to which China is a party have thus far provided similar venues, the SRP may serve as a novel testing ground for civil society involvement in the policy domain of climate change. While the rather modest formulation of the SRP may appear far from ideal to some, compromises and balancing to get a State on board are, as always, essential for a mechanism of consensus-based international law to be operative.

B. Identifying risks of abuse

There, of course, remains the possibility that the SRP may turn out to be ineffective. Various factors, from minimizing administrative costs to eliminating barriers to policy implementation, can motivate governments to maintain only minimal engagement with civil society actors. Absent constraints, these incentives can result in a proclivity to reduce involvement mechanisms to mere strategies of legitimation.[105]

The magnitude of respondent discretion under the SRP renders this scenario all the more likely, not to mention its weak accountability structures. A first example arises with, again, the benefit of comparative perspectives. The EU's SEP establishes a (non-binding) 150-day timeframe for conducting preliminary assessments,[106] while the USMCA places time limits on the finalization and publication of factual records.[107] The USMCA also maintains publicly available records on the progress of each submission, showing whether the applicable timelines at each stage have been met.[108] Even with these requirements in place, exceeding specified time limits has not been rare in the implementation of the SEP and the SEEM.[109] In contrast, no precise timeframe is imposed by the SRP on either the responding parties or the Committee, which would likely incur arbitrary delays and prolonged procedures in the provision of responses and completion of consideration.

Second, the domestic self-evaluation process, as it currently stands, is clearly susceptible to abuse. The only safeguard to ensure that civil society submissions are handled properly during this phase is entirely transparency-based, requiring that each respondent "make the

[105] Deborah MARTENS, Diana POTJOMKINA, and Jan ORBIE, *Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?* (Berlin: Friedrich-Ebert-Stiftung, 2020) at 18; Annita MONTOUTE, *Civil Society Participation in EPA Implementation: How to Make the EPA Joint CARIFORUM-EC Consultative Committee Work Effectively?* (2011) at 7.

[106] SEP Operating Guidelines, *supra* note 88 at 13–14.

[107] USMCA, *supra* note 86 at arts. 24.28.1 & 24.28.5.

[108] "SEM Compliance Tracker", online: Commission for Environmental Cooperation http://www.cec.org/submissions/sem-compliance-tracker/.

[109] In a SEP complaint filed in May 2022 by CNV Internationaal against Colombia and Peru, the European Commission has taken more than a year to handle the petition, and the case has not progressed beyond the stage of preliminary assessment. See video recording via "Committee on International Trade Meeting on 21 March 2023", online: European Parliament Multimedia Centre https://multimedia.europarl.europa.eu/en/webstreaming/inta-committee-meeting_20230321-1500-COMMITTEE-INTA, beginning at 16:41:25.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

submissions and its responses available to the public, for example by posting on an appropriate public website".[110] There is, however, no external oversight mechanism to monitor whether the parties have adhered to the transparency obligation. Like any other procedure that allows one to rule on their own case, this creates a gap that CPTPP parties may exploit to dismiss submissions at will.

It should be noted that many NGOs routinely disclose the legal proceedings that they have initiated or taken part in, serving in effect a monitoring role that may impel governments to observe the transparency obligation. However, whether this external monitoring channel is operative in China's case seems uncertain. There are good reasons to doubt that the environmental NGOs based in China would speak out if their submissions met with disregard from the government. Scholars have characterized NGO activities in China as a function of closeness and even alliance with State agencies and local authorities, where interaction with and support from central or local governments could substantially affect an NGO's scope of work and available resources.[111] Concerned about the potential backlash and disapproval from the State, it is not unlikely that a Chinese NGO would refrain from revealing the government's questionable practices in handling submissions in exchange for flexibility in other cooperative activities, thereby rendering the monitoring function ineffective.

Third, it is noticeable that despite the extended impact of respondent-defined criteria across all three SRP processes, their appropriateness is entirely insulated from external review. This bears the question of whether the criteria currently adopted by CPTPP parties are fit for purpose. Although the SRP has not to date been invoked in practice, Australia, Japan, New Zealand, and Singapore have published their respective guidelines for assessing SRP submissions.[112] Among those, Australia, Japan, and New Zealand adopt the "ongoing proceedings" criterion, which excludes the eligibility of submissions concerning issues being addressed in other ongoing judicial or administrative proceedings. Further, all four endorse the "trade effect" criterion, requiring that submissions clarify whether and to what extent the concerned measures affect trade or investment among CPTPP signatories. Both criteria are included in the list of suggested considerations under Article 20.9.2 of the CPTPP.

[110] CPTPP, *supra* note 14 at art. 20.9.1.

[111] Jennifer Y.J. HSU and Reza HASMATH, "The Local Corporatist State and NGO Relations in China" (2014) 23 Journal of Contemporary China 516 at 533–4; Carolyn HSU, "Beyond Civil Society: An Organizational Perspective on State–NGO Relations in the People's Republic of China" (2010) 6 Journal of Civil Society 259 at 273. It should be noted that the discussion above does not intend to categorically deny the agency of environmental NGOs in China. See, e.g., Chung-pei PIEN, "Local Environmental Information Disclosure and Environmental Non-Governmental Organizations in Chinese Prefecture-Level Cities" (2020) 275 Journal of Environmental Management 111225; Qiusha MA, "The Governance of NGOs in China since 1978: How Much Autonomy?" (2002) 31 Nonprofit and Voluntary Sector Quarterly 305. Chinese scholarship has highlighted policies adopted by the central government to "regulate" and "govern" NGOs' activities in environmental governance. See YE Tuo, "Institutional Space and Acting Strategies of ENGOs' Participation in Environmental Governance" (2018) 18 Journal of China University of Geosciences (Social Sciences Edition) 50 (in Chinese).

[112] "CPTPP Outcomes: Environment", online: Australian Government Department of Foreign Affairs and Trade https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-environment [Australia SRP Guidelines]; "Public Submissions Based on Chapter 19 (Labour) and Chapter 20 (Environment) of the TPP Agreement", online: Cabinet Secretariat https://www.cas.go.jp/jp/tpp/tppinfo/kyotei/tpp_19_20shou/index.html [Japan SRP Guidelines]; "CPTPP Environment Chapter – Guidelines for Public Submissions", online: New Zealand Ministry of Foreign Affairs and Trade https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/environment/ [New Zealand SRP Guidelines]; "CPTPP Environment Chapter Public Submission", online: Ministry of Sustainability and the Environment of Singapore https://www.form.gov.sg/5f927711b51de900120d930b [Singapore SRP Guidelines].

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

However, neither appears well-fitted to uphold an effective climate petition mechanism. With respect to the ongoing proceedings criterion, its precluding effect could be strategically used by governments to commence domestic judicial or administrative procedures for the sole purpose of blocking SRP submissions.[113] Indeed, the NAAEC's SEEM mechanism has seen parties cite pending domestic proceedings as a basis for terminating submissions, whereas the Secretariat found no such proceedings that could actually address the substance of the concerned issues.[114] Perhaps more concerning is that, in contrast to the NAAEC where only those domestic procedures that are conducted "in a timely fashion" are regarded as "judicial or administrative proceedings" with the mentioned precluding effect,[115] the CPTPP does not expressly define or limit what qualifies as an "ongoing judicial or administrative proceeding". This adds to the possibility of responding parties initiating pre-emptive domestic proceedings that lack bona fide intention. It should be noted that Article 20.7.3 of the CPTPP does impose on each CPTPP party an obligation to establish "judicial, quasi-judicial, or administrative proceedings" that are "fair, equitable, transparent and [compliant] with due process of law", which may provide contexts for interpreting "ongoing proceedings" under the SRP. Nonetheless, as the wording of the SRP allows signatories to unilaterally construct and interpret their own evaluating criteria, there is no guarantee that all CPTPP parties would favour this contextual reading.

Regarding the trade effect criterion, it is true that the effective enforcement provision under the CPTPP, as mentioned above in Section IV.A, encompasses an express link between a failure to effectively enforce environmental laws and its impact on international economic activities.[116] Therefore, if the task is to establish that a CPTPP party has violated precisely *this* FTA obligation, the existence of trade effects would have to be demonstrated. However, whether a civil society actor should be required to prove trade effects in an SRP submission is a different question. The inquiry is twofold: first, do all the CPTPP environmental provisions that fall within the SRP's purview specify trade effect conditions? As discussed above, the SRP in general addresses non-implementation of CPTPP environmental provisions, whereas SRP procedures that proceed to referral and Committee consideration phases apply to submissions that assert a party's "fail[ure] to effectively enforce its environmental laws".[117] Different from the effective enforcement obligation, this quoted SRP provision is not conditioned by any link to international trade or investment.[118] It could well be the case that a CPTPP party's failure to enforce its environmental laws constitutes a breach of other FTA environmental obligations that prescribe no trade effect condition, such as the MEA consistency provision mentioned above (Article 20.4). When an SRP submission takes issue with a non-enforcement of such nature, predicating its eligibility on the establishment of trade effects appears contradictory to the plain language of the SRP.

Second, where the concerned FTA provision does stipulate a trade effect condition, should the burden to establish that requirement be imposed on SRP petitioners, who are typically individuals or environmental NGOs? It should be borne in mind that while civil society actors often possess or have ready access to on-the-ground knowledge about questionable State practice and its environmental and socio-economic implications,[119]

[113] See Pablo PEÑA, "Could a Trade Agreement Strengthen the Enforcement of Domestic Environmental Laws? Envisioning the Impacts of the US–Peru Environmental Submissions Mechanism" (2023) 32 Review of European, Comparative & International Environmental Law 465 at 471.

[114] NAAEC Joint Public Advisory Committee, "Advice to the Council No 15-02: JPAC Advice and Recommendations Regarding Submissions on Enforcement Matters" J/15-02/ADV/Final (8 May 2015) at para. 1.

[115] NAAEC, *supra* note 86 at art. 45(3).

[116] CPTPP, *supra* 14 at art. 20.3.4.

[117] *Ibid.*, at art. 20.9.4.

[118] For a similar interpretation, see Peña, supra note 113 at 4.

[119] Princen and Finger, *supra* note 44 at 223.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

their province of information is unlikely to cover the measures' impact on international trade or investment. If the purpose of installing petition mechanisms is to harness the monitoring role of civil society actors, requiring them to supply evidence outside their informational capacity seems out of tune. What should be contemplated instead is an allocation of evidentiary burden between civil society actors and FTA parties and across private petition and inter-State procedures: SRP submitters should only be required to establish a party's failure to enforce climate laws, whereas it is the task of another CPTPP party, which decides to bring the matter into inter-State systems, such as referral processes or dispute settlement, to demonstrate any economic benefits associated with that non-enforcement.[120]

In addition, given the flexibility in formulating evaluating criteria, a party may adopt factors not listed in Article 20.9.2 that could undermine the effectiveness of the SRP. What has been clearly exemplified by the development of the EPIL in Chinese procedural laws[121] is that owing to the broad and dispersed impact of climate change, conditioning plaintiff eligibility on narrowly interpreted "direct" or "immediate" interests would effectively block climate cases out of judicial and administrative systems. Understanding this legal characteristic of climate change is likewise necessary for the SRP. Though not concerning respondent-defined criteria per se, Singapore has proposed that referring parties should justify their referral requests by showing "substantial interest[s]" in the concerned submissions.[122] While the intention might be to turn away purely politically driven and unfounded referrals, an overly restrictive interpretation of the proposed term could curtail the SRP's efficacy in addressing climate change-related submissions.

C. Achieving the SRP's experimental potential

When contemplating ways to mitigate the identified risks of abuse, it is worth recalling the SRP's value as a laboratory for civil society involvement in a State-centric climate governing system. Proposals should therefore be designed with a two-fold objective: to curb governments' tendency to use the SRP arbitrarily while upholding its experimental potential.

In that connection, three modifications to the current SRP mechanism may be put forward. First, time-bound responses should be guaranteed. The Environment Committee should establish comprehensive and transparent timeframes for the referral and Committee consideration processes, while urging parties, in fulfilling their CPTPP obligation to "respond in a timely manner" in the domestic self-evaluation process, to adopt precise and binding time limits in their domestic laws.[123]

Second, to reduce the risk of non-transparency in the self-evaluation process, the Committee should establish and administer a centralized registry whereby all SRP submissions are initially sent, registered, and made publicly available before being dispatched to the relevant respondents for review and response. The USMCA's dedicated website for recording progress of SEEM submissions could be of valuable reference here. Meanwhile,

[120] In the context of labour provisions in EU FTAs, it has also been argued that private petitioners should not be required to demonstrate any trade-distorting effect of labour non-enforcement, as such an evidentiary requirement has proven arduous in inter-State disputes and economic concerns are not the primary motivation that prompted the EU to address sustainability issues in trade agreements. See Marco BRONCKERS and Giovanni GRUNI, "Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously" (2019) 56 Common Market Law Review 1591 at 1604–6.

[121] See discussion in Section I.B.

[122] CPTPP Environment Committee Report, CPTPP/ENV/2021/R001 (13 July 2021) annex 1.

[123] Most CPTPP parties that have published guidelines on Article 20.9 submissions have already set down unambiguous, albeit not always obligatory, time limits. See the SRP Guidelines of Japan, New Zealand, and Singapore, *supra* note 112.

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bearing in mind the SRP's experimental value, it is important that such a registry only documents and disseminates submissions and does not exercise any substantive authority.

Third, the Committee should conduct periodic reviews on respondent-defined evaluating criteria. Much ink has been spilled above on the (in)appropriateness of several criteria adopted or proposed by certain CPTPP parties. However, it is not my intention to argue that the SRP should therefore follow EU and US models and authorize the Committee to define a universal set of considerations binding on all parties, as this would alter the very nature of the domestic self-evaluation process and eliminate the conditions conducive to experimentation. Rather, the point is that the appropriateness of respondent-defined criteria should not be entirely shielded from external scrutiny. Drawing upon the WTO's Trade Policy Review Mechanism, the Committee could organize regular assessments on each party's SRP practice, without imposing binding recommendations to modify or enforce any specific criterion.[124]

In terms of feasibility, all three proposals can be readily accommodated within the specified mandate of the Environment Committee, namely to oversee, discuss, and review the implementation of the SRP and the environment chapter.[125] Detailing time limits, maintaining a centralized registry, and reviewing the respondent-defined criteria on a regular basis do not seem to go beyond the ordinary meaning of the Committee's defined remit.

V. Conclusion

Against the backdrop of China's request to accede to the CPTPP, this article examines whether the CPTPP's environmental SRP mechanism, which has thus far received limited attention in academic and non-academic discussions, might furnish opportunities to build up civil society in China's climate change decision-making.

Civil society involvement matters for climate governance. While it may sound like an aphorism to some, the case study on China in this article indicates that the crucial role played by civil society has not been universally recognized even among the major players in the global fight against climate change. Lacking civil society involvement, China's approach to climate decision-making, motivated by intents to obtain industrial competitiveness and prevent social unrest, has risked rendering the country's mitigation efforts unreliable, unsustainable, and at times inequitable. Meanwhile, it is precisely this entrenched pro-industry and instability-averse mentality that perpetuates the State-centric approach of climate "governing" and drives civil society to the periphery. As this political-economic context is likely to persist in the foreseeable future, an international instrument that seeks to open up space for civil society involvement in China can only be viable if, somewhat paradoxically, it still upholds the centrality of government authority.

Turning to the SRP, its distinctiveness lies in the considerable degree of respondent discretion. This is evinced by the initial self-evaluation process, the legal weight attached to respondent-defined criteria, and the mechanism's cooperative character and procedural priority over inter-State procedures, all of which set the SRP apart from other existing petition mechanisms. Consequently, the SRP offers a forum for civil society to bring problematic State practice to light, while limiting the possibility that public submissions would actually result in curbing the government's decision-making authority. With respect to China's specific case, its mitigation policies and practices that appear to be problematic can be interpreted as matters of enforcing domestic environmental laws and therefore fall within

[124] *Trade Policy Review Mechanism, Marrakesh Agreement Establishing the World Trade Organization, Annex 3*, 15 April 1994, 1869 U.N.T.S. 480 at art. A(i) (stating that the Trade Policy Review Mechanism "is not … intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members").

[125] CPTPP, *supra* note 14 at arts. 20.9.6 and 20.19.3.

https://doi.org/10.1017/S2044251325000013 Published online by Cambridge University Press

the SRP's scope of review. In that regard, it is argued that the SRP is both substantively and procedurally compatible to serve as a testing ground for civil society involvement in China's decision-making; hence its "experimental potential".

It is important to reiterate that the SRP is not free from design defects. Steps need to be taken to ensure that it would not be reduced to another instrument for diluting environmental stakes that are at odds with other interests deemed superior by the government. Several proposals have been put forward in this article in that regard, which seek to balance the need to maintain respondent discretion, upon which the SRP's experimental value is based, and the necessity to mitigate risks of abuse.

As mentioned at the outset of this article, this article should not be understood as speaking merely to one isolated local case. The analysis above, especially that regarding the features of the SRP and proposals to rectify its drawbacks, was put forth beyond a case-specific context. On the other hand, as the SRP's substantive scope is partly limited to non-enforcement of domestic environmental laws, the discussion on the application of the SRP was advanced in the context of China's specific case for illustrative purposes. The relevant discussion showed that the substantive fit of the SRP ultimately depends on the existence of "hooks" in domestic regimes to facilitate a claim of non-enforcement. This should not be a long shot, as data shows that by the end of 2019 every country in the world has at least one piece of law or policy addressing climate change.[126] And when such domestic hooks are available, the trajectory for deploying the SRP detailed in this article can be of reference.

Acknowledgements. I wish to extend my sincere gratitude to the two anonymous reviewers for their engaging and detailed comments. I would also like to thank Professor Gracia Marín Durán, Professor Piet Eeckhout, Dr Yanwen Zhang, and Nahide Basri for their constructive feedback on earlier versions of this article, and Professor Ming Du and other participants at the 2024 Oxford Chinese Law Discussion Group Conference for Junior Researchers for the illuminating discussion. I am also grateful to Dr Anna Saunders for the very helpful advice on submission options. All errors remain mine.

Funding statement. None.

Competing interests. The author declares none.

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[126] Shaikh ESKANDER, Sam FANKHAUSER, and Joana SETZER, "Global Lessons from Climate Change Legislation and Litigation" (2021) 2 Environmental and Energy Policy and the Economy 44 at 69.

Cite this article: Siyu BAO, "The CPTPP "Lab" for Enhancing Climate-Related Civil Society Involvement: The Case of China and Beyond" (2025) Asian Journal of International Law pp. 1–25. https://doi.org/10.1017/S2044251325000013

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