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The Trade-Environment Nexus and the Potential of Regional Trade Institutions

MORTEN BØÅS

Centre for Development and the Environment,
University of Oslo

Morten Bøås
Centre for Development and the Environment, University of Oslo
P.O. Box 1116 Blindern, 0317 Oslo, Norway
Tel. +47 22 858909; fax. +47 22 858920
e-mail: morten.boas@sum.uio.no
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The Trade-Environment Nexus and the Potential of Regional Trade Institutions*

> *"In public discourse and among scholars, attention appears to be riveted on the questions: Is regionalism a stepping stone or a stumbling block on the path towards globalisation? Are regionalism, often identified with the major trading blocks, and globalisation complementary or competitive processes"*[1]

Introduction - the regional potential?

The popularity in some circles of regional governance is largely built on the perception that regional governance will help resolve collective action problems on the global level. The argument is that in areas where the "tragedy of commons" and the "problem of big numbers" are notorious, global negotiations are often inefficient, and the implementation of agreements once agreed ineffective. One reason lies in the difficulty of aggregating the interests of a great number of actors into a common policy position, another in supervising implementation. As such, advocates of state-led formal regionalism often argue that the regional level may aggregate individual national policy positions on a joint position *vis a vis* third parties and thus facilitate both the establishment and the implementation of global multilateral agreement.

In order to try to assess such an argument this paper will look at how three organisations for regional co-operation - the Association for Southeast Asian Nations (ASEAN), the European Union (EU) and the North American Free Trade Agreement (NAFTA) - deal with the trade-environment nexus. The argument put forward here is that there is no necessity that the establishment of various layers of regional governance in the world political economy will enhance the possibility of global governance within this specific issue-area. That said, the establishment of regional governance layers can facilitate joint positions with respect to regional third parties and/or to global negotiations. However, for this to happen regions must agree internally on what their position within an issue-area such as the trade-environment actually should be. As we will see from the analysis of ASEAN, the EU and NAFTA this is most often much easier said than done. Even the most institutionalised regional scheme in the world, the EU, have huge problems of coming to terms with this issue-area internally. In fact, of these three regional schemes the one with the most coherent

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position is also the one less likely to promote global governance within this issue-areas. The reason is that all ASEAN member countries resist the trade-environment linkage.

Regionalism and the trade-environment nexus

Regarding the relationship between regionalism and the trade-environment nexus, the analysis and arguments in this paper are built on the assumption that the world political economy is constituted by more than production, and flows of trade and investment. It is also constituted by cognitive flows of ideas, meanings and identities. In the trade-environment nexus' list of content we find the tangible issue-areas of production, and international flows of trade and investment, but also intangible issue-areas: the cognitive flows of ideas, meanings and identity. Interaction within this nexus cannot be seen just as an outcome of tangible capabilities, interaction is also to a significant degree influenced by the various actors' interpretations of cognitive flows of intangibles.

Conventional approaches to regionalism understands power as a material source: a tool wielded by nation-states in order to facilitate their own interests. My position is that power in the form of control over material resources, and the ability to transform these into capabilities of power that can be utilised within various issue-areas are an important (perhaps still the most important) determinant of specific outcomes. Nevertheless, I will argue that, at least, in studies concerned with post-industrial issues like the trade-environment nexus, the understanding of power as a material resource have to be supplemented with interpretations that focuses on the subjective understandings of state and nonstate actors as the source of interests and actions.[2] For example, the emergence of the trade-environment nexus on the international agenda cannot be understood in isolation from the *zeitgeist* which made environmental issues a legitimate concern and a major political issue in the 1980s/1990s. Moreover, because the trade-environment nexus as an emerging field of study is more characterised by adherence to competing *weltanschuungen*/doxas; to what Pierre Bourdieu labels as:

> "Schemes of thought and perception can produce the objectivity that they do produce only by producing misrecognition of the limits of the cognition that they make possible, thereby founding immediate adherence, in the doxic mode, to the world of tradition experienced as a "natural world" and taken for granted."[3]

than to consensual agreement of normal science in a Kuhnian sense,[4] knowledge and the ability to interpret new knowledge in a manner favourable to one's initial position and

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perceived interests is a significant source of power. Rather than the usual academic situation of one commonly accepted paradigm and scattered voices of opposition the trade-environment nexus is characterised by competing paradigms. In fact, there is neither academic nor political consensus as to the necessity of linking trade and environment policies. Scholars have argued that unrestricted international exchange of goods and services will cause severe environmental degradation,[5] that trade instruments do not provide an appropriate mechanism for environmental protection,[6] or that trade barriers will be, at most, a second best way of reducing environmental degradation.[7] There is also an abundance of charges that linking environment considerations to trade policy is an implicit protectionist measure. It has for instance been argued that:

> "The trade/environment area has an above average risk of being exploited by special interest groups to their own benefit at the expense of the general interest. More specifically, the risk is that traditional protectionist groups will manipulate environmental concerns in order to reduce competition from imports.[8]

The regional trade-environment nexus in practice

In practice, different regional arrangements have taken different positions on this issue. The 15 countries that constitute the EU have formally agreed on the necessity of linking trade and environment within the multilateral framework of the World Trade Organisation (WTO). In NAFTA, trade and environment are linked, at least, partly, through the NAFTA Side-agreement on the environment. While the ASEAN member countries have expressed outspoken resistance against such linkages.

This paper makes no *a priori* assumption with regard to the inherent nature of the tension between trade and environment: there is no inherent logic, economic or other, that generally determines whether trade liberalisation (deregulation) and environment protection (regulation) stand in conflict or are reconcilable. Trade liberalisation may damage the environment by giving governments incentives to relax environmental policies (deregulation) in order to give their producers a competitive edge. However, one may also point to reasons why the effectiveness of environmental deregulation may be low or even reversed. Through processes of environmental regulation economic actors may adopt strategic behaviour in dealing with political and institutional factors. By allowing for strategic behaviour by and interaction among producers, the incentives for the government to keep environmental standards could be reversed. Nevertheless, deregulation as either decreasing the field of legal regulation or as replacing public regulation (e.g. command-control) with other means and

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methods (e.g. market-based incentives) is on the rise.[9] Both in the U.S. and in the EU new schemes of environmental protection have been introduced which are designed to encourage collaboration between state and market. These new schemes tend to favour the use of market forces over traditional command-control approaches to environmental protection. The name of the game for environmental protection as we approach the millennium seems to be "environmental protection through deregulation." In other words, an other type of environmental governance than the one prescribed by the command/control approach.[10] Thus, deregulation and regulation within the trade-environment nexus in the world political economy is not separate processes, but elements of the globalisation process. Subsequently, the remaining parts of the paper is dedicated to an attempt to document how nation-states through regional trade institutions as ASEAN, the EU and NAFTA have tried to respond to the challenges that globalisation represents to them. The idea is that such documentation can help to clarify the potential of regional trade institutions within the trade-environment nexus.

The trade-environment nexus: the regional response

> *"Regional trading arrangements are essentially trade creating and would enable the participants to move more closely and quickly to free trade than could be expected at the multilateral level (...)*
> *Regionalism will result in inward-looking, discriminatory and protectionist trading blocks, centred around major powers competing for spheres of influence. it could seriously undermine the MFN principle and result in trade diversion instead of trade creation."*[11]

ASEAN

For many developing countries and/or newly industrialising countries the main objective of regionalism is to recapture collective autonomy in relation to the EU and the U.S, and to begin to organise a competitive response to the Japanese challenge.[12] The objectives behind the establishment of ASEAN is however somewhat different. As an international institution ASEAN was originally established in 1967 and comprises Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, Vietnam, Laos and Myanmar.[13] ASEAN's primary objectives are to promote security, economic growth, and social and cultural development in the sub-region. Historically, political and military security were the most important aspects of the ASEAN agenda and constituted the main factors behind its establishment. It was formed as a deliberate political act, as a bulwark against what was perceived as the spread of world communism in the subregion. As recently as the late 1980s Thai and Vietnamese forces clashed on the Cambodian border. Thailand was backed by its

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ASEAN partners and the West, while Hanoi was supported by the former Soviet Union.[14] However, the end of the cold war has completely changed this part of Asia's geopolitics. ASEAN has started to turn from looking narrowly at the regional security framework as a defence against world communism towards a broader perception of it that includes economic and environmental components as well. Following completion of the Uruguay Round, the initiative to form the Asia-Pacific Economic Forum (APEC), and unilateral liberalisation in a growing number of countries, ASEAN ministers agreed in September 1995 to accelerate its plan to create a regional trade block with a combined market of 420 million consumers by 2003. It was agreed to increase the number of items with tariff rates reduced to between zero to five per cent by 2000, and to give members of ASEAN Free trade Area (AFTA) concessions in the service sector more favourable than those agreed in the WTO.[15] The decision came as a response to a push by Brunei and Singapore who expressed fear that ASEAN would be left behind by other regional trade groupings.

> "AFTA must move faster than other free-trade areas. I have therefore proposed at the ASEAN ministerial meeting last month that we advance the time frame for the realisation of AFTA to the year 2000."[16]

The accelerated pace of AFTA's development both in scope and depth contrasts with the patchy start to the regional free trade zone. It is therefore reasonable to assume that the acceleration is a response to competition from other foreign regional schemes, reflecting at the same time a new perception of economic security. The threat is no longer neighbouring countries within the same regionalisation project, but attempts at economic regionalisation in other parts of the world. Put differently, the ASEAN countries are concerned with keeping their competitive edge which has helped them carve out substantial shares of the world market.

ASEAN and the environment

Concerns for the environment has emerged more slowly. ASEAN has developed a Strategic Plan of Action on the Environment which among other elements aim to strengthen the legal and institutional capacity to implement international environmental agreements, and to harmonise ambient air and river water quality standards. The association have also developed an ASEAN Co-operation Plan on Transboundary Pollution that covers the programme areas of transboundary atmospheric pollution, transboundary ship-borne pollution, and transboundary movement of hazardous waste between member countries. However, even though ASEAN's concern for the environment of its member countries have

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grown, ASEAN governments still appear to believe that too much emphasis on environmental issues and policies could dampen the region's economic development. Environmental concerns are therefore directed towards problems directly affecting living conditions and population health, not towards broader environmental issues such as global warming and biodiversity. In light of the recent financial crisis in the ASEAN countries considerable political will is necessary to mitigate further serious degradation of the natural resource base. The presence of such a will can be questioned. Nationally, all ASEAN countries have formally enacted various environmental laws and regulations, but the institutional capacity for developing, implementing and particularly for enforcing environmental measures are still limited. The Indonesian forest fires that annually spew smoke over neighbouring Malaysia and Singapore illustrates the enforcement problem. This is clearly a regional issue, that ASEAN should have addressed, but when the smoke spew over its member countries ASEAN as a regional institution usually keep its head down. So far the environment ministers of the ASEAN countries have primarily used ASEAN as a chair for co-ordinating environmental policy positions on the international agenda and to demand stronger commitment from the Western countries towards the global environment and the Rio Earth Summit Declaration.

Nevertheless, sooner or later the ASEAN countries will face considerable environmental challenges because Asia is the most polluted and environmentally degraded region in the world.

> "During the past 30 years, Asia has lost half its forest cover, and with it countless unique animal and plant species. A third of its agricultural land has been degraded. Fish stocks have fallen by 50 per cent. No other region has as many heavily polluted cities, and its rivers and lakes are among the world's most polluted. In short, Asia's environment has been under attack. While rapid economic development has created dynamism and wealth, Asia has at the same time become dirtier, less ecological diverse, and more environmentally vulnerable."[17]

In itself this is not a big surprise. The environment suffered during the industrialisation of Western Europe, North America and Japan as well, but because Asia's economic transformation has taken place faster than anywhere else, the environmental impact seems to be worse.[18] Furthermore, Asian policy makers ignored the environmental impact of rapid growth for too long. Concern about the environment was not a priority. Rather the mentality was one of "grow now, clean up later." And when the governments finally got going, the environmental regulations that they adopted were ineffectively designed and not well implemented. The imposed environmental standards were often neither monitored nor

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enforced. In short, as the example with the Indonesian forest fires illustrates several of these governments seems to lack the institutional capacity and/or political willingness to enforce their own standards. As the governments' political will to confront these issues can be questioned, one could argue that further trade liberalisation may exacerbate the environmental problems because environmental costs are not being sufficiently internalised. They are not reflected in the prices for goods and services.

Furthermore, the goal of attracting foreign direct investments may increase the pressure for resource extraction from pristine natural ecosystems and mitigate attempts to introduce higher environmental standards. The political and economic importance of TNCs in Southeast Asia's contemporary economic development illustrates that not only states have an important effect on environmental conditions in the region. Since the mid-1980s, industrialisation has been one of the most important factors in understanding environmental change in Southeast Asia. Industrial development has been the goal of all states in the region since independence. It is, however, only in recent years when Japanese, South Korean and Taiwanese firms have transferred operations to Southeast Asia that this goal has come within their reach. Foreign-led industrialisation has, however, been concentrating on Malaysia, Indonesia and Thailand (the second-tier NICs) and Singapore. It is starting in Vietnam, but has yet to have an appreciable effect on countries like Cambodia, Laos and Myanmar.

More emphasis on environmental concerns and greater opportunities to promote convergence with trade issues would appear to be largely dependent on pressure from abroad, on TNC policies, and on the growth of civil society including democratisation in the ASEAN countries. Promotion of civil society depends *inter alia* on the role of NGOs, and their record to date appears at best mixed.[19] The further discussion will take these observations as a point of departure and look at how ASEAN have responded to the environmental challenges posed by the trade-environment nexus, and whether and how ASEAN may provide leadership on this issues.

Like other developing/newly industrialising countries the ASEAN countries are faced with the possibility that more stringent environmental standards not only can make their products less competitive, but could also be used as nontariff barrier against them. Such scenarios are in particular threatening for the ASEAN countries because economic growth in these countries occurred simultaneous with stagnant, and not increased intra-ASEAN trade. Rather it was concurrent with a tremendous increase in trade with non-ASEAN countries.[20] The guiding economic principle of the ASEAN countries has traditionally been to seek

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economic growth through improved competitiveness in global markets, and not by giving preferential access to other ASEAN member countries. The two most commonly cited environmental standards in trade are product standards related to production methods and ecolabeling. These are particularly important for the ASEAN countries because about 60% of the value of their manufacturing exports originates in sectors with potentially significant environmental impacts. Product standards can reduce market access because they can be formulated in such a way that domestic industries find it easier to conform to them. Ecolabeling is in principle voluntary. Their intention is to give consumers the ability to express their demand for environmental conservation by buying environmentally friendly products. Nevertheless, ecolabeling can also be biased against imported products.

So far, the main response from ASEAN to these challenges has been to argue with force that issue-areas such as the trade-environment nexus should not be included on the WTO agenda. Their argument is that they are not, and never have been at the heart of the GATT agreement. In the WTO debate on the trade-environment nexus ASEAN have accused Western powers such as the EU and the U.S. for hypocrisy, claiming that their attempt to raise environmental standards in other countries is not motivated by environmental concerns, but by increased unemployment and the desire to blame this problem on unsound exploitation of the environment by trading partners like the ASEAN countries. For example, the ASEAN reaction to Western criticism of forest degradation in Indonesia and Malaysia has come in the form of counter arguments like:

> (...) it seems odd that the argument put forth by DCs often refers to the compulsion to safeguard the global environment (ozone layer), the present quality of which has been thoroughly affected by DC's past production and present consumption."[21]

In other words, ASEAN's main argument against Western insistence of uniform environmental standards is that Western countries got rich by polluting the global environment, but now these countries want to force the expenses from this development strategies on newly industrialising countries as well. ASEAN acknowledges that it is quite likely that in the years to come various environmental issues in the ASEAN countries will be brought by the region's trading partners into the trade policy debate. Nevertheless, ASEAN's response is that this is just too bizarre. According to ASEAN, trade is not, and never has been, the cause of environmental problems. Subsequently, trade sanctions cannot and will not affect the root cause of such problems. ASEAN admits that its member countries should try to do more to protect their local environments, but not because they have to comply to demands

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made by trading partners. National environmental policies and standards are an integrated part of a country's national development strategies. External attempts to influence such policies and standards are equivalent to infringements on the national sovereignty of the ASEAN countries.[22]

The core of the ASEAN position is that national competitiveness is the single most important concern for trade, and not global commons like ozone depletion, climate change or endangered species. The trade-environment nexus is therefore regarded by ASEAN as a reflection of the West's "export of ideology," which if forced upon them could diminish their economic growth and subsequently put into jeopardy the legitimacy of the political regimes in the ASEAN region. At the heart of the matter is therefore also the (in)famous debate about universality: one either interprets the right to development and affluence as a prerequisite for environmental awareness (e.g. "grow now, clean up later") as ASEAN contend, or believes that today the opposite is the correct strategy (as ASEAN believe that the West thinks).

The question is what kind of implications these differences will have for the economic (and political) relationship between ASEAN and both its individual trading partners and other regional trading arrangements as well. At worst, the trade relations between ASEAN and other countries/regional trading arrangements could be constantly threatened by tension and conflict. At best, some sort of compromise will be reached in the next GATT/WTO round. However, so far, the achievements within the context of the WTO have been very small within this issue-area.

NAFTA

The implementation of NAFTA in January 1994 created a free trade area comprised of Canada, Mexico and the United States. NAFTA is in fact a novelty in the history of regionalisation because it contemplates virtually complete free trade (in 10 to 15 years) between two highly developed countries and one developing country, which receives no special and differentiated treatment apart from different time frames for the implementation of some measures. This agreement created the world's largest free trade zone, stretching from the Yukon to the Yucatan, with a combined gross national product of approximately $6 trillion.

The treaty incorporates a schedule of staged tariff reductions on qualifying goods from each NAFTA signatory. The schedule is supposed to lead to the progressive elimination of all tariffs on trade between the three member countries. The NAFTA treaty also includes provisions similar to those found in GATT/WTO regarding most favoured nation treatment,

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national treatment, rules of origin, and customs procedures. According to the agreement the three countries are to eliminate prohibitions and quantitative restrictions applied at the border, such as quotas and import licenses. In addition, NAFTA includes provisions designed to reduce barriers to trade in services, provisions that remove significant investment barriers, ensure basic protection for NAFTA investors, provide a mechanism to resolve disputes between investors and NAFTA countries and sets out certain basic protection for intellectual property rights.

Supporters of NAFTA have pointed to the treaty's environmental virtues.[23] And it is a matter of fact that in the NAFTA preamble the signatories make commitments not only to environmental protection, but in addition to promote sustainable development. The main elements in the side agreement are the Commission for Environmental Co-operation and the Dispute Settlement Mechanism. During the negotiations between the three countries involved important differences surfaced. Both the Canadian and the Mexican drafts proposed a weaker commission than the U.S., in which the commission's secretariat would be less independent of ministerial control.[24] Whereas the U.S. preferred a more powerful institution, more independent and less subject to national control. With respect to the Mexican position, it reflects both political tradition as well as fear of losing national control.

> "If such an institution frequently would issue complaints, recommendations and demands, the Mexicans would end up in a response situation where much time, energy and resources would end up being directed towards responding to allegations and recommendations forwarded by the commission."[25]

The outcome of the negotiations was a trinational Commission for Environmental Co-operation (CEC) which provides for the parties a structure to study issues, form working groups and solve problems of common concern. The commission is constituted by the following bodies: the Council, the Secretariat and the Joint Public Advisory Committee. The Council is constituted by the environmental ministers of the three parties, and it is supported by a full-time permanent and independent secretariat. The Council has the power to appoint arbitration panels, if it is requested by one or more of the parties, in order to investigate complaints on persistent patterns of non-compliance with environmental laws. The Secretariat has the power to independently prepare reports for the Council, but the most important function of the Secretariat is that it can decide whether complaints from NGOs or individuals should be submitted to the parties with the request of a response. The Joint Advisory

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Committee is made up by five representatives of civil society from each country. This committee is supposed to advise the Council on any matter within the scope of the agreement.

It is quite clear that on the whole it was the U.S. preferences that prevailed during the negotiations. The Secretariat was granted independent capacity to investigate issues of environmental concern between the parties, and the Commission was also granted more independent power than Mexico preferred.

The differences between the concerned parties were pretty much the same as above with respect to the issue of trade sanctions. The U.S. position was that sanctions were to be allowed for persistent and unjustifiable pattern of non-enforcement of a country's environmental laws. If the Council or the parties themselves were unable to solve the dispute NAFTA benefits could be suspended. The Mexican position on enforcement was that two or three countries when confronted with unjustifiable, persistent and systematic failure to enforce domestic law in order to attract or retain investment they could request that the state against which the allegations were made should make a full report to the Council. The Council could then recommend further action. Trade sanctions were not contemplated in the Mexican position. The heaviest sanction advocated by the Mexicans was to make the Council's recommendations public unless otherwise agreed by the parties.[26] With respect to the Canadian position, their point of departure in the negotiations was to oppose the incorporation of trade sanctions in the side agreement. According to Saunders,[27] Canada's insistence on the avoidance of trade sanctions was rooted in a long standing distrust of U.S. willingness to use trade sanctions for protectionist ends. But the Canadian Prime Minister Brian Mulroney also argued in public that trade sanctions were antithetical to the philosophy of free trade agreements. In an effort to break the impasse in the negotiations that had been created by the different national positions of the three concerned parties Canada proposed that fines against governments could serve as an alternative to trade sanctions as an enforcement measure. However, such a solution would have created legal problems in the U.S.,[28] and Mexico rejected the proposal as a clear and undesired infringement on national sovereignty. In the end the negotiations therefore ended with the establishment of a dispute settlement mechanism which is supposed to ensure that the parties effectively enforce their domestic environmental laws. In the side agreement, parties who are found to have a persistent pattern of failure to effectively enforce their environmental laws are required to correct the problem (e.g. to implement the plan recommend by the Council). If the accused party does not implement the plan, the Council can impose a fine up to $20 million in the first year. If the

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party complained against still refuses to act on the complaint or to pay the fine, it will be liable to trade sanctions or, in the case of Canada, the decision may be enforced against the government in court. The dispute settlement mechanism is, however, a complex and long process that must be initiated by the governments (through the ministers in the Commission), and there are many hurdles to jump before the process reaches the dispute panel stage.

The dispute settlement procedure:[29]

1. consultation on whether there has been a persistent failure to effectively enforce environmental laws;
2. special session of the Council;
3. convening of an arbitration panel;
4. presenting an initial and final report to the panel;
5. making an action plan;
6. if nonagreement with the action plan, approvement by the panel or fines;
7. if continued non-compliance NAFTA benefits are suspended.

The test for potential sanctions is whether there is a "persistent pattern" of failure to enforce effectively domestic environmental laws.[30] It may prove very difficult to prove, but this is also the element that makes NAFTA an unique international agreement.

> "Under the Environmental Agreement, NAFTA parties are committed to enforcing their domestic environmental laws. This is the first time such commitments have been made in an international agreement, and the Agreement creates mechanisms to ensure that they are carried through."[31]

In the end, the U.S. therefore succeeded in their efforts to establish trade sanctions as the last deterrent against persistent non-enforcement of environmental laws. But the final solution was broadened to include fines in the case of Canada as opposed to trade sanctions in the case of Mexico and the U.S. Canada's successful resistance against trade sanctions can be interpreted in three interwoven ways.

1. The *reason d'etat* behind the Side Agreement was environmental problems at the U.S.-Mexican border.
2. Canada already had the Free Trade Agreement with the U.S., and wanted NAFTA for strategic reasons.
3. The U.S. have much higher confidence in the Canadian legal system than in the Mexican courts.

Together these arguments did not favour too much pressure on Canada from the U.S. The Side Agreement was directed towards Mexico not Canada.

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Another example often put forward by NAFTA protagonists is NAFTA's treatment of trade obligations imposed by international environmental agreements. A number of environmental treaties require nations to restrict or prohibit trade in harmful goods, but NAFTA provides that trade obligations set out in a limited and specified number of international treaties "shall prevail" over any inconsistencies in NAFTA.[32] Although NAFTA supporters claim that this provision affirms the supremacy of international environmental agreements, not all measures taken pursuant to international environmental obligations "shall prevail" over NAFTA obligations. Rather, it seems such measures will survive NAFTA scrutiny only:

> "provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this agreement."[33]

This language seems to follow closely the "least trade restrictive" interpretation given to the term "necessary" found in the Article XX exemption clause of the GATT,[34] and moreover, this provision contrasts sharply with NAFTA's treatment of pre-existing tax conventions, the provisions of which expressly and unconditionally take precedence over any inconsistent NAFTA provisions.

Another formal exception with NAFTA is that it addresses the question of "pollution havens." In response to concern that a NAFTA party might lower its environmental standards to attract foreign investments, NAFTA provides that:

> "a Party should not waive or otherwise derogate from domestic environmental measures to encourage foreign investment."[35]

However, a nation that believes another party is lowering its environmental standards to encourage foreign direct investment and thereby failing to honour the NAFTA provision quoted above cannot utilise the formal NAFTA dispute settlement process to resolve this issue. Instead, the nation can only request for consultations with the allegedly offending nation with a view to avoid any encouragement of foreign direct investment though relaxation of environmental measures.

It is truth in the claim made by NAFTA supporters that the agreement represent a new and fresh regional approach towards the trade-environment nexus, but it is also obvious that there are several weaknesses in NAFTA. Questions concerned with legitimacy can be raised. For instance, the Side Agreement did not define clearly the actual relation between trade and

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environment. Only the dispute mechanism procedure is set up with qualification procedure: the problem must have a trade nexus. And as this definition is very likely to be interpreted differently, the question of how legitimate the NAFTA partners think that the trade-environment linkage is, is lurking around the corner. The point is that the Side Agreement was an American invention directed against Mexico which Mexico was not able to resist during the negotiation, but the fact that definitions and procedures are unclear entail that capable agents have sufficient space to try to influence the functioning of the institution. As long as actors have different motivations for linking and/or accepting linkages in agreements, the fruitfulness of the trade-environment nexus in terms of its contribution to sustainable development can be overrated if we do not have a proper understanding of why the nexus was initiated and for what strategic purposes. It is therefore perhaps true that the fact that the trade-environment relation remained unspecified is a good illustration of the strong symbolic aspects of the Side Agreement.[36] However, in politics symbols are not unimportant, and NAFTA's role as an example of co-operative regionalisation (although highly asymmetrical) across the former North-South divide is important within a trade-environment debate which quite often seems to recreate the "new international economic order" cleavages of the 1970s between developed and developing countries.

The European Union

The case of the EU is somewhat distinct compared to the two other regional arrangements that are analysed in this paper. The EU is the regional arrangement with the broadest mandate, it has a wider range of legal instruments at its disposal than other regional arrangements, and on the contrary to ASEAN and NAFTA it is a truly global actor. It is the world's largest trading bloc, and the sheer size of its market gives it incomparable potential influence on both international trade policies and international environmental policies.[37] Given the high level of institutionalisation it thus reflects the "hardest" regional project and provide therefore an interesting "ideal" case of the opportunities for and constraints to governance at the regional level.

The search for European unity and governance is driven by two competing visions. These are based on the notion that competitiveness requires constant-wide approaches, but they lead to opposite results. The first idea holds that market forces should operate on a continental basis, and subsequently the process of European integration should provide greater access to third parties. The second idea assume that intervention and rules, the social-

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environmental dimension should be likewise, and subsequently leading to a Europe which is more protectionist and closed to outsiders.[38]

The point is that the EU as an avant-garde of regionalisation with considerable economic clout have forced the rest of the world to conform increasingly to its standards, to reduce their barrier to EU exports and to seek lower entry barriers for their products in the EU market by concluding special associational agreements with it or, where possible, to join it. However, this is just one dimension of the EU-picture. The EU as the most institutionalised example so far of regional socio-economic governance, shows that trade represents just one part of a much more complex and dynamic economic system constructed by the interaction of services, technology, advanced and integrated public infrastructures and corporate cross-border networking strategies.

> "European-based companies rather than simply seeking exports and economies of scale, are developing Euro-wide delivery systems, corporate alliances, production networks and electronic marketplaces. The profound restructuring they are carrying out involves seeking customised, in-depth interactions with clients, suppliers and partners, through an expanding gamut of networking strategies, many of which have a strong information and advanced communication content. In this they are supported by Community programmes such as RACE, ESPRIT, EUREKA, Erasmus and Comet and institutions like ETSI (European Telecommunications Standardisation Institute."[39]

In other words, economic competitiveness (trade) were highly instrumental in the formation of the European Economic Community in 1957, and whereas other objectives such as environmental protection have gained currency, competitiveness is still of primary importance in the EU. At the same time there has been some recognition of the necessity to integrate trade/competitiveness issues and environmental concerns. The Single European Act as well as the Treaty on the European Union explicitly state the principle of environmental policy integration and introduce the notion that there need not be a trade off between seeking a higher level of environmental protection and creating internationally competitive economic structures in Europe. This is also the central message of the Fifth Environmental Action Programme. The 1993 Commission White Paper on Growth, Competitiveness and Employment discussed the notion of a "double dividend," i.e. the integration of environmental protection with economic growth through a reform of the tax system and support of the environmental technology sector. The 1996 Communication on Trade and Environment discusses the compatibility of environmental protection measures with the expansion of liberal trading relations on a global scale (under the GATT/WTO). However, these ideas have so far not been translated into policy, and competitiveness and environmental policies

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continue to be pursued along separate tracks. Furthermore, there is some evidence of environmental damage resulting from various EU policies and measures which aim at enhancing competitiveness (e.g. infrastructure programmes, increased intra-community trade) but, to date, there has been much environmental rhetoric but little systematic effort at analysing and responding to the links between competitiveness and environmental protection at the EU level.

At the EU level, globalisation has coincided with greater calls for subsidiarity as a number of member states have become disenchanted with the increased centralisation of policy-making at the EU level. At the same time, the adoption of sustainability as a goal in EU policy making has led to calls for "shared responsibility" (through the Fifth Environmental Action Programme). In principle, subsidarity and shared responsibility could mean a more decentralised type of decision-making with a greater participation from and co-operation among all relevant actors, which could be compatible with both environmental and competitiveness objectives. However, claims has been made that instead these concerns with the appropriate level of policy making are leading to both re-nationalisation and deregulation, with a disproportionate influence from industry, referring to competitiveness issues as a reason for less stringent action. For instance, in 1993 the influential European Round Table of Industrialists[40] called for significant changes to the extent and nature of the European regulatory framework as part of their plan to restore European competitiveness. Furthermore, this way of thinking was echoed in communication from the Commission. In a speech in 1994, Bernard Delogu, a leading DG XI official in charge of environmental auditing and control of industrial installations, stated that future European environmental legislation would be strongly influenced by the concept of market forces and less dependent on command and control regulation.[41]

The driving force behind the shift from command-control (regulation) to market forces (deregulation) was concern in the EU about the erosion of European competitiveness.[42] In April 1994, the British and German governments set up a group of business leaders as part of an effort to curb the effects of what was perceived as over-regulation in the EU. In the spring of 1995, this group called on the Commission to scrap the Directive on Dangerous Substances, revise the Drinking Water Directive and amend proposals for Integrated Pollution Prevention and Control.[43] Furthermore, the alliance established between Britain and Germany continued to press for further deregulation at the Corfu European Summit. At this summit, Britain supported Germany's request for the establishment of a group of businessmen and

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civil servants in order to examine whether the EU and national legislation was imposing unnecessary burdens on companies. With a mandate from the summit to examine national and EU wide legislation and their effects on competitiveness and job creation and to recommend how regulations could be abolished or simplified the committee went to work.

Its conclusions were presented to the Cannes Summit in June 1995. It did not call for widespread deregulation. Nevertheless, it did state that regulatory frameworks must be reviewed if competitiveness and employment objectives were to be achieved, and hence environmental and other regulations were identified as creating additional burdens for companies. In short, the argument was that the "playing field needed levelling." However, the Commission defended the benefits of regulation with the argument that "a good regulatory framework sets out the within which the businessman knows he can operate freely."[44]

In other words, whereas claims that "shared responsibility" leads to both re-nationalisation and deregulation, with a disproportionate influence from industry, referring to competitiveness issues as a reason for less stringent action yet are unsubstantiated, questions do arise about the future of environmental protection in the EU in a context of increased economic globalisation and political struggles over governance structures. It has, for instance, been suggested that with respect to the question of environmental deregulation in Europe firms are applying the game of competition on two different arenas: the policy area and the competitive arena.

> "A firm's ability to influence the outcomes in the regulatory arena depends on its position in the competitive arenas; symmetrically, its competitive position depends, [in] the medium and long run, on its ability to secure advantages on the policy arena, so that the two chessboards interact with each other in a complex way."[45]

However, a firm is not just any firm, and evidence from the EU seems to suggest that, in general, the balance of the advantage in both arenas is with the larger firm, although the difference is more marked in the policy arena than in the competitive arena.[46] Larger firms have better access to and greater possibilities to influence the agenda of environmental deregulation in the EU whereas the competitiveness of smaller firms are likely to be more adversely affected by existing and proposed regulations. Large firms are (de)- regulation makers, small firms are (de)regulation takers.[47]

Another contested area for deregulation is the transport sector and EU policies regarding governance of the transport-environment nexus. The main problem is that both from a legal and from a historical perspective, European transport policies were designed to serve

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the objective of European integration, and not environmental protection. The environmental dimension must therefore try to findt its niche within the generic objective of European/market integration.[48] Thus, until recently, taxes on road transport have mainly been treated by the EU as a harmonisation problem. The building of a common European transport market entailed liberalisation intra-EU transport and a step-by-step opening of national markets for non-resident hauliers (cabotage). This created tension between member states with high vehicle taxes, no direct charges for road use and attractive internal transport market (particularly in Germany). On the other side stood those whose national hauliers were expected to gain the main profits from the opening of markets. This group was comprised by the Netherlands, Belgium and Denmark. For instance, the Dutch hauliers are among the most efficient in Europe and in addition, they enjoyed lower tax burdens than their German competitors. This made the German government, and in particular the Ministry of Transport, who is traditionally considered to have a close relationship to the national hauliers' association, block any further step towards the opening of markets as long as there was no agreement on parallel harmonisation measures. Germany insisted on the harmonisation of annual vehicle taxes on a high level, and argued for the introduction of road user charges built on the principle of territoriality. As a consequence of the German position charges would have to be paid where the infrastructure was actually used and not only in a vehicle's home country. Apart from fiscal motivations and Germany's obvious will to defend its national road transport industry, in order to sustain and strengthen its position the German government also argued strongly that high taxes were needed in order to ensure that road transport contributed to the total infrastructural and environmental costs. This conflict was resolved in a political compromise in June 1993. The outcome was an agreement around a framework of stepwise deregulation of cabotage until 1998,[49] the introduction of minimum levels for vehicle taxes and the introduction of new road user charges in the Benelux countries, Denmark and Germany.[50] In other words, in line with the general spirit of the European Community a compromise was reached which nobody really was extremely thrilled about, but which also nobody disliked enough to keep the issue as top priority on their EU agenda.

In sum, we can say that the system of regionalised governance that is emerging in Europe is both unique and uniquely complex. To some extent the member states seems to become semi-sovereign entities, but on the other side no evidence at hand seems to suggest that they will disappear. The outcome is a complex system of regionalised governance in which the Community's supranational institutions have to share power with national as well as

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international, transnational and subnational institutions. Such a system of governance has its strengths - it facilitates the kind of political compromise described above, but it also has its obvious weaknesses. The main one is a profound absence of hierarchy and monopoly among a wide range of players - nations, classes, sectors and firms - of different but uncertain status. In other words, the EU is without doubt the regional arrangement with the broadest mandate, with the widest range of legal instruments at its disposal and the highest level of institutionalisation, but it is also clear that even though the EU can be used as a showcase for the opportunities for governance at the regional level it has not managed to sort out the multitude of constraints against regional governance. The trade-environment nexus is still unsolved within the EU, and the discussion on the compatibility of environmental protection measures with the expansion of liberal trading relations under the supervision of GATT/WTO has not be translated into policy. In short, both the internal and the external dimension of the competitiveness-environmental policy nexus continue to be pursued along separate tracks by the EU.

Conclusion - the potential of regional trade institutions?

Both ASEAN, NAFTA and the EU can be interpreted as regional layers in a globalised world political economy that try to deal with the challenges that general deregulation of public control over the economy represent for national actors. Nevertheless, no evidence suggests that they represents a firm barrier against globalisation. On the contrary, they should rather be seen as in-betweens: the regional project is both a part of and a facilitator of globalisation, and a regional counter-governance layer in the world political economy. In other words, no general answer can be offered to the question of whether they can constitute a governance basis on which international co-operation can be built. The potential is present (as indicated by the NAFTA experience), but whether we will actually be able to reap these benefits is an entirely other matter. This will depend on the actors involved in the regional project, and how they perceive their situation and their contextual relationship to other regional arrangements. It is not just one uniform approach to the trade-environment nexus, but a whole range of approaches. What kind of approach different regions chose is influenced by their various historical trajectories and how the participants involved perceive their socio-economic situation. The same kind of adherence to competing doxas we find within the scientific community we also find among the three regional projects put under scrutiny in this paper. The legitimacy of the political regimes that constitute ASEAN is built

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on economic growth. Subsequently, the ASEAN countries are afraid that the trade-environment nexus can constitute an effective barrier against further ASEAN penetration of overseas markets. ASEAN has therefore argued with force that issues like the trade-environment nexus should not be included on the WTO agenda. In NAFTA, the trade-environment nexus is formally integrated through the Side-agreement, but we also saw how the various actors involved in that process clearly had different motivations for linking and/or accepting linkages in the agreement. These differences may decrease the legitimacy of the trade-environment linkage in NAFTA. Even in the EU - the avantgarde of regionalisation - the opportunities for governance at the regional with respect to the trade-environment nexus have not yet materialised. The 15 EU countries has formally agreed to link trade and environment, but the quite advanced generic discussion on the compatibility of environmental protection measures with the expansion of liberal trading relations under the supervision of GATT/WTO have not been translated into policy. The question is if this evidence suggests that the idea about a regional governance layer is a bridge too far?

Not necessarily. At least not, if we accept that national governance of interwoven issue-areas such as the trade-environment nexus under the spell of globalisation is more or less impossible. If this is the situation we are faced with, we are in need of new efficient, effective and legitimate governance structures in which some kind of reconciliation of the trade-environment nexus can be embedded. Thus, even though, all of the three regional projects put under scrutiny here seems to have both efficiency problems and legitimacy problems it is also difficult to envision the emergence of other and more viable governance alternatives than the regional layer. In other words, the best bet for reconciliation of the trade-environment nexus in the age of globalisation is most probably the emergence of various regional governance layers. However, in order for such a development to emerge the various regional projects in place around the globe must sort out their problems connected to the regional governance triangular problematique of efficiency, effectiveness and legitimacy. It is only through effective and legitimate regional co-ordination of national policies that the regional layer can emerge as an efficient and viable governance alternative, in-between the national and the global level.

Notes

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[1] James H. Mittelman (1999) "Rethinking the new regionalism in the context of globalisation." In Björn Hettne, András Inotai & Osvaldo Sunkel [eds.] *Globalism and the New Regionalism*. London: Macmillan, (p. 25).
[2] For similar arguments see, for instance, Karen T. Litfin (1994) *Ozone Discourses*. New York: Columbia University Press.
[3] Pierre Bourdieu (1977) *Outline of a Theory of Practice*. Cambridge: Cambridge University Press, (p. 164).
[4] See for instance, Thomas Kuhn (1970) "Logic of discovery or psychology of research." In Imre Lakatos & Alan Musgrave [eds.] *Criticism and the Growth of Knowledge*. Cambridge: Cambridge University Press.
[5] Tim Lang & Colin Hines (1993) *The New Protectionism. Protecting the Future Against Free Trade*. London: Earthscan Publications Ltd.
[6] Kym Anderson & Richard Blackhurst (1992) "Trade, the environment and public policy." In Kym Anderson & Richard Blackhurst [eds.] *The Greening of World Trade Issues*. London: Harvester Wheatsheaf.
[7] J. Dean (1992) "Trade and environment: a survey of the literature." In Patrick Low [ed.] *International Trade and the Environment*. Washington D.C.: The World Bank.
[8] Anderson & Blackhurst, (p. 20-21).
[9] See, for instance, Gyula Bándi (1996) "Deregulation as an environmental policy instrument in Hungary." Paper presented to a workshop on *Deregulation and the Environment*, European University Institute, Florence, 9-11 May, 1996.
[10] This does not necessarily imply that environmental protection will be harmed, but it will change the political-economic context of environmental protection.
[11] UNCTAD (1994) *The Outcome of the Uruguay Round: An Initial Assessment - Supporting Papers to the Trade and Development Report 1994*. New York: UN, (p. 31)
[12] An excellent example of such arguments is W. Streeck & P.C. Schmitter (1991) "From national corporatism to transnational pluralism: organised interests in the Single European Market." *Politics and Society*, vol. 19, no. 2, (p. 133-164).
[13] Vietnam joined on the 28th of July 1995. Cambodia were supposed to join ASEAN together with Myanmar and Laos in July 1997, but after the *coup d'etat* by Hun Sen on the 5th of July 1997 ASEAN had to postpone Cambodia's induction into the regional grouping for one year.
[14] Thailand and Vietnam's respective traditional backing of the royalist movement and Hun Sen's communist party is one reason why the new Cambodian crisis that surfaced on the 5th of July 1997 was so painful for ASEAN. Instead of celebrating Southeast Asian harmony and unity by the enlargement of ASEAN to 10 countries by induction of Cambodia, Laos and Myanmar, Cambodian membership had to be postponed and it was feared that the situation could escalated to renewed tension between Thailand and Vietnam. In other words, one feared that the situation could turn the clock back to the regional geopolitics of the cold war.
[15] The process of removing intra-regional trade barriers are supposed to be completed by 2203 when most tariffs are supposed to reach the 0-5 per cent level. See Chia Siow Yue (1998) "Foreign and intra-regional direct investments in ASEAN and emerging ASEAN multinations." In Kiichiro Fukasaku, Fukunari Kimura & Shujiro Urata [eds.] *Asia & Europe: Beyond Competing Regionalism*. Brighton: Sussex Academic Press, (p. 45-84).
[16] Sultan Hassanal Bolkiah, opening address to the ASEAN trade and economic ministers meeting, Brunei, September 1995.
[17] Asian Development Bank (1997) *Emerging Asia: Changes and Challenges*. Manila: ADB, (p. 199).
[18] This is however not an argument in favour of slow or zero growth. Slow economic growth does not guarantee a better environment. The environmental problems is just as huge in slow growing South Asia as in fast growing Southeast Asia. The environmental degradation in Eastern Europe is another rejoinder that the relationship between growth rates and the environment is ambiguous at best.
[19] See Bernard Eccleston & David Potter (1996) "Environmental NGOs and different political contexts in Southeast Asia: Malaysia, Indonesia and Vietnam." In Michael J.G. Parnwell & Raymond L. Bryant [eds.] *Environmental Change in Southeast Asia. People, Politics and Sustainable Development*. London: Routledge.
[20] See Iwan J. Azis (1996) "Resolving possible tensions in ASEAN's future trade - using analytical hierarchy process." *ASEAN Economic Bulletin*, vol. 12, no. 3, p. 309-324).
[21] *Ibid*, (p. 311).
[22] Rules listed in any multilateral environmental agreement that ASEAN countries have agreed to join is however another matter. The ASEAN view is that these should be adhered to even if such agreements have trade provisions.
[23] See, for instance, Daniel C. Esty (1994) *Greening the GATT: Trade, Environment and the Future*. Washington D.C.: Institute for International Economics.
[24] See Mary E. Kelly (1993) *NAFTA's Environmental Side Agreement: A Review and Analysis*. Austin: Texas Centre for Policy Studies.

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[25] Brænden, (p. 92).
[26] See Inside US Trade Special Report May 21, 1993 for further details.
[27] Owen J. Saunders (1994) "NAFTA and the North American Agreement on Environmental Co-operation: a new model for international collaboration on trade and environment." *Colorado Journal of International Law and Policy*, vol. 5, no. 2, (p. 246-273).
[28] Of the three countries concerned it is only in Canada it is possible to use domestic courts to enforce fines by an international body.
[29] Source: Brænden and part five of the Side Agreement, Articles 22-36.
[30] "Persistent patterns" means a sustained or recurring course of action or inaction beginning after the day of entry of the agreement. See art. 45 (1).
[31] Carol Browner, Administrator EPA, NAFTA Testimony 10 November 1993.
[32] NAFTA supra note 115, art. 104. This provision applies to C.I.T.E.S., the Montreal Protocol and the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal.
[33] NAFTA, supra note 115, art. 104 [1].
[34] This provision also imposes new requirements and new trade disciplines on parties to these international environmental agreements.
[35] NAFTA, supra note 115, art. 2103. During the NAFTA negotiations, the three parties considered, but finally could not agree on stronger language. The Canadian had urged the use of the mandatory verb "shall" rather than the hortatory "should," this suggestion was rejected by the Bush administration.
[36] See Brænden.
[37] See Charlotte Bretherton & John Vogler (1999) *The European Union as a Global Actor*. London: Routledge.
[38] See, Robert Z. Lawrence (1994) "Emerging regional arrangements: building blocks or stumbling blocks?" In Jeffrey A. Frieden & David A. Lake [eds.] *International Political Economy*. New York: St. Martin's Press; and Sandro Sideri (1997) "Globalisation and regional integration." *The European Journal of Development Research*, vol. 9, no. 1, (p. 38-82), for similar arguments.
[39] Sideri, (p. 55).
[40] This roundtable is made up of the chief executives of leading European companies.
[41] The EU's schemes for ecolabeling and environmental management and auditing (EMAS) are examples of this trend. See European Chemical News, 20 June 1994.
[42] For instance, the report of the "Five Wise Men" in November 1994 argued that any export-led recovery had to be coupled with more deregulation. See Wyn Grant (1996) "Large firms, SMEs and European environmental deregulation." Paper presented to the workshop on *Deregulation and the Environment*, European University Institute, Florence, 9-11 May, 1996.
[43] *Ibid*.
[44] Financial Times, 23 June 1995.
[45] S. Brusco, P. Bertossi & A. Cottica (1996) "Playing on two chessboards - the European waste management industry: strategic behaviour in the market and the policy debate." In F. Lévèque [eds.] *Environmental Policy in Europe*. Cheltenham: Edward Elgar, (p. 133).
[46] See Grant.
[47] See F. Lévèque (1996) "Conclusion." in F. Lévèque [ed.] *Environmental Policy in Europe*. Cheltenham: Edward Elgar.
[48] For more details see Christian Hey (1997) "Greening other policies: the case of freight transport." In Duncan Liefferink & Mikael Skou Andersen [eds.] *The Innovation of EU Environmental Policy*. Copenhagen: Scandinavian University Press, (p. 173-197).
[49] See Council regulation 3118/93.
[50] See Eurovignette, Council directive 93/98.

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