新跨區域主義？論歐盟與東亞的整合

New Inter-regionalism? On EU-East Asian Integration

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摘要

本文將從貿易政治的觀點檢視歐盟與東亞國家之間的跨區域對話，特別是針對亞歐會議(ASEM)和歐盟與東協之對話。東協與歐盟是兩個對比鮮明的區域團體，前者常被視為一貌合神離的區域社群，而後者則被視為緊密團結的區域組織，這可從其對政經與安全議題觀點之差異而瞻知。歐盟被東協視為重要的戰略夥伴，以平衡其與外部強權的關係，特別是針對中國的興起。而歐盟在其 2006 年的白皮書裡，亦將東協列為最優先協商跨區域貿易協定的對象之一。然而，即使歐盟被視為東協社經發展的主要支助者，雙方的夥伴關係還是相當狹窄與淺短。本文希望從雙方在亞歐會議的互動裡，找出雙方不願積極進行整合的重要因素，更藉此指出新跨區域主義的弱點。

關鍵詞：跨區域主義、亞歐會議、貿易政治

Trade and Human Rights

A story told by Stefanie Grant is quite intriguing and stimulating. She was once visited by the Geneva trade representative of a major developed country. He had heard that the UN Office of High Commissioner on Human Rights (OHCHR) was preparing a report on the WTO Agreement on Trade-Related Intellectual Property Rights (the TRIPS Agreement). He wanted to know why, and he expressed sheer incredulity that a trade agreement was any business of a UN human rights institution.[1] The "trade and human rights" debate has clearly come a long way since those days in which it was a struggle even to convince many of any connection between the two fields. Nevertheless, today the UN human rights institutions are increasingly addressing aspects of international trade, and embarking on the difficult task of identifying incompatibilities between international trade rules and international human rights principles. Most frequently, the Committee on economic, Social and Cultural Rights (CESCR) is beginning to frame trade issues in the context of human rights treaty obligations. The Human Rights Commission and the Sub-Commission on the Protection and Promotion of Human Rights give increasing attention to social and economic issues. The OHCHR addresses international economic and financial issues a part of its general mandate to "mainstream" human rights.

Why has this taken place? Since the Vienna Conference in 1993, implementation of social and economic rights has moved out of the shadow cast by the cold war, to be recognized as a priority and as an essential element in poverty reduction and conflict prevention. In parallel but separate processes, most states have ratified the majority of human rights treaties and many have also become WTO members. Furthermore, all WTO members are now parties to one or more of the human rights treaties, with a concomitant legal obligation to respect the rights contained in them.

Human rights discussion on trade related issues takes as its starting point the recognition that, for some people living in the developing world, the removal of obstacles to trade and capital movements in the past decades has not resulted in accelerated growth and income convergence with more advanced countries. The number of countries classified as LDCs has risen to 47 (nearly ten more than in 1991),[2] and for the citizens of those countries economic marginalization has been

[1] Stefanie Grant, "Functional Distinction or Bilingualism? Human Rights and Trade: The UN Human Rights System," in Frederick M. Abbott, Christine Breining-Kaufmann and Thomas Cottier, eds., International Trade and Human Rights: Foundations and Conceptual Issues (Ann Arbor: University of Michigan Press, 2006), p. 133.

[2] See "LDC Data" at the United Nations webpage (https://esango.un.org/sp/ldc_mem/web/StatPlanet.html?_ga=2.218232666.273912672.1556077740-2031398766.1552362324).

accompanied by increased poverty and related denials of social and economic rights. It is in this broad context that states have begun to study the impact of the processes of globalization, including WTO trade treaties, on the enjoyment of human rights.

On the other hand, there is recognition that while international law placese responsibility for implementing human rights on the state, the state's actual power to regulate the activities of the private sector, especially of large international corporations, is often limited. Given the increasing role of transnational corporations, especially where national provision of basic services such as healthy, food provision, or education is privatized, the broad human rights obligations of non-state actors need to be clarified. Specifically, there is concern that the patent provisions of the TRIPS Agreement impact negatively upon equal access to health care and pharmaceuticals which is required by the right to health provisions of international human rights law.

There is also growing recognition of human rights violations which are carried out through illicit international trade, and facilitated by globalized commerce, travel and communication, such as abusive migration, trafficking, the sale of children, and transboundary dumping of toxic waste.[3]

Perhaps the most sustained and influential contribution to the debate on "trade and human rights" has come from the High Commissioner's office, in the form of a series of reports. The first, released in 2001, addressed the TRIPs agreement and its impact on human health, and since then the topics covered have included agricultural liberalization, and the principles of non-discrimination and participation as they apply in the context of trade policy.[4]

Of course, UN human rights institutions were not the first to make a connection between human rights and international Trade. This seems to have been an innovation of some elements of civil society, particularly in the context of the

[3] Grant, "Functional Distinction or Bilingualism?" pp. 133-34.

[4] "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights," E/CN.4/Sub.2/2001/13 (27 June 2001); "Globalization and Its Impact on the full enjoyment of Human Rights," E/CN.4/2002/54 (15 January 2002); "Liberalization of Trade in Services and Human Rights," E/CN.4/Sub.2/2002/9 (25 June 2002); "Human Rights, Trade and Investment," E/CN.4/Sub.2/2003/9 (2 July 2003); "An Analytical Study on the Fundamental Principle of non-Discrimination in the Context of Globalization," E/CN.4/2004/40 (15 January 2004); "Analytical Study of the HCHR on the Fundamental Principle of Participation and Its Application in the Context of Globalization," E/CN.4/2005/41 (23 December 2004). See also OHCHR, *Human Rights and World Trade Agreements: Using General Exceptions Clauses to Protect Human Rights* (New York and Geneva: UN, 2005).

campaigns conducted during the negotiation of both NAFTA and the aborted Multilateral Agreement on Investment (MAI).[5] In some sense, the UN work program was a response to civil society pressure, or at least to a growing perception that international trade matters ought to be a central part of modern human rights agenda. At the same time, the work of UN human rights institutions has been a central driver in expanding and directing that civil society agenda. The important place of civil society in the trade and human rights debate can be seen in a number of different development: the diffusion of human rights language into the work of NGOs primarily interested in trade matters; the trend among human rights NGOs to develop new expertise and activities on international economic questions, as well as the significant growth in groups, and networks, specifically mandated to work at the nexus between the trade and human rights regimes, and to facilitate conversation between the two.[6]

At the same time, the empowerment of Third World countries have found its clearest expression in the call for a "New International Economic Order". While many elements making up this catalogue of demands in the long run proved to be utopian, in the 1970s they, nonetheless, could not be totally disregarded; some sort of response was unavoidable should the dialogue between North and South be maintained. The elaboration of a new framework agreement represented an ideal opportunity to test the case for development cooperation approach.[7] For developing countries, fighting for their due position in international relations also meant underlining their sovereignty. Development cooperation had, therefore, to be liberated from any patronizing attitude incompatible with a system of relations between equal partners. Concepts such as cooperation, partnership and dialogue became pivotal.[8]

Take, for example, the prohibition on discrimination in respect of domestic regulation, contained in GATT Article III and GATS Article XVII. While the formal scope of application of these provisions is very wide, in principle covering virtually the

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[5] For an early work see, e.g., Malini Mehra, ed., *Human Rights and Economic Globalisation: Directions for the WTO* (Global Publications Foundation in cooperation with International NGO Committee on Human Rights in Trade and Investment [and] International Coalition for Development Action, 1999).

[6] See Andrew T.F. Lang, "Rethinking Trade and Human Rights" (2006) (https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=7916&context=expresso), p. 6.

[7] See, for example, Karen A. Hudes, "Towards a New International Economic Order," *Yale Journal of International Law*, 2(1) (1975), pp. 88-181.

[8] Peter Hilpold, "EU Development Cooperation at a Crossroad: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance," *European Foreign Affairs Review*, 7 (January 2002), PP. 5-6.

universe of internal regulatory measures which affect trade, in practice their operation has been considerably more limited. This is, in part, because of the existence of a variety of informal norms and tacit understandings which tell us what sorts of regulation can properly thought of as an impediment to trade, and what sorts simply have nothing to do with trade. Of course, these informal norms are not always well defined, and certainly vary over time. Before the 1980s, for example, internal regulations of any sort were rarely the subject of trade dispute. Since then, however, particular regulatory fields have come to be perceived as potential sources of trade barriers, and as legitimate targets of trade dispute: health and safety regulation, consumer protection regulation, and industrial policy are examples. Other fields—such as public interest regulation of essential service suppliers, affirmative action policies in respect of marginalized groups, social labelling schemes, or even renewable policy,[9] are arguably in the early stages of the same process.

Though it is rarely made explicit, the human rights movements is, therefore, very much in the game of knowledge production.[10] When human rights actors produce their numerous commentaries on the "human rights impact" of the trading system, and so on, one of the most important functions they are performing is facilitating the production of social knowledge: generating shred narratives; synthesizing some kind of consensus about how certain aspects of the trading system operate: and selecting, reframing and imparting new meaning to information produced by various kinds of trade policy experts. The knowledge thereby produced can, of course, influence policy makers directly, helping them to reformulate their strategies and explicit policy preferences. Just as important, however, is the destabilizing role it plays in respect of traditional trade debates. It facilitates the reconsideration and renewal of such debates by highlighting their inevitable cognitive limitations, and by demonstrating that traditional trade experts have no monopoly on truths which can be told about the trading system. As Jacobsen has noted in a different context, it is precisely the "public clashes" among different communities, and among different regimes of truth, that can often yield "the most valuable and self-critical input into policy decisions".[11]

In the area of agriculture, developing countries, social movements and many NGOs have been calling for ther inclusion of specific language on Special Products (SPs) and the creation of a Special Safeguard Mechanism (SSM), which would allow developing

[9] Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer View of Lw and Politics," *International Organization*, 55(3) (Summer 2001), p. 743.
[10] See Lang, "Rethinking Trade and Human Rights", p. 82.
[11] John Kurt Jacobsen, "Review: Much Ado About Ideas: The Cognitive Factor in Economic Policy," *World Politics*, 47(2) (January 1995), pp. 283, 303.

countries to exempt certain food crops and to protect domestic agriculture with highe tariffs. There is still no agreement among countries on how to define Sps and SSM. Controversy on the question is one of the reasons why the Doha talks in WTO were suspended in July 2006.

Although SPs and the proposed SSM are necessarily limited tools that do not address the need for a fundamentally different model for trade policy-making in the area of agriculture, they nevertheless would enable countries to protect national agricultural programs and to curb dumping. They also offer the scope for governments to design and implement gender-specific goals for sustainable agricultural development. For example, gender-specific indicators to apply the SPs and SSM could include measures to assess and protect the mosy vulnerable women based on their income level and their level of access to economic and productive resources. Such indicators might also take into consideration the relationship of agricultural products to food security, social and cultural development, national and regional contexts, and gender-disaggregated data on rural trends in employment and well-being.[12]

Human Rights Framework as Applied to Agribusinesses

Dutch colonial rulers used to have a strong grasp of the pluralistic legal systems in Netherlands East India—the name of Indonesia at that time. They invested resources into researching local systems of law so as to guide policy-making in the colony. The general understanding of the colonial government was that State (colonial) law was to be separate from people's law which consisted of customary (*adat*) and religious (mainly Islamic) laws.

Indonesian independence on August 17, 1945 led to a fundamental change in the legal system. A national legal system was set up to replace the colonial one. The dualism of state and people's laws as recognized during the colonial period was now denied. *Adat* law and, in certain cases, Islamic laws were now considered to be the pillars of national law. The Basic Agrarian Law (Law 5/1960), for example, clearly states that the national agrarian (land and natural resources) law is based on *adat* laws.

[12] Maria Pia Hernandez, *Incorporating Gender Considerations for the designation of special Products in WTO Agricultural Negotiations*
(Geneva: International Gender and Trade Network (IBTN), March 2005); cited in Alexandra Spieldoch, *A Row to Hoe: The Gender Impact of Trade Liberalization on Our Food System, Agricultural Markets and Women's Human Rights* (Geneva: Friedrich-Ebert-Stiftung, 2007), p. 17.

In Suharto's New Order period, however, *adat* las was never considered as part of national laws. Several laws on natural resources either ignored or limited the recognition of *adat* laws. A revival of *adat* laws—and also Islamic laws—took place in the beginning of *reformasi*—a period after the resignation of Suharto. Some district regulations were enacted to recognize certain *adat* communities and their land. A law on special autonomy was also enacted in 2001 for Papua, recognizing the role of *adat* institutions and the implementation of *adat* law in that province. Similarly, after a peace agreement between Indonesia's government and Aceh separatist organization *Gerakan Aceh Merdeka* (Aceh Independence Movement, GAM), a law on special autonomy for Aceh was enacted, allowing the implementation of Islamic law in that region.

It appears that, gradually, the State law has adopted both *adat* and Islamic laws. Yet, in many fields, people continue to struggle to get their *adat* laws respected and recognized by the State. In addition to the fact that State and people's laws are often in tension with each other, the case of Indonesia also highlights the pluralistic nature of State laws on land and natural resources, a field in which numerous disharmonized laws coexist. There are quite a few laws concerned with land tenure, environmental management and spatial planning such as the Decree of the Consultative People's Assembly (TAP MPR, No. IX/2001), the Basic Agrarian Law (BAL, Law 5/1960), the Spatial Planning (Law 26/2007), Environmental Protection and Management (Law 32/2009) as well as some laws concerning specific natural resource management.[13]

Given these legal developments, it must be understood that legal pluralism in Indonesia is not a dualism of State versus people's laws, but rather a complex situation in which laws of both the State legal system and people's normative systems interact and coexist.

The post-1998 political transition in Indonesia has opened up a new chapter for the protection of human rights, in part, achieved through constitutional and legal reforms. Indonesia is party to 8 major human rights conventions: the Convention against Torture (ratified through Law 5/1998); the Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on Right of the Child; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of

[13] See Myrna A. Safitri, "Legal Pluralism in Indonesia's Land and Natural Resource Tenure: A Summary of Presentations," in Marcus Colchester and Sophie Chao, eds., *Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia* (FPP and AIPP, 2011), pp. 127-28.

Discrimination Against Women; and the International Convention on the Rights of Migrant Workers and Their Families. Protection of rights is also guaranteed through Law 39/1999 on Human Rights, which reiterates the rights enshrined in the Universal Declaration on Human Rights.

While earlier attention to the protection of rights in Indonesia was heavily focused on the protection of civil and political rights due to the repressive regime under the New Order, a growing body of literature points to a development in economic, social and cultural rights, including in relation to recognition of the rights of indigenous peoples. The Constitutional Court, established in 201, has played a crucial role in this regard. It has jurisdiction over the violation of rights as guaranteed by the Constitution, and provides an avenue for citizens to bring up and seek remedy for such violations. Substantial jurisprudence has emerged from this body for the strengthening of protection of human rights for individuals and communities in the face of non-State actors, including corporations. While earlier case laws focused on questions of the constitutionality of privatization of services (such as electricity and water), later jurisprudence has focused and problematized the issue of collective land rights and rights to manage coastal areas, as part of their rights to life under Article 28A of the Constitution.[14]

However, the implementation of the normative constitutional and legal framework has fallen short of protecting and recognizing such rights in practice. This is due to the issuance of laws and policies which contradict the said provision, as well as the lack of implementing regulations concerning constitutional and legal guarantees. For instance, Law 39/1999 on Human Rights contains a normative framework but not related implementing regulation has been produced. Particularly relevant to agribusiness expansion is 41/1999 Forest Law, which fails to recognize *adat* law by incorporating forest controlled by indigenous peoples into State forest.[15]

Land as a Factor Influencing Development

Overlaps and contradictions in national and international laws have, in turn, led to competing claims, misuses and manipulation of laws and regulations by parties in

[14] See, for instance, Constitutional Court Decision No. 3/PUU-VIII/2010 Concerning Judicial Review of Law No. 27 of 2007 Regarding the Management of Coastal Area and Small Isles.

[15] See Indriaswati Saptaningrum, "Brief #2 of 8: Republic of Indonesia," in Sophie Chao, ed., *Agribusiness Large-Scale Land Acquisitions and Human Rights in Southeast Asia: Updates from Indonesia, Thailand, Philippines, Malaysia, Cambodia, Timor-Leste and Burma* (Forest Peoples Programme, August 2013), p. 26.

conflict, as in the case of land conflicts in Lembata, Eastern Indonesia.[16] In retrospect, the "classical" view of the importance of natural resources as a prime determinant of the wealth of nations was allied to the belief that these resources are finite in quantity and that, therefore, competition to control them amounted to a zero-sum game. Thus, in the Mercantilist tradition, the possession of overseas colonies was regarded as enhancing the wealth and power of the colonial nation by an amount matched by the diminution of the actual or potential power of rivals and enemies. Notwithstanding the events of the nineteenth century which vitiated this argument, Germany in the twentieth century sought to expand her *lebenstraum* and Japan seized an empire in the western Pacific. And since about 1970, the spectre of finite resources which are on the verge of exhaustion has returned.[17]

During the nineteenth century and the first three-quarters of the twentieth, several events, or series of events, diverted attention from the natural resource endowment as a factor of importance for the more advanced nations. Adam Smith and Ricardo visualized the growth of an economy as in Figure 1.[18] The initial wealth of a nation, at time t_0 and as indicated by AB, is determined by the combination of natural endowment and existing technology. Smith visualized a transition process to a higher income level, CD, which also set by the finite nature of a nation's resource endowment. Therefore, for Smith the problem of development was the problem of transition from AB to CD. As is well known, Smith emphasized the economies to be had in manufacturing by the division of labor and extension of markets, and by derivation drew attention to capital investment as the engine of change. This was the view that came to dominate thinking about the growth process in the more advanced countries, a domination reinforced by the evidence of increasing returns in manufacturing in contrast to the supposed diminishing returns in agriculture. Hence, Marshall could observe, "We say broadly that while the part which nature plays in production shows a tendency to diminishing return, the part which man plays shows a tendency to increasing return".[19] Admittedly, Marshall went on to observe that the two tendencies are constantly operating against each other, but at the time he wrote it seemed clear that the increasing return of man's activities outweighed any tendency to diminishing return from the use of natural resources.

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[16] See Safitri, "Legal Pluralism in Indonesia's Land and Natural Resource Tenure," p. 129.

[17] Donella H. Meadows *et al*., *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York: Universe Books, 1972).

[18] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (ΜεταLibri, [1776] 2007); David Ricardo, *On the Principles of Political Economy and Taxation*, 3rd ed. (Cambridge University Press, [1817] 1821).

[19] Alfred Marshall, *Principles of Economics* (New York: Macmillan, [1890] 1949), p. 265.

An important reason for this optimistic neglect of land as a factor of production may be found in a whole series of developments that occurred throughout the nineteenth and early twentieth centuries. Improvement in overland and ocean transport opened up very large areas of the world to commerce and settlement. The invention of the cotton gin, barbed wire, grain harvesters, etc., rendered possible the large-scale exploitation of land that was otherwise difficult to use for commercial production. Technological developments in manufacturing industry led to more economical use of raw materials and fuels. Systemic mapping and chance discoveries yielded major mineral finds that, in some cases, dwarfed the familiar deposits in Europe and the eastern seaboard of North America. Finally, the nineteenth century saw the emergence of Britain's free trade doctrine into the leading, though not the exclusive, principle whereby international trade was regulated. The combined effect of all these developments was to create a situation in which the developed nations (of western Europe and North America) experienced no serious check on account of resource scarcities—though there were periods of relative shortage.[20] In terms of Figure 1, the limiting situation imposed by natural resources and represented by CD was lifted so far above the growth path that had been achieved that its actual or potential existence ceased, during the nineteenth and early twentieth centuries, to be a matter of concern.

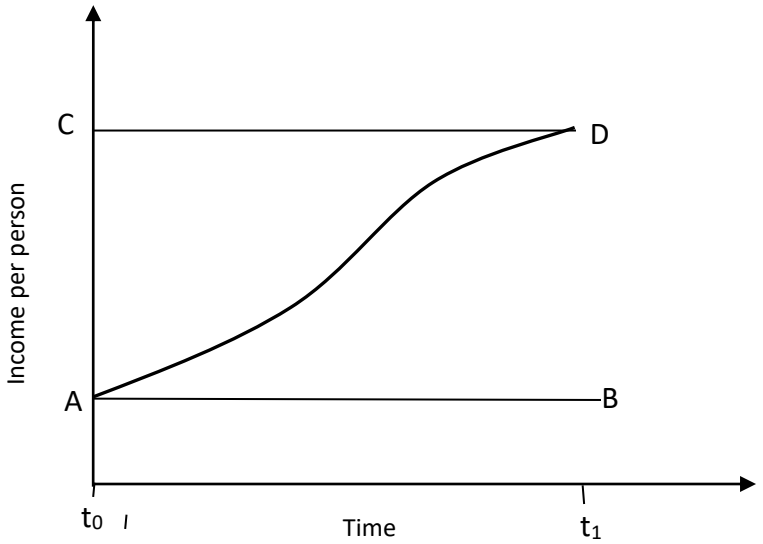

Figure 1 *Economic growth constrained by natural resources*

[20] N.D. Kondratieff and W.F. 76, "The Long Waves in Economic Life," *Review of Economics and Statistics*, 17(6) (November 1935), pp. 105-15; W.W. Rostow, *The World Economy: History & Prospect* (Austin: University of Texas Press, 1978).

Thus, the anxiety expressed by Jevons concerning Britain's future supply of coal proved unfounded.[21] The conservation movement in America, which can be traced back to 1873 and the fear of timber shortages, finding that predictions a resource scarcity were falsified, turned to other aims, especially the preservation of wildlife.[22] The warning by Marshall in 1890 concerning the vulnerability of Britain, were supplies of food and materials to be interrupted, went unheeded at the time; subsequently, steps have been taken to safeguard food and timber supplies, but only against the contingency of war. And in 1962, Kindleberger dismissed fears of materials shortages, on the ground that with much reduced real costs of transport, foreign supplies could and would supplement domestic resources.[23] Thus, in 1957, Meier and Baldwin were distinctly out of fashion in reminding readers of the earlier warnings given by Marshall and Wicksell.[24]

The twentieth century has seen several developments which have undermined this comfortable Eurocentric picture of the world economy. The theory of trade has evolved in the twentieth century, especially in the 1930s, with the emergence of the Heckscher-Ohlin concept of comparative advantage based on factor proportions (including labor and capital) rather than on land alone. This more sophisticated approach implies that relative advantages are not permanent, and depend at least in part on man-made rather than natural (land) attributes of the productive process. However, the full evaluation of the factor-proportions theorem—especially the land component—has remained infuriatingly out of reach. The difficulties are nicely illustrated by Vanek in his attempt to resolve the Leontief paradox, which having apparently shown that the United States exports goods embodying relatively large amounts of labor whereas one would expect her exports to embody much capital. Vanek's paper clearly shows the problems attending the measurement of the land component of international trade.[25]

The second twentieth century development which has undermined the Eurocentric view of the world, especially since 1945, is the emergence to independence of the

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[21] W.S. Jevons, *The Coal Question: An Inquiry Concerning the Progress of the Nation, and the Probable Exhaustion of Our Coal-mines* (London: Macmillan, 1865).

[22] H.W. Arndt, *The Rise and Fall of Economic Growth: A Study in Contemporary Thought* (New York: Longman, 1978).

[23] Charles P. Kindleberger, *Foreign Trade and the National Economy* (New haven: Yale University Press, 1962).

[24] Gerard M. Meier and Robert E. Baldwin, Economic Development: Theory, History, policy (New York: Wiley, 1957); Knut Wicksell, *Value, Capital and Rent* (London: Allen and Unwin, 1893).

[25] Jaroslav Vanek, "The Natural Resource Content of Foreign trade, 1870-1955, and the Relative Abundance of Natural Resources in the United States," *Review of Economics and Statistics*, 41(2), Part 1 (May 1959), pp. 146-53.

former colonial territories. They have sought to emulate the development of the more advanced countries. Conversely, the industrialized states have tried to foster development in the so-called Third World. In this context, therefore, interest has focused on those attributes of the more advanced nations which can be exported—technology, education, etc. Attributes of the natural environment, the land, must be taken as given; they have in fact been very largely ignored.

But not entirely ignored. Geographers in the tradition of Gourou and Ginsburg continued to emphasize the importance of environmental variables.[26] Particularly in the 1950s, some economists also recognized the significance of these variables.[27] However, for about two decades, the mainstream of development literature gave scant regard to the widely differing resource endowments of the poorer nations, and ignored the much greater relative importance of these endowments (or lack of them) than has appeared to be the case for the more advanced countries. During this period, industrialization was widely regarded as *the* road to development.

Since about 1970, attitudes have begun to change yet again, placing more emphasis on land resources. Alarmist literature such as Meadows *et al.*'s report prophesized the end of development on account of the exhaustion of resources and/or intolerable pollution, unless relevant avoiding action were taken quickly.[28] At the end of 1973, the OPEC countries raised the price of oilo sharply in the context of the latest (and last?) Israel-Egypt war. Rostow is of the opinion that from about 1972 the world entered a stage of the Koudratieff cycle in which food and materials become relatively scarce and expensive. Certainly, it is interesting that international statistics now differentiate the oil-rich from the other developing nations, thereby recognizing the significance of one major natural resource on the global pattern of development.[29]

To summarize the position thus far, it is manifest that the incorporation of land into

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[26] Pierre Gourou, *The Tropical World: Its Social and Economic Conditions and Its Future Status* (London: Longman, 1956; first published in French 1947); Norton Ginsburg, "Natural Resources and Economic Development," *Annals of the Association of American Geographers*, 47(3) (September 1957), pp. 197-212.

[27] W. Arthur Lewis, *The Theory of Economic Growth* (London: Unwin University Press, 1955); Peter T. Bauer and Basil S. Yamey, *The Economics of Under-Developed Countries* (Chicago: The University of Chicago Press, 1957); Charles P. Kindleberger, *Economic Development* (New York: Mcgraw-Hill, 1958); Hla Myint, *The Economics of the Developing Countries* (London: Hutchinson University Library, 1964); C.C. Onyemelukwe, *Economic Underdevelopment: An Inside View* (London: Longman, 1974).

[28] Meadows *et al*., *The Limits to Growth.*

[29] General Agreement on Tariff and Trade (GATT), *Networks of World Trade by Areas and Commodity Classes 1955-1976* (Geneva: GATT, 1978).

conventional national income accounting presents enomous problems, perhaps insuperable. It would appear tha although land may be a relatively unimportant variable for the more advanced nations today, foe the self-same countries it was substantially more significant at stages of development which were quite high by comparison with the present-day poor states. And there are signs of a revival of interest in land as a factor influencing development.

Human Rights Conditionality in the EU

In the Doha ministerial declaration, members of WTO affirmed that they "agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to effectively take account of their development needs, including food security and rural development".[30] There is some foundational substance in international trade law that can be interpreted to support the protection of human rights. The preamble of the Marrakesh Agreement Establishing the WTO states that "raising the living standards and ensuring full employment and sustainable development" are among the objectives of the organization.[31]

The evolutionary character of the Common Commercial policy (CCP) reveals that the EU external trade and economic relations have undergone major changes in order to adapt to internal and international challenges. The demand of globalization and the trend towards liberalization of international economic regulations, as mainly expressed by the formation of WTO. The promotion of non-commercial objectives through trade relations has gained significant prominence in EU external action following the entry into force of the 2009 Treaty of Lisbon (TL). The TL reinforced the EU's external commercial competence[32] while, at the same time, injecting a normative dimension in its international relations, thus advancing values, principles and objectives that are emphatically presented as "European" and whose universal application is sought via explicit reference to compliance with international law.[33]

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[30] WTO, "Doha Ministerial Declaration," November 14, 2001, WT/MIN(01)/DEC/1, para. 13.

[31] See "Marrakesh Agreement Establishing the World Trade Organization," April 15, 1994, U.N.T.S. 154, para. 1.

[32] Article 3(1)e of the *Treaty on the Functioning of the European Union* (TFEU) and Articles 206 and 207 TFEU, and 218 TFEU (in relation to the increased power of the EU Parliament in the CCP); for critical commentary see, *e.g.*, Angelos Dimonpoulos, "The Common Commercial Policy After Lisbon: Establishing Parallelism between Internal and External Economic Relations?" *Croatian Yearbook of European Law and Policy*, 4 (2008), p. 102.

[33] Article 3(5) and 21(1) of the *Treaty on European Union* (TEU).

Since the mid-1990s, and pursuant to the Treaty of Maastricht's reshaping of the EU as an international organization with a human face, the EU has been using its strong global commercial leverage to progressively promote and strengthen the social dimension of globalization through a web of hard and soft external trade measures as well as via political and human rights sanction policies, focusing chiefly on the promotion of labor standards international through increased cooperation with the ILO. T varying degrees and with mixed success, many of EU's trade agreements (both bilateral and regional) include social incentive clauses and condition trade concessions and market access on the respect and implementation of internationally recognized human rights and social and environmental standards.[34] Unilaterally and, chiefly , under its GSP+ scheme, the EU grants tariff concessions and preferential treatment on the condition that a beneficiary third country complies with the above standards.[35] The methods used as conditionality are made up of two elements: A punitive method, i.e., the "stick," in order to punish proven breaches of human rights standards with elimination of trade preference, and an incentive method, i.e., the "carrot," that provides for additional preferential treatment via further reduced tariffs and market access, to reward achievements in respecting and promoting human rights and social and environmental standards.[36]

We can see, in the post-Lisbon EU, a clear influence of the Parliament on the EU's trade agenda. The Commission negotiators must nowadays reassure themselves that their positions are supported by the House if they are put forward towards third countries s EU positions. T a certain degree, this limits the flexibility of the EU as a diplomatic actor. Negotiators are increasingly torn between the need to promote political EU values, and tne the imperative to reach an economically viable deal with the trading partner who may have quite a different approach to the idea of putting political clauses into trade agreement. Nevertheless, the EU has so far always succeeded to find an agreement on appropriate wording for such thematic clauses with its trading partners.[37]

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[34] Lorand A. Bartels, "Social Issues: Labour, Environment and Human Rights," in Simon Lester and Bryan Mercurio, eds., *Bilateral and regional Trade Agreements: Case Studies* (Cambridge: Cambridge University Press, 2015), pp. 380-81.

[35] Tamara Takács, "Human Rights in Trade: The EU's Experience with Labour Standards Conditionality and Its Role in Promoting Labour Standards in the WTO," in Jan Wetzel, ed., The EU as a "Global Player" in Human Rights? (London: Routledge, 2012), p. 97.

[36] For detailed analysis of human rights conditionality, see Lorand A. Bartels, Human Rights Conditionality in the EU's International Agreements (Oxford: Oxford University Press, 2005); Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhoff Publishers, 2003).

[37] Frank Hoffmeister, "The European Union as an International Trade Negotiator," in J.A. Coops and G.

A case in hand is the EU-Vietnam FTA, where the EU boasts that it contains "strong commitments on fundamental labour rights and environmental protection", while "respect for human rights is also embedded in the FTA".[38] At the same time, the EU was strongly criticized by the European Ombudsman for failing to carry out a prior human rights impact assessment (HRIA) for EU-Vietnam FTA.[39] However, the European Commission sees no need for a separate HRIA, on the basis that the 2009 Sustainability Impact Assessment (SIA) covering the whole of ASEAN suffices. The Ombudsman, contrarily, concluded that the ASEAN SIA "covers only certain aspects of the impact on social rights, it is not a proper substitute for human rights impact assessment".[40]

In a policy new press in October 2015, the Commission announced that its is proposing a new trade and investment strategy for the EU, entitled "Trade for All: Towards a more responsible trade and investment policy". EU companies export nearly a much as China to the rest of the world and more than firms in the United States or any other country. It said, "a new strategy will make trade agreements more effective and that will create more opportunities means supporting jobs in Europe."[41] "We've listened to the debate," said EU Trade Commissioner Cecila Malmström. "Europeans know that trade can deliver jobs, growth and investment for consumers, works and small companies. And they want more of those results. But they don't want to compromise on core principles like human rights, sustainable development around the world or high quality regulation and public services at home…. So trade policy must become more effective, more transparent and more in tune with our values".[42]

On trade matters, the European Commission represents the EU. That flows from Article 17(1) 6 TEU. Specifically, the Commission is the Union negotiator under Article 218 (3) TFEU, as trade agreements almost never relate "exclusively or principally to the common foreign security policy", which would make the High Representative the lead negotiator. During negotiations the Commission coordinates the EU position

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Macaj, eds., *The European Union as a Diplomatic Actor* (Paqlgrace Macmillan, 2015), p. 146.

[38] E-002395/2016, Parliamentary questions, Answer given by Ms. Malmström on behalf of the Commission (7 June 2016).

[39] See "Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement" (26 February 2016) (https://www.ombudsman.europa.eu/en/decision/en/64308).

[40] Ibid.

[41] Directorate-General for Trade, European Commission, "Trade for All: European Commission presents new trade and investment strategy," News archive (Brussels, 14 October 2015).

[42] Ibid.

with a Special Committee of the European Council (Articla 218(4) TFEU). In practice, the Council entrusts this role to the Trade Policy Committee (TPC). Hence, the Commission negotiators regularly inform the TPC about progress and problems in the negotiations and receive feedback on member states' interests and assessments. This process of coordination between the Commission and the Council allows a constant refinement and adaptation of EU positions.

At the same time, the Commission is in regular contact with the Parliament. Under the Lisbon Treaty, the Parliament is to be fully and immediately kept informed about the negotiations of all international agreements (Article 218(10) TFEU). The information is to be channeled through the relevant committee, where confidentiality is safeguarded through special procedures.[43] Again, through this process negotiators receive important implications from leading MEPs about their expectations on a particular agreement. If those coincide with Council views, the Commission is likely to fully endorse them. If there is a divergence between Council and Parliament, a fair balance must be struck.

Thus, the internal decision-making in the EU on trade agreements is much more complex than one might assume under a simple "one voice" narrative. While the Commission was clearly in the lead on shaping the agenda and providing for the substance of the agreement, its acceptance in the Council and in the Parliament were not a sure thing. This led to a not insignificant time-gap between initialing and provisional application of more than one and half years. On the other hand, the intensive discussions at member states and Parliament level also mobilized support for the agreement crossing party lines. This again shows the increased politicization of trade policy in the EU. Trade agreements are not anymore "technical agreements" which are left to "experts" from the Commission, but they are more and more perceived as politically so important that a broad consensus is required for their negotiation and ratification.

Since 2010, the Parliament's power to reject trade agreements can be used by influential Parliament members to insist that the Commission takes into account certain issues while negotiating. There is an expectation in the Parliament that FTAs should contain chapters on human rights.[44] Here, a traditional clause, which declares that the protection of human rights forms an "essential part" of the

[43] Sec. 24 of the Framework Agreement between the Commission and the Parliament, 20 October 2010, L304.

[44] European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreement (2009/2219(INI), § 12.

agreement, creates a link between human rights situation in a country and the obligations under an international agreement. In particular, in situations of grave human rights violations, either side may suspend the operation of the agreement. This right is often specifically mentioned in a "non-execution" clause. Again, for the European parliament, it is important that this EU practice, which has developed in cooperation or association agreements defining the political relations with a third country, is also applied for pure trade agreements.[45]

The Parliament may also wish to see that social and environmental standards, which concerns sustainable development, are treated in a similar fashion as human rights provision.[46] Such a chapter has been agreed with Korea, Peru and Colombia but not India, who was less open to accept language which is seen as only remotely linked to trade. The Parliament's insistence on such clauses thus make them a "must-have" in negotiation terms, which ends up in a different enforcement mechanism. Social, labor and environmental issues can be discussed in treaty-monitoring bodies, as well as between civil society advisors. However, violations of social or environmental standards would not give rise to a sanction right for the other side.[47]

Furthermore, in its resolution of 6 April 2011 the Parliament emphasizes the need to negotiate standard investment protection clauses.[48] In the same vein, Parliament wishes to see guarantees in future treaties that the "rihts to regulate" of the EU and its member states is properly safeguarded.[49] The idea is to make sure that the high environmental, food safety and other industrial standards cannot be challenged by international investors *per se*. Rather, only arbitrary or unfair governmental or administrative decisions would usually come under the purview of international investment arbitration. It would be interesting to see how the European Union will address this issue in the investment protection chapter of the EU-Indonesian CEPA.

Natural Resources-Related Human Rights Issues in EU-Indonesian CEPA

In the negotiations for the EU-Indonesia CDEPA, launched in mid-2016, the EU's agenda appears to aim for extensive liberalization and deregulation, in particular in

[45] Hoffmeister, "The European Union as an International Trade Negotiator," p. 145.
[46] European Parliament resolution on human rights and social and environmental standards in international trade agreement, § 13
[47] Hoffmeister, "The European Union as an International Trade Negotiator," p. 145.
[48] European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), § 19.
[49] European Parliament resolution on the future European international investment policy, §§ 23-26.

relation to trade and investment in services.[50] In addition, the far-reaching protections for foreign service providers and investors that the EU includes in its recxent and investment agreements and also envisages for the CEPA, will have a significant impact on Indonesia's policy space, and may restrict its efforts to regulate in the public interest, respect and promote human rights, and protect the environment. These investment protections are still phased in such broad and open-ended ways that almost any type of government regulation can be challenged as an indirect expropriation or a breach of fair and equitable treatment (FET), for which compensation is required. To avoid financially crippling claims, states can easily be "persuaded" to water down or shelve proposed regulation that displeases foreign investors—a phenomenon known as "regulatory chill".[51]

[50] See EU-Indonesia Joint Vision Group, Invigorating the Indonesia-EU Partnership: Towards a Comprehensive Economic Partnership Agreement (2011) (http://eeas.europa.eu/archives/delegations/indonesia/documents/press_corner/20110615_01_en.pdf).

[51] Roeline Knottnerus, *The EU – Indonesia CEPA Negotiations: Responding to Calls for an Investment Policy Reset: Are the EU and Indonesia on the Same Page?* (SOMO, TNI, IGJ, 2018).