



Partnerships for Sustainable Trade?

The EU's Trade and Sustainable Development
Chapters in the Context of Global Justice

Joachim Vigrestad

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About GLOBUS

Reconsidering European Contributions to Global Justice (GLOBUS) is a Research and Innovation Action (2016 – 2020) funded by the EU's Horizon 2020 programme, Societal Challenge 6: Europe in a changing world – Inclusive, innovative and reflective societies. GLOBUS is coordinated by ARENA Centre for European Studies at the University of Oslo, Norway and has partner universities in Brazil, China, Germany, India, Ireland, Italy and South Africa.

GLOBUS is a research project that critically examines the European Union's contribution to global justice. Challenges to global justice are multifaceted and what is just is contested. Combining normative and empirical research GLOBUS explores underlying political and structural obstacles to justice. Analyses of the EU's positions and policies are combined with in-depth studies of non-European perspectives on the practices of the EU. Particular attention is paid to the fields of migration, trade and development, cooperation and conflict, as well as climate change.

Abstract

This report examines the distinctive features of the Trade and Sustainable Development Chapters in the EU's external trade agreements. Furthermore, it utilises theoretical perspectives of global political justice to assess to what degree the EU's approach can be deemed reasonable.

Sustainable development has become a key part of the European Union's trade agenda. Following the end of the EU's moratorium on bilateral trade agreements in 2006, all bilateral trade agreements, wherein the EU has been a participant, have included provisions on Core Labour Standards and Multilateral Environment Agreements. Since the signing of the EU-Korea Free Trade Agreement in 2010, these provisions have been implemented in dedicated trade and sustainable development chapters. These chapters introduce monitoring and implementation bodies, and dispute settlement mechanism for over-seeing compliance.

The EU is not alone in this way of promoting labour and environmental standards. The U.S., Canada, EFTA states, Australia and Japan are all including references to sustainable development in their preferential trade agreements. However, the content of these provisions varies greatly.

The theoretical framework highlights what considerations the EU is making between priorities like: the equal standing of states, individual rights, and special and differential treatment of vulnerable groups.

This report finds that the inclusion of sustainable development standards in preferential trade agreements are a reasonable measure to mitigate the negative effects of globalisation. However, the EU's approach challenges the equal standing of states, as it addresses these issues bilaterally rather than multilaterally. Further, the EU's emphasis on 'soft' dispute settlement mechanisms fails to guarantee a neutral and unbiased enforcement of the sustainable development provisions. Lastly, by relying on a more or less predefined template, the EU's sustainable development chapters might seem unsuited for the specific contexts they are applied in.

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Chapter 1

Introduction

In 2017, the European Commission published a series of reflection papers addressing the future of Europe and its main challenges. The second reflection paper in this series, entitled *Harnessing Globalisation* (European Commission [EC] 2017a), addresses the various opportunities and challenges associated with increased international interconnectedness. On the one hand, the Commission sees fewer barriers between countries as underpinning the growing demand for European goods and services, and increased opportunities for its citizens. On the other hand, the Commission recognises that globalisation has led to growing inequality, displacement of workers, environmental challenges, and challenges to sovereign states' regulatory autonomy (EC 2017a: 9). In this conflicting system, the Commission regards the EU as a force for a fairer global order, as it promotes global rules and governance that limit the negative effects of globalisation (EC 2017a: 13). An important tool for achieving these goals has been the inclusion of labour rights and environmental protection standards in preferential trade agreements (EC 2017b). This report sets out to critically assess on what grounds, if any, the EU's approach to trade and sustainable development can be justified.

The purpose of this report is to make a normative assessment, from the perspective of global political justice theory, of the considerations

made by the EU when pursuing a trade and sustainable development agenda. This objective is linked to the main research question:

On what grounds, if any, can the European Union's approach to trade and sustainable development be justified?

To answer this question I make an assessment from a perspective of global political justice, of the strengths and weaknesses of the way in which the EU promotes sustainable development standards through preferential trade agreements. However, in order to answer these questions, it is necessary to first of all address the preliminary research question:

How does the European Union approach the notion of sustainable development in its external trade policy, and what is distinct about this approach?

The second question rests on the idea that there are multiple ways to include sustainable development norms in preferential trade agreements, and that the considerations underlying a distinct approach have ramifications for global political justice. I examine this question from two perspectives. Firstly by conducting an in depth examination of the EU's existing preferential trade agreements. In so doing, I use unstructured comparisons to the trade and sustainable development agendas of other actors in order to explicate the distinctive features of EU's approach. Secondly, I conduct an in-depth case study of the ongoing trade negotiations between EU and India. The purpose of this case is to identify the considerations the EU makes when demanding the inclusion of sustainable development provisions in preferential trade agreements. Concrete expectations based on three different theoretical conceptions of global political justice serve as theoretical guides and measure of control. The EU's trade and sustainable development agenda is a case of normative trade policy.

Theoretical framework and expectations

The theoretical point of departure in this report is republican theories of justice. This theoretical approach to political justice has, in the last twenty years, seen a revival with the works of Philip Pettit (1997; 2012; 2014). In this theoretical tradition, the core tenant of injustice is domination, understood as arbitrary interference. The concept of domination captures many of the adverse aspects of a world of growing

interdependence, as arbitrary interference is performed by powerful private economic actors and states beyond borders.

In republican theories of justice, the appropriate response to arbitrary interference is to incapacitate dominating power. This is achieved by institutionalising rules and procedures that empower those who are affected, and incapacitates the powerful's ability to dominate. In the GLOBUS framework¹, three conceptions of justice outline different approaches for establishing and reinstating just relations (Eriksen 2016). These perspectives prioritise differently in regards to the equal standing of states, individual rights, and the right to special and differential treatment. For this report, particular attention is paid to how these conceptions differ relating to who, at the international level, should be enabled to make claims to justice (states, individuals or groups), what rightful reasons to act on injustice are, and what institutions (multilateral, supranational or collaborative) should facilitate the reinstatement of justice.

Research design

The EU includes sustainable development standards in dedicated trade and sustainable development chapters. The signing of the EU-South Korea Free Trade Agreement in 2010 has set a precedent for sustainable development standards in the EU's preferential trade agreements. Since the concluded agreements are public, they provide a reliable and comparable data source on how the EU approaches sustainable development standards in trade agreements. I examine the sustainable development chapters in the preferential trade agreements between the EU and: South-Korea (2010), Vietnam, Singapore² and Canada (2016). The sustainable development chapters in these agreements are not identical. However, by examining these agreements as units of a broader case it is possible to identify the EU's general approach for implementing sustainable development provisions in preferential trade agreements. Legal analyses of the sustainable development chapters in EU trade agreements, have been

¹ The research project: Reconsidering the European Contributions to Global Justice (GLOBUS) has developed a theoretical framework that presents three different conceptions of republican theories of justice (Eriksen 2016).

² The Free Trade Agreement between EU and Vietnam, and EU and Singapore have been formally concluded but are not ratified. The EU Vietnam agreement is undergoing legal review. The EU Singapore agreement is awaiting ratification. Due to its status as a mixed agreement, it requires ratification by individual member states.

important secondary sources. I use these legal analyses to underpin my interpretations of the sustainable development provisions. Hence, the legal analyses play an important role in supporting the findings. Furthermore, unstructured comparisons to sustainable development provisions in trade agreements of other OECD economies – mainly the U.S. – have been utilised to further explicate the distinctive features of EU's approach to sustainable development standards in preferential trade agreements.

An in-depth case study of EU-India trade negotiations provides a second perspective on the trade and sustainable development agenda. The EU and India have engaged in negotiations on a free trade agreement since 2007. India has a history of standing up against the U.S. and EU in international trade, by trying to make the international system more considerate to the interests of lower income countries (Narlikar 2017: 95). Examining the negotiations reveals the EU's underlying concerns for a trade and sustainable development nexus.

This report is delimited to address *how* the EU pursues trade and sustainable development, and the normative considerations underlying this approach. It is not the intention of this report to address *why* the EU promotes such principles, nor does it address the *effectiveness* of the EU's approach at any length. Lastly, this report does not make an assessment of the extent to which the EU's trade and sustainable development agenda is complemented or undermined by the commercial aspects of EU's preferential trade agreements.

Relevance of this report

Increased trade liberalisation has had negative effects on social and environmental conditions in both high- and low-income countries. This realisation has led to the demand for states to alter their approach to trade liberalisation. Mainly by establishing more regulated international trade (Falke 2005: 7). Trade policy, since the establishment of WTO (1995), has been increasingly concerned with positive rule-making in a broad spectrum of domestic policies, including labour and environmental regulations (Dymond and Hart 2000). Labour and environmental regulations in international trade constitutes what Alasdair R. Young (2007) defines as social trade policy. Social trade policies 'address the intersection between international trade and national rules addressing market failures' (Young A.R. 2007: 796).

The debate on labour rights and environmental protection standards in international trade can be seen in light of a broader discussion on justice in the international trade system. Academics like Amrita Narlikar (2006), and Andrew Brown and Robert Stern (2007) see justice in the international trade system as revolving around two conceptions – fairness as reciprocity (equality of process), and fairness as distributive equity. Narlikar, in particular, argues that the international trade system is underpinned by high-income countries' ideal of reciprocal trade liberalisation, against the low-income countries' claim to special and differential treatment (Narlikar 2006: 1025). From this perspective, demands for labour rights and environment protection standards equals demands for a more fair process; some argue, at the cost of distributive fairness.

A view that labour standards and environment protection in trade agreements come at the cost of distributive equity, is supported by the economist Jagdish Bhagwati. Bhagwati argues that social and environmental standards in international trade are distorting the purpose of trade liberalisation. He considers low-income and emerging economies' lower standards as a reflection of their level of development, and thus a legitimate comparative advantage (Bhagwati 1995). By setting high international standards for trade, high-income countries with more advanced economies are depriving low-income countries of their chance to compete in the global market (Bhagwati 2008). This, in turn, obstructs economic growth, which is the true driver of increased standards in low-income countries (Bhagwati and Hudec 1996).

Opposing views on standards in trade are held by the likes of Paul De Grauwe of the Brussels based think-tank CEPS, and Dani Rodrik. Rodrik argues that global rules are a prerequisite for trade liberalisation to be justified (Rodrik 2012: 402). De Grauwe (2016) goes even further by arguing that 'globalisation has reached its limits' under the current trade system. In his view, new international rules that limit the negative effects of trade opening are required for continued trade liberalisation to be justified.

This debate elucidates two important points. Firstly, the manner in which trade liberalisation is promoted deserves serious thought due to its adverse transnational effects. Secondly, the response to these adverse effects deserves equally strong consideration on the EU's behalf, because increased regulation promoted by powerful

economies, in itself, might constitute dominance. Further, while this report contributes to the literature on fairness in international trade, it reconceptualises the aforementioned understanding of fairness in the trade system. Instead of seeing fairness in international trade as a conflict between the ideal of reciprocal process and distributive equity, it sees fairness in international trade as a conflict between different perceptions of what a fair process is. It asks whether trade is conducted fairly when states are respected as equals; when the rights of individuals are universally and impartially enforced; or when the endangered and vulnerable attain differential treatment that accommodate their distinctive needs. This report does not answer these questions directly, but examines how the EU is prioritising between these ideals in the context of trade and sustainable development and reflects upon the strengths and weaknesses of its approach.

Outline

The remaining chapters of this thesis are structured as follows:

Chapter 2 of this thesis starts off by defining the EU as an actor in international trade. It then goes on to explain the legal and political mandate the EU has for including labour rights and environmental protection standards in preferential trade agreements. The chapter then proceeds to address the link between trade and sustainable development standards in the multilateral trade system.

Chapter 3 provides a detailed explanation of the theoretical framework. It does so by firstly explicating what the concept of justice as non-domination is, before demonstrating why this is a suitable theoretical framework when studying the EU's approach to trade and sustainable development. The chapter proceeds to clarify three perspectives of justice as non-domination, and develops concrete expectations – according to the respective theoretical perspectives – of how the EU might pursue a trade and sustainable development agenda. *Chapter 4* provides an operationalisation of the key indicators, and discusses the research design and methodology.

By linking theoretical concepts with empirical findings, *Chapter 5* unpacks the distinctive features of the EU's approach to sustainable development standards in trade. This is done by firstly examining the content, monitoring mechanisms and dispute settlement mechanisms in the Trade and sustainable development chapters of four preferential

trade agreements. Then, the second part of the chapter looks at the trade and sustainable development nexus from the perspective of the India-EU trade negotiations. In *Chapter 6*, the three theoretical conceptions of justice are used to assess on what grounds, if any, the EU's distinct approach can be justified. *Chapter 6* concludes with a short summary of the thesis and the main findings.

Chapter 2

International trade and sustainable development

The purpose of this chapter is to contextualise the EU's trade and sustainable development agenda. The aim is to provide an understanding of how sustainable development objectives have become an integral part of the Common Commercial Policy. The first section briefly defines the EU as an actor in international trade – emphasising the European Commission, Council and European Parliament's role in the various stages of trade negotiations. The second section examines the EU's mandate in the Treaties and Trade Strategies for pursuing commercial trade objectives in accordance with sustainable development principles. The final section explains how labour rights and environment protection issues have been addressed at the multilateral level of international trade.

EU as an external trade actor

When the EU engages in international trade negotiations (both bilateral and multilateral), competence is delegated to the European Commission. The Commission has the exclusive right to initiate and conduct trade negotiations on behalf of the EU and its Member States. The Commission acts on a mandate from the Council of the EU, and under supervision of the European Parliament. The Council, representing the Member States, has extensive competences in trade policy. The Council authorises the Commission to open negotiations, and provides the negotiating mandate. During the negotiations, the

Commission is obligated to keep the Council informed. After negotiations are concluded, the ratification of trade agreements requires the Council's approval. Consequently, the Council is able to assert control over the Commission from the initial thorough to the concluding stages of negotiations. The Parliament's competences in trade policy have been substantially improved with the 2009 Lisbon Treaty. After the Lisbon Treaty entered into force, the Parliament has a more active role in the oversight of negotiations. Equally important, the Parliament does now have veto powers over the approval of agreements by simple majority. However, the Parliament does not provide the Commission with a negotiating mandate, giving it little influence in initial stages of negotiations. Tobias Leeg (2018: 11) makes the argument that the European Parliament's restricted influence in the pre-negotiation stages allows the Commission to moderate many of its proposals. Leeg also questions the Parliament's willingness to reject a potentially economically beneficial agreement should it lack a sufficient emphasis on social standards (Leeg 2018: 6).

Sustainable development in EU trade policy

An EU trade and sustainable development agenda for external policies, was for first time formulated in the Communication: *Towards a Global Partnership for Sustainable Development* (EC 2002). The Communication was a formalisation of Trade Commissioner Pascal Lamy's *Harnessing Globalisation* doctrine; a doctrine Lamy had announced at a 1999 hearing in the European Parliament. *Harnessing Globalisation* rested on the idea that while open markets were necessary for economic growth and job creation, internal policies had to ensure equitable distribution of benefits (Lamy 2004). To Lamy, this meant that the EU had to 'ensure that trade [worked] in the favour of sustainable development' (Lamy 2004: 3). This objective was to be achieved through positive rulemaking in multilateral organisations like the World Trade Organisation (WTO) (Lamy 2004: 38).

At the time of Lamy's tenure as Trade Commissioner, sustainable development principles had already become a regular feature of the EU's preferential trade agreements. The first time the EU included sustainable development principles in a trade agreement was the 1993 Hungary-EU economic partnership agreement. Since then, sustainable development principles have appeared frequently in preferential trade agreements (Bartels 2013: 306). However, the sustainable development

norms in these agreements have been limited in scope and commitment (Orbie, Gistelinck & Kerremans 2009: 157).

The 2002 *Global Partnership for Sustainable Development* communication, outlined measures for how the EU was to conduct broad range of external policies, including trade, in line with principles of sustainable development. The agenda relied entirely on reaching the trade and sustainable development objectives through the WTO, and the ongoing Doha Round of Negotiations. Lamy had laid down a moratorium on preferential trade agreements until the Doha Development Round of Negotiations (2001-2013) were concluded (Meunier 2007: 902). At the Cancun Ministerial Conference (2003), the hope of including social and environmental regulations in the WTO body of rules were shattered. The EU had wished to include labour- and environment standards alongside a breadth of other regulatory issues³. The objective to expand the regulatory scope of the WTO had met stark opposition from low and medium income countries. Eventually, the EU had to remove these issues from its Doha agenda.

The EU has continued to promote sustainable development norms in its external trade policy, despite the failure at the WTO. Sustainable development provisions are now part and parcel of every preferential trade agreement signed by the EU. These sustainable development provisions are characterised by a committing legal language. Moreover, the agreements include a comprehensive monitoring and enforcement mechanism, for the purpose of enforcing the provisions on labour and environmental standards. The first of these new generation of agreements were signed with South Korea in 2010. In subsequent agreements, the EU has included sustainable development norms in dedicated chapters. As the following sections demonstrate, the Lisbon Treaty and the latest EU trade strategies have provided the EU with a mandate for pursuing a more comprehensive trade and sustainable development agenda.

Legal mandate

The treaties establish a set of general rules and objectives that the EU and the Member States are obligated to follow. The objectives of the Common Commercial Policy (CCP) are stated in the Treaty on the

³ These so called Singapore Issues included regulatory standards on competition policy, trade facilitation, investment and public procurement.

Functioning of the European Union. According to the Treaty, CCP shall 'contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade' (Article 206 TFEU), and 'be conducted in the context of the principles and objectives of the Union's external action' (Article 207 TFEU). The principles and objectives of EU's external action are articulated in Article 21 of the Treaty of the European Union, and include the aim of fostering 'the sustainable economic, social and environmental development of developing countries, with the aim of eradicating poverty' (Article 21(d) TEU), 'encourage the integration of all countries into the world economy' (Article 21(e) TEU) and 'develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development' (Article 21(f) TEU). The EU shall pursue these principles and objectives in external relations through international law, multilateralism and good global governance. These articles provide the EU with a legal mandate to include sustainable development principles in trade agreements on behalf of the Member States. However, the treaties do not identify specific measures or institutional mechanisms for fulfilling these obligations. Neither do they explicate what the tangible content of sustainable development norms in trade should be. Further, the EU Treaties do not make clear how strongly sustainable development provisions should feature in trade policy. As noted by Araujo (2016: 66), linking the Common Commercial Policy with non-trade related objectives – such as labour- and environmental standards – raises the possibility of conflict between the objective of trade liberalisation and sustainable development, as there is no recognised hierarchy between the aforementioned aims in the Treaties.

The Lisbon Treaty changed the decision-making procedure of CCP by extending the European Parliament's competences. The treaty enhanced the Parliament's capacity in trade policy by granting it voting rights on the ratification on external trade agreements. The Parliament has made use of its extended competences to influence EU trade policy. In 2010, the EP passed a resolution addressing human rights, social and environmental standards in international trade agreements (European Parliament [EP] 2010). The resolution reverberated the Lisbon treaty, stating that the EU should 'not [...] envisage trade as an end in itself, but a tool for promoting European values and commercial interests'. It further warned against 'the risks

of environmental and social dumping' from trade partners with low standards (EP 2010). The resolution underlines the importance of reciprocity, but specify that an economy's level of development might legitimise differential treatment. It identifies multiple reasons for pursuing labour and environmental standards in trade, but highlights 'fair and equitable trade' and 'a level playing field' (EP 2010).

In contrast to the treaties, the Parliament's resolution is detailed in its recommendations to the Commission on how to institute sustainable development provisions in preferential trade agreements. It calls for implementation of labour and environment standards in accordance with international conventions, and the establishment of monitoring and enforcement mechanisms for overseeing the effective ratification and commitment to these provisions (EP 2010). The Parliament does also emphasise the need to include civil society in trade policy. In conclusion, the 2010 resolution reinforces the trade and sustainable development objectives as articulated in the treaties. Moreover, the Parliament goes further than the Lisbon Treaty by suggesting specific measures for what it considers appropriate approaches to the trade and sustainable development nexus.

Political mandate

Whereas the treaties establish general principles for EU's trade policy, the Commission's trade strategies provide more concrete political goals for the CCP. Trade and sustainable development has been a recurrent issue in these strategies. Nevertheless, there has been a varying emphasis between trade and sustainable development objectives in the different strategies. However, the predominant feature of these strategies has been the weight on increased competitiveness and defence of European economic interests. The 2006 *Global Europe* trade strategy is recognised as a turning point in EU trade policy (Young A.R. and Peterson 2014: 61). The strategy was issued by Trade Commissioner Peter Mandelson (successor of Pascal Lamy), and envisaged a new direction for CCP guided by commercial incentives (EC 2006a). While the Commission, through the *Global Europe* strategy, recognised the merits of multilateral trade, it admitted that reopening bilateral and regional negotiations were necessary in order adequately address the needs of European businesses. The strategy singled out large economies with high levels of protection towards EU exports, as the primary targets for trade negotiations (EC 2006a: 6). These included ASEAN and Mercosur blocks, South Korea and India.

Despite its undeniable primacy on commercial objectives, *Global Europe* did not fully neglect sustainable development issues. The Commission recognised the potentially disruptive impact of market opening on labourers and poorer regions (EC 2006a: 5). It further stated that the lack of attention to these issues could lead to political opposition to free trade, and that the EU's external trade agreements should promote European '[...] values, including *social and environmental standards* and cultural diversity around the world (emphasis added)" (EC 2006a: 5).

The follow-up strategy from 2010: *Trade, Growth and World Affairs*, reaffirmed the EU's strong commitment to market liberalisation (EC 2010). The 2010 communication, similar to *Global Europe*, underlined the increased competitiveness of the EU as the predominant objective of CCP (EC 2010: 9). *Trade Growth and World Affairs* only briefly addressed trade and sustainable development issues. However, the 2010 strategy, unlike *Global Europe*, explicitly stated that dedicated sustainable development chapters were the appropriate instrument for including social and environment protection standards in trade agreements (EC 2010: 8).

The latest EU trade strategy: *Trade for all: Towards a more responsible trade and investment policy* (2015), issued under the current Trade Commissioner, Cecilia Malmström, goes further in accentuating the social and environment aspect of trade policy (EC 2015). *Trade for all* dedicates a full chapter to the issue of value based norms in the EU's external trade policy (EC 2015: 20-26). This agenda sees social justice, and labour and environmental standards as objectives that go 'hand in hand' with the aim of economic growth (EC 2015: 22).

In the *Global Europe* (2006) and *Trade, Growth and World Affairs* (2010) strategies, it seems evident that sustainable development objectives had weak priority in EU trade policy. These strategies indicate that the Commission was putting far less emphasis on the social and environmental aspects of the EU's trade policy than on commercial interest. Meunier has argued that *Global Europe* was a 'doctrinal shift', away from Lamy's *Harnessed Globalisation* ideal, and a 'return to the roots of trade policy, with the EU [...] pursuing economic instead of normative foreign policy objectives' (Meunier 2007: 906). The 2006 and 2010 strategies, increased the emphasis on competitiveness and growth, through focus on economically beneficial agreements and the

vigilant defence of European economic interests. However, the social and environmental aspects that had featured strongly in the *Harnessing Globalisation* doctrine, were not completely abandoned. Subsequent trade agreements have included sustainable development provisions in a more committing manner than before. Furthermore, the 2015 *Trade for all* strategy seems to have provided a new rhetorical shift, and a return to normative objectives on the Commission's agenda for trade.

To summarise, the EU is bound by its treaties to pursue trade liberalisation in accordance with principles of sustainable development. However, as the trade strategies demonstrate, emphasis on sustainable development in trade has been weak, while there has been a solid emphasis on the competitiveness and economic interest of European businesses. Consequently, questions have been raised about the EU's commitment to trade sustainable development, and there have been doubts about the underlying motives. The most recent trade communication demonstrates a rhetorical shift and more symmetry between trade and sustainable development objectives of CCP. This development is underpinned by the Lisbon Treaty and the extended competences of the European Parliament. The resolution passed by the Parliament – while not being legally binding – provides a strong indication that sustainable development standards in trade must be addressed in a substantial manner in order to acquire its necessary approval (Woolcock 2008; Van den Putte, de Ville & Orbie 2014). Moreover, the Parliament resolution proposes concrete recommendations on how the Commission should pursue the trade and sustainable development link.

Multilateral trade and sustainable development

As indicated in the previous sections, questions of labour and environmental standards have also been raised at the multilateral level. These issues have met strong opposition from low- and medium-income countries. At the Ministerial Conference in Doha in 2001, the Indian Minister of Commerce and Industry stated the following.

We firmly oppose any linkage between trade and labour standards. The Singapore Declaration had once and for all dealt with this issue and there is no need to refer to it again. Similarly, on environment we are strongly opposed to the use of environmental measures for protectionist purposes and to imposition of unilateral trade restrictive measures. We are

convinced that the existing WTO rules are adequate to deal with all legitimate environmental concerns. We should firmly resist negotiations in this area which are not desirable, now or later. We consider them as Trojan horses of protectionism.

(Maran 2001)

The controversy of sustainable development principles in trade, is associated with a larger justice debate in international trade. Since the establishment of the multilateral trade system in 1948, much controversy has revolved around the ideal of a reciprocal trade system as opposed to the ideal of a trade system based on special and differential treatment for developing countries (Toye 2012: 91). The multilateral system has been harshly criticised for favouring the interests of affluent economies and neglecting the developmental needs of the poor. The National Treatment Principle, and the Most Favoured Nation clause have established an international trade system based on an ideal reciprocal market opening, and non-discrimination in trade practice between economies – irrespective of market size and developmental status (Zeiler 2012: 105). Narlikar (2006) argues that these principles were the result of the dominant members of the General Agreement on Tariffs and Trade's focus on fairness as equality of process rather than equal outcomes. Low- and medium-income countries, led by India and Brazil, have fought to change these principles by institutionalising principles of preferential treatment for development purposes, with limited success (Narlikar 2006: 1016-8). The repeated attempts by high-income countries to introduce more comprehensive regulatory regimes in WTO have been regarded as a threat to the efforts by groups of developing countries to institute special differential principles (Narayanan 1996). It is constructive to view the controversy of sustainable development provisions in trade agreements in light of this debate.

Notions of sustainable development have not been completely absent from WTO, and is included in the pre-ambles of the Marrakesh Agreement (1994) and in the Singapore Ministerial Declaration (1996). However, standards on environment protection and labour rights are not part of the enforceable body of rules in the multilateral system. The exception is the General Exemption Clause (GATT Article XX) that exempts a country from its WTO obligations when it is deemed necessary for the protection of human, animal and plant life or health.

After the stagnation in WTO, the international trade system has witnessed a proliferation of bilateral- and regional trade agreements. According to the WTO World Trade Report of 2011, 30 preferential trade agreements were active in 1990. This number had grown to about 300 agreements by 2010⁴ (WTO 2011). The shift towards bilateral trade, in turn, has resulted in significant changes in global trade governance. Preferential trade agreements have become 'the dominant instrument of trade policy' (Heydon and Woolcock 2014: 11). Consequently, international trade system is, now, to a lesser extent governed by consensus based decisions in the WTO, and to a greater extent governed by the prevailing trade agendas of dominating market powers (Bhagwati 2008: 71). Through a vast network of regional and bilateral trade agreements, market powers are more easily able to entrench the standards of international trade that suits their interests (Bhagwati 2008).

As the use of bilateral- and regional trade agreements have increased, the countries who have advocated labour and environmental standards in WTO have included such provisions in their preferential trade agreements. Consequently, the issue of sustainable development standards in trade has been removed from the multilateral level, at the same time as it is becoming a more predominant feature of preferential trade agreements (Milewicz, Holoway, Peacock & Snidal 2016). In 2007, the OECD Joint Working Party on Trade and Environment (JWPTE) published its first study on environmental provisions in regional trade agreements. The JWPTE study found that environmental provisions were becoming increasingly common features of trade agreements – especially those involving high-income countries (OECD 2007). The annual updates to this report is confirming that the trend is continuing (George 2014). In the same period of time, preferential trade agreements have increasingly included provisions on fundamental labour rights. While four agreements had references to fundamental labour standards in 1994, 58 agreements containing labour rights provisions had been signed in 2013 (ILO 2015).

⁴ 459 Regional Trade Agreements have been notified to the WTO as of 14 May 2018

Chapter 3

Theory

The EU, together with most high-income countries, is setting normative standards in its trade agreements. The aim is to promote social justice and mitigating the adverse effects of globalisation. There are substantial differences in the approach various actors take to trade and sustainable development (Draper, Nkulueku & Tigere 2017). My aim is to investigate how the EU addresses the notion of sustainable development in its external trade policy, and to identify the distinctive features of the EU's approach. The initial purpose of the theoretical framework is to develop concepts that guide the examination of the empirical case. The second purpose of the framework is to make three concrete expectations related to the theoretical perspectives, which will enable a normative assessment of the EU's approach to trade and sustainable development.

The underlying reasons for why the EU includes core labour standards and provisions on environment protection in trade agreements are contested. Some propose that the norms pursued by the EU in trade must be assessed on the basis of the idea that the EU creates and upholds laws in trade because of their functional benefits (Damro 2012). I argue, based on the understandings of norm dynamics in international politics (Finnemore and Sikkink 1998), that an equally strong account can be made for evaluating these norms on a broader basis (See Hurrell 2001 for a similar argument). While the sustainable

development provisions are assessed on normative grounds, the actual intentions of the EU is outside of the scope of this report.

The concept of domination is the point of departure in the theoretical framework of this thesis. Domination, understood as arbitrary interference and control, is considered by theorists of republican justice as the core element of injustice (Pettit 1997: 51-79; Laborde and Maynor 2008; Buckinx, Treji-Mathys & Waligore 2015). My proposition is the following: if the EU's intentions when entrenching sustainable development norms in its external trade agreements are to promote stability and equity, then these norms should be intended to function as justice enabling mechanisms that mitigate arbitrary interference. The first section clarifies the concept of justice as domination in greater detail. Furthermore the section also demonstrates why theories of political justice are an appropriate theoretical reference point when studying political justice in international trade.

The GLOBUS framework builds on republican theories of justice, and provide three reasonable approaches to how the EU might seek to promote sustainable development and trade (Eriksen 2016). Each conception differs in respect to who should be enabled to address injustices (states, groups or individuals), what the main concern of justice enabling institutions should be (the equal standing of states, individual autonomy, due hearing of the concerned parties) and who the addressees of justice claims should be (multilateral-, supranational- or collaborative institutions). The section 'Global political justice and normative standards in trade' provides a detailed description of these perspectives, and advances three theoretically grounded expectations of how the EU might institutionalise sustainable development norms in external trade agreements. The variance in the different theoretical perspectives serves as the basis for the following discussion of the EU's approach.

Global political justice and normative standards in trade

As mentioned in chapter 2, awareness of the adverse effects of liberalised trade on labour standards and environment have encouraged some trade actors to pursue the linkage of sustainable development standards with trade agreements outside of the multilateral system. This section develops a theoretical framework based on three theoretical perspectives on global political justice. The

three perspectives bring attention to different ways of institutionalising social and environmental standards in trade agreements.

Trade liberalisation through the lens of domination

Justice is a highly contested concept. What seems to be less ambiguous is the rampant presence of injustices in the international trade system. The unequal distribution of the cost and benefits of trade liberalisation is broadly recognised, and well documented in reports published by many of the major international organisations (IMF 2017: 7; World Bank 2017: 69; Keeley 2015). In most OECD countries, the income gap between the rich and poor has increased since the 1980's (Keeley 2015: 32). Impressive economic growth in emerging economies have lifted millions out of poverty. However, the revealing of a trend where the economic growth is absorbed by a smaller segment of society, also in the emerging economies like China and India (Pogge 2008: 69). Furthermore, globalisation is not only seen to yield negative effects on the compensation of workers, but also on their working conditions (ILO 2018).

The adverse effects of trade liberalisation are often defined in terms winners and losers of globalisation. Those who are the under-privileged in the globalised system are put in an even more vulnerable position, as they might have to either accept lower pay and standards of labour in order to compete on a global labour market. More privileged groups, on the other hand, are enabled to take advantage of enlarged markets and greater freedom of mobility. The system itself might be regarded as inherently arbitrary (Pogge 2002: 50; Bohman 2004: 342).

A premise of this report is that the EU includes sustainable development standards in preferential trade agreements to moderate the adverse effects of liberalised trade. Secondly, set aside the fact that what is just is highly contested, injustice is a frequent element of international trade. In this paper, I propose to frame these issues in relation to domination. The merit of this approach is that it directs attention towards the power relationships between different kinds of actors. While theories on distributive justice can answer questions like 'who receives what, and on which grounds?', theories of republican justice more readily answers questions concerned with power relations; 'Who are given a voice and a capacity to cause change under what institutional arrangements?'

Domination

Justice as non-domination conceptualises injustice as a qualitative state of a relationship between an actor and a subject. The concept of domination provides a rich toolkit for understanding unjust relations at both the domestic and global level. To be dominated is to be subjected to the arbitrary will of others. This is understood as interference ‘without reference to the interests, or opinions, of those affected’ (Pettit 1997: 55). The ones who are dominated are deprived of the voice, status or standing to challenge laws, institutions and structures under which they are subjects (Buckinx et al. 2015: 1). Domination can be both intentionally or unintentionally performed by dominating actors. At the global level, dominating agency can be performed by states, powerful private economic actors and non-governmental organisations. Structures in the international trade system can also be a source of dominance. The subjects of domination can be individuals, collectives or states. Domination can be actively performed, or it can be latent in a relationship through virtual or reserve control.

Active domination is exercised when an actor removes, replaces or misinterprets the choices of another actor (Pettit 2015: 43). Such forms of interference stand in contrast to interferences such as legitimate laws. The latter form of interference enables, rather than restricts freedom. For example, by restricting firms from depleting common resources or by requiring a business to allow its workers to organise. This distinction separates those acts of interference that are justified – and in some cases required – from those that are not. Other forms of interference can also be fully legitimate. If an actor rewards certain options, nudges or simply persuades its partners then it may be regarded as legitimate interference for the following reasons: by offering a reward, the actor interferes by adding a supplementary option, which is one of the original options with the addition of a reward; by nudging, an actor is making one of the options a more convenient choice. These types of interference are improving the original set of options. Lastly, by the act of persuasion an actor interferes by seeking to inform its partner of the virtues of one of the original options. As long as the persuading arguments are truthful, the act of persuasion does not count as dominance. These forms of interference might come at play in situations where independent parties are engaged in balanced negotiations. However, when

negotiating positions are asymmetrical there might be a fine line between persuasion, incentivising and nudging, and arbitrary control.

Arbitrary interference may also be performed by reserve- and virtual control (Pettit 2015: 51). These types of dominance can result from asymmetrical power-relations and economic pressure. Reserve control, is the removal of options other than the one which is chosen. The loyal followers of hegemonic powers do not necessarily see themselves as being interfered with, because their wish is to follow the hegemon's will. Nevertheless, they are dominated if they are not permitted to follow alternative interests.

Virtual control is the potential of arbitrary interference. The mere possibility of arbitrary interference is in itself sufficient to count as domination. The reason being that the hegemonic power, holding virtual control, might change its mind at any time, turning its influence into active control. A benevolent hegemon might allow its subjects to choose freely – even against its own interests. Nevertheless, the subjects are, at any time, dependent on virtual consent. Additionally, the potential threat of being dominated might modify the behaviour of the subjects, as they might wish act in a manner that satisfies the hegemon. This must be regarded as unjust.

A theory based on the concept of justice as non-domination is a particularly relevant point of departure for assessing normative standards in trade (Laborde and Ronzoni 2015: 280). Trade is an international activity, and the concept of domination is well suited to capture injustices at the global level. The theory emphasises some actors' ability to actively or virtually deny reference to the interest of others in their actions (Laborde 2010: 54). The argument that individuals, groups and states need to be enabled to control the power exercised over them, is equally persuasive on the global level as on the sub-state level. The republican conception of justice as non-domination provides a useful analytical tool to identify forms of injustice and categorise them either as active, virtual or reserve dominant control. For example, if a state allows for the depletion of common resources, then it actively removes the option of others to benefit from them. A corporation can virtually control a state's labour laws by threatening to outsource its production if labour standards are not lowered. It then replaces the option of labourers to work under acceptable labour standards with the option to work under sub-standard conditions.

These are examples of domination in the international system. This section has addressed what it means to be under the arbitrary control, and exemplified how relationships of dominance might result from international trade. The succeeding section outlines three perspectives on what reasonable approaches for addressing injustices might be in the context of EU's bilateral trade relations.

Three approaches to sustainable trade

Republican theories have two important commonalities. Firstly, as outlined above, they are underpinned by the concept of justice as the absence of arbitrary interference. Secondly, republican theories of justice are institution dependent (Halldenius 2010: 12). Justice is not established by individuals and institutions acting in accordance with justice principles out of benevolent intentions (Pettit 1997). Rather, principles of justice have to be institutionalised in ways that incapacitate powerful actors' ability to exercise arbitrary control. Halldenius (2010: 20-3) describes this dynamic as an idealised three step process she labels the *Structure of Rights Claims*: (1) when a subject is being dominated it generates a right for a claim to justice; (2) the rightful claimant of justice must be enabled to present its justice-claim to an institution with the capacity to restore the unjust relationship; (3) when a justice-enabling institution receives a legitimate claim, it must trigger an obligation on its behalf to correct the unjust relationship, regardless of whether or not it serves the interest of the addressee.

In the theoretical discourse on global political justice, there are divergent views on who should be able to rightfully present a justice claim at the global level (1), what claims of justice might be legitimate (2), and what institutional arrangements are best suited to manage justice-claims (3) (Table 3.1). The different perspectives on global political justice are more or less state centric in how they prioritise the salience of state sovereignty; more or less cosmopolitan, in regard to whether or not they see responsibilities of justice as transcending beyond borders; and more or less inclusive in how they priorities the needs of the vulnerable. All three perspectives come with distinct prospects and short comings, with regard to the objective of improving conditions for a more just global order (Sjursen 2017).

The main perspectives on global political justice in the republican theoretical tradition, are captured by the GLOBUS framework (Eriksen 2016). Table 3.1 (Sjursen 2017) summarises these views along three

perspectives: (i) justice as non-domination, which is a statist perspective emphasising status and equality among sovereign states; (ii) justice as impartiality, which is a cosmopolitan perspective emphasising the rights of the individual; (iii) justice as mutual recognition, which is a perspective based on the idea of differentiation and inclusion as prerequisites of fair international systems. These models represent reasonable expectations for how the EU might enhance justice; in this report the three conceptions are used to discuss how the EU can institutionalise sustainable development norms in preferential trade agreements. Firstly, these perspectives are used as typologies of normative trade. The typologies function as conceptual tools for linking the empirical findings with the theories of global political justice. These conceptual tools are used to identify and describe the distinctive features of the EU's trade and sustainable development agenda. Secondly, the different conceptions are used to underpin a normative assessment of the EU's approach to sustainable development provisions in preferential trade agreements.

Table 3.1: Three perspectives on global political justice (Sjursen 2017)

	Non-domination	Impartiality	Mutual recognition
Reasons for action	Duty of beneficence	Moral duty	Endangered vulnerabilities
Rightful claimants of justice	States	Individual human beings	Groups, individuals, states
Main concern	Arbitrary-interference	Autonomy	Due hearing
Core organisational principle of global politics	Equal sovereignty	Rights protection	Reciprocity
Institutional form	Multilateral	Supranational	Collaborative
Legal structures	International law	Cosmopolitan law	Democratic cosmopolitan law

Non-domination

According to Laborde and Ronzoni (2015: 280), 'one of the most problematic features of the existing global order is that it enables the domination of states – and of their citizens as a result'. According to the justice as non-domination perspective, the international community should be ordered so that it ensures the equal treatment of states (Sjursen 2017: 7). Since the foremost priority of a state in the

international community is not to be interfered with, all states have a common interest in respecting the same right to non-interference for other states that are effective and representative (Pettit 2014). Claims to justice beyond the state is limited, and 'human rights do not trump sovereignty' (Eriksen 2016: 10). Consequently, 'the role of global institutions is to promote global reasons and to foster deliberation and critical dialogue, not to legally sanction non-compliance' (Eriksen 2016: 10). The commonly agreed aims of the international community are reflected in norms and international law. Most states aspire to follow international law, and wish other states to do the same. However, the community of states should refrain from sanctioning non-compliance.

In the state centric perspective, obligations and responsibilities of justice are determined by national association. This means that individuals have very little – if any – legitimate claims to justice beyond the territorial borders of the state they are members of. Additionally, states have few obligations to people who are non-members (Pettit 2014: 159). In the model of justice as non-domination, states are the *rightful claimants* of justice in the international community, as they are best suited to represent the interests and opinions of their citizens⁵. Consequently, state institutions should be the rule-makers in international trade and related policy areas.

According to Pettit, the point of departure in this perspective is the system of states such as it is (Pettit 2010: 70). It is important to note that this perspective of republicanism does not prioritise state interest above the needs of individuals, as 'the normative justification of sovereign liberties ultimately goes back to a concern with the freedom of the individuals who constitute a people' (Mikalsen 2017: 5). The EU should definitely care about the global poor and environmental protection outside the EU's territorial borders. Notwithstanding, they have no *obligations* towards the global poor. Further, the EU should accept that sovereign states and their citizens are best able to address these issues independently.

⁵ In Pettit's view, only those states that are functionally effective can claim to speak for its people (Pettit 2014). Pettit has a broad understanding of what constitutes a representative state. All of the EU's trade partners fall within Pettit's understanding of representative states and should therefore be treated as equals in the international trade system.

States might, but have no obligation to, address injustices outside their borders (Eriksen 2016). When citizens of a state publicly demand it to assist foreigners, through for example aid, it might provide the state with a reason for taking action abroad. This is restricted to support that is desired by the client, and which is not imposing on the client's sovereignty (Pettit 2014: 175). Addressing injustices as a *duty of beneficence* in line with the ideal of justice as non-domination would mean that the benefactor should be restricted from attaching demands to the aid it is offering. The Everything But Arms initiative and the General Scheme of Preferences are arrangements in the EU's external trade policy that match this description. These unilateral trade schemes confirms the EU's duty of beneficence, as they offer low-income economies non-reciprocal preferential or tariff free market access to the Common Market for certain goods.

In this model, the *core organisational principle* in international community of states should be the equal treatment of its members. This is accomplished by maintaining a set of sovereign liberties in international systems (Pettit 2015). Sovereign liberties, are liberties that '[...] any state can exercise at the same time as others, and that any state can exercise without jeopardising the satisfaction that other states can derive from the exercise of such sovereign liberties' (Pettit 2015: 48). Rules and norms in accordance with sovereign liberties make up the common basis of justification in international trade. These rules and norms are entrenched in a *legal structure* based on international law. Legitimate claims to justice are derived from the violation of these rules. The international trade system should not concern itself with the liberties of individuals, as violations of personal liberties are first and foremost an issue that belongs to the domestic domain. To conclude, at the international level, legitimate justice claims arise from the violations of the sovereign status of states and not from violations of the personal liberties of the citizens in states⁶. In the international system of states, the aim is to protect states' sovereign liberties (Pettit 2014: 154).

From a perspective of justice as non-domination, the EU must maintain a system that protects these liberties not only for Member States of the EU, but also protect the sovereign liberties of its trade partners when acting at the global level. This is first and foremost accomplished by

⁶ An exception is the worst forms of human rights violations (Pettit 2015).

not intervening in the domestic policies of its trade partners. However, it is not only state-state relations that pose threats to sovereign liberties in international trade. Structural features of globalisation and the international trade system, are also undermining state sovereignty (Laborde and Ronzoni 2015: 281). Transnational issues such as powerful economic actors' capacity to modify domestic regulations, climate change and the exhaustion of resources affects states' ability to exercise self-determination. A common set of regulations on these issues might therefore be required. This is achieved by institutionalising rules that protect 'free statehood rather than replacing it' (Laborde and Ronzoni 2015). A common set of rules on trade in pollutants and endangered species, as well as a minimum set of labour standards can restrict the arbitrary control some powerful economic actors hold over states (Pettit 2014). However, it is not up to the EU alone to act as a global regulator, and the EU should refrain from establishing supranational institutions. The EU should support rule-making through *multilateral institutions* where states can pursue their interests, and determine on equal terms, the rules of international trade.

In the state centric perspective of global political justice, the addressees of global justice claims are the international community of states, where multilateral institutions function as forums for deliberation (Pettit 2015). These international institutions should facilitate intergovernmental discussions by bringing states together and allowing structured debate. The purpose of international deliberation is not to establish an international body of binding law. Instead, it should foster policy debates on relevant issues that establish 'a currency of considerations and common standards' (Pettit 2015: 61). Hence, international law constitutes a set of norms that all states view as legitimate expectations. International non-state organisation play an important role in monitoring compliance to international law (Pettit 2014: 169). Both other states and the citizens expect adherence to common recognised norms. In cases where norms are breached, citizens, organisations and states only have recourse to naming and shaming tactics to correct the behaviour of the violator.

In international trade, the WTO has served as a multilateral institution for deliberation on trade related issues. After 1995 the WTO has developed a consensus based decision making procedure. Further, collectives of low-income countries have successfully grouped together to counteract the dominating power of the U.S. and EU

(Narlikar 2006; Hopewell 2017). This makes the WTO a multilateral institution that coincides with the key criteria of Pettit's international forum of deliberation (2015: 58), hence, the EU should act within the WTO-system. There are, nevertheless, great deficiencies in the organisation as the decision-making procedure is severely crippled by internal differences (Narlikar 2010). The EU should emphasise the improvement of the functioning the WTO, and not divert towards bilateralism. The EU is a formidable trade power, and it would – at best – function as a 'benevolent despot' (Pettit 2015: 56), if it were to emphasise normative standards through bilateralism in international trade.

Expectations

If the EU adheres to the justice as non-domination model, then one would expect the promotion of multilateral institutions in order to facilitate deliberation on international trade issues. The WTO will play a pinnacle role in EU's trade policy. Normative standards should not be pursued bilaterally, as the risk of domination is inevitable due to the EU's extended market power.

The role of bilateral agreements should be to facilitate trade, and not promote changes at the domestic level of their trading partners, as international rule making is best pursued through deliberative processes in multilateral institutions.

If this is the reasoning of the EU in international trade, then it admits that there are unjust global structures that it cannot address, especially within the territories of its trade partners. However, the EU would work to enhance the ability of states to themselves correct the injustices their citizens suffer from. The aforementioned measures do all serve the purpose of restricting public bads, without imposing on the sovereignty of states.

Further, it can be expected that the EU as a beneficiary of free trade will establish some development programs to support less privileged trading partners and maintain the legitimacy of the system. The EU has already established a European Globalisation Adjustment Fund to support EU citizens who lose their jobs due to structural changes in the economy. Similar schemes could be pursued on the global level or bilaterally with its trade partners.

Impartiality

The impartiality model requires that individuals have a more direct influence over the decisions that affect them, in contrast to the conception of justice as non-domination (Bohman 2004). States are central justice enabling institutions. However, an international institutional arrangement above the level of the state is warranted (Eriksen 2016). International institutions should establish a shared basis of public justification based on universal human rights. These institutions need mechanisms that make them responsible to the citizens (Mikalsen 2017). Further, enforcement mechanisms that penalise violation of norms in sovereign states, are a prerequisite for compliance. This calls for international institutions with supranational qualities. Delimited state sovereignty and obligations to justice beyond borders are legitimised by human rights reasoning.

The liberty of individuals cannot be solely dependent on representative states' ability to function as justice enabling institutions (Halldén 2010: 24). Some individuals have membership to states that have an inadequate ability or willingness to act as representative of their citizens' interests. In other cases, states are too impoverished to effectively implement it. Weak states can for example be pressured by powerful private economic actors to reduce labour standards from fear of outsourcing of production. Alternatively, in corrupt societies, government officials might act on behalf of their economic self-interest rather than the interest of the citizens they represent when giving concessions to vulnerable resources.

In cosmopolitan strains of thought, individuals have moral and structural affiliations that extend beyond arbitrary boundaries, such as territorial or cultural affiliation (Beitz 1979). A thin moral association between all individuals establishes a foundation for basic universal liberties, such as human rights. All of the EU's external activities, including trade, should be conducted in line with basic principles that protect these rights. Moreover, individuals have a right to be included in processes that affect them. Iris M. Young (2000: 242) summarises the cosmopolitan account on responsibility of justice as:

Wherever people act within a set of institutions that connect them to one another by commerce, communication, or the consequence of policies, such that systemic interdependencies generate benefits and burdens that would not exist without those

institutional relationships, then the people within that set of interdependent institutions stand in relations of justice.

Interconnectedness is the basis for a moral context of justice. In this context the EU has a responsibility to ensure that those who are affected by its external activities have a say in the process (Forst 2015: 91). This is particularly valid for trade policy, which forges strong interdependent relationships between different societies. The EU's external trade policy creates strong interdependent relationships due to its emphasis on both tariff reduction and regulatory convergence of the commercial aspects of domestic public policy (Araujo 2016). This provides the EU with a moral obligation of justice to the citizens of its trade partners.

At the international level, there are requirements for an international set of rules that function as a common basis for public justification. This is recognised in both the non-domination and impartiality perspectives. While international rules, in the non-domination perspective, are primarily concerned with sovereign liberties, the impartiality perspective puts emphasis on the rights of the individual. In the conception of justice as impartiality, these rights should be entrenched in cosmopolitan law and function as common rules that govern social activity, including trade. The EU has a moral duty to adhere to such rules, and legitimate justice claims are derived from the violation of them. The aim of enforcement mechanisms in the impartiality perspective is to provide 'neutral and unbiased solution[s], that may in principle be seen as justifiable from the perspective of all' (Sjursen 2017: 8). Only supranational institutions with the capacity to impartially enforce common obligations, can guarantee that the autonomy of individuals is respected (Eriksen 2016).

The mere formulation of justifiable norms and the further entrenchment of these norms in the international system of trade is insufficient. The Impartiality model 'underscores the need for authoritative institutions to interpret and enforce valid norms' (Eriksen 2016: 15). Institutions with the capacity to sanction violation of norms is a prerequisite for justice to be upheld. In contrast to the Non-domination model, sovereignty does not trump human rights. Consequently, dispute settlement mechanisms must have supra-national qualities and the ability to make impartial judgements on the actions of state and non-state actors.

In cases where the existing international rules are inapt, the EU has a responsibility to participate in creating institutions that can formulate, entrench and enforce international rules (Forst 2015). Establishing institutions that, through discourse, enable concerned parties to reciprocally formulate justified norms, are the first task of justice (Forst 2015: 104). A number of such institutions already exist, particularly in the United Nations (UN) family of organisations. ILO and the UN Framework Convention on Climate Change are organisations that establish norms on respectively international labour rights and climate change. The EU should not only assist the workings of these institutions; the principles of these institutions' declarations and conventions must underpin the EU's external activities.

Expectations

In the model of justice as impartiality, the EU has a responsibility to conduct trade, as well as all other external relations, in a manner that respects the rights of those who are affected by its actions. The EU should seek to strengthen the system of international organisations that tries to mitigate the adverse effects of trade liberalisation. These might be both organisations working with environment and labour issues. The EU will emphasise the importance of such institutions as mediators in conflicts between the parties of EU's trade agreements. Moreover, these institutions should have enforcement capacities that enables them ensure compliance with environment protection and labour standard norms. The EU will also work to increase the modes of inquiry in international institutions, in order to open up these institutions to the opinions of the full range of civil society. The EU will use a human rights language to justify its commitments to international norms. The EU will back up justified common obligations with dispute settlement mechanisms that legally enforces compliance.

Where the existing institutional structures are inadequate to fulfil the requirements of the Impartiality model, the EU should not shy away from taking it upon itself to establish such institutions.

The EU will see this as a moral obligation to establish reciprocal minimum standards to secure an impartial regulation of trade related activities. The EU will justify the inclusion of normative standards in trade based on human rights arguments. The EU will be equally concerned with norm violations in its own territory as with norm violations in its trade partners' territories. It will emphasise the

importance of normative standards to be reciprocally upheld. The EU might therefore concern itself with un-level playing fields.

Mutual Recognition

Justice as mutual recognition rests on the idea that we cannot know what is just before the opinions of all interested parties are heard (Eriksen 2016). The Mutual Recognition conception is less concerned with obligations of justice grounded in universal human rights, and more concerned with interdependent relationships (Young I.M. 2011: 123-151). A global society should establish a thin regulatory regime based on fundamental rights. However, local societies need to be self-determining, and administer these general principles in a manner that take into consideration the distinct qualities of their communities way of life and level of development (Young I.M. 2000: 266). If not, paternalism resulting from the good intentions of a majority is inevitable. Hence, international institutions cannot be preconditioned on value laden principles, and they need mechanisms that channel the distinct voices of interested parties.

Proponents of the Mutual Recognition model argue that special concern must be made for vulnerable groups. Some groups of people have distinctive ways of living, which are recognised by their community, but do not necessarily correspond with universal values. Global society must be aware not to violate the self-determination of distinct peoples (Ivison 2015). Further, vulnerable groups are highly affected by transnational structures, and at the same time lack the ability to address the issues affecting them. It is a conception of justice that focuses on structural cosmopolitanism and the self-determination of vulnerable individuals, and argue that vulnerable peoples have a special claim to justice (Young I.M. 2000). It is important for the EU to recognise how liberalised trade affects groups of people differently within the EU itself and its trade partners. The EU must pay particular attention to how its trade relations might reinforce structures of exploitation (Eriksen 2016). If the economy of a potential trade partner is underpinned by exploitative structures based on social and cultural differentiation, then these groups' interests must be given increased consideration in the EU's policies. If the EU engages in trade with an economy that exploits resources belonging to indigenous peoples, then the EU essentially supports this practice.

Justice as mutual recognition emphasises the importance of inclusion. By moving away from moral universalism as the basis of justification, the Mutual recognition model can take into account the distinctive needs of marginalised groups. Further, its emphasis on due hearing makes the model more sensitive towards paternalism and cultural imperialism, as local jurisdictions are left to determine how to implement international rules (Eriksen 2016). As established above, normative standards are important in the EU's external trade agreements. However, the provisions in the agreements should not prescribe how its trade partners are to implement these regulations. This is in contrast to the Impartiality model, where shared governance institutions and regulatory practices are promoted.

Nevertheless, there are good reasons for why self-determining local societies should not be completely independent from international regulations. The first reason is the interdependence argument outlined in the previous section. Self-determining people must take into consideration the extent to which their actions influence others (Young I.M. 2000: 260; 2011: 153). Secondly, a thin set of international standards protect vulnerable groups from interference by powerful economic actors.

The addressees of justice claims in the mutual recognition model are multiple democratic forums. These institutions have to be accessible to those individuals who are affected by their decisions. Representativeness is obtained by opening up international institutions to the inquiry of civil society (Bohman 2004). A balanced representation of business, labour representatives, and environment and human rights organisation should have access to the international public discourse.

Expectation

Those who are most affected by trade liberalisation should be given enhanced determination over the process of trade liberalisation. This would require engagement of civil society groups, representing labour, environment and local interests in the initial stages of the trade negotiations.

At the macro level, the EU will work to strengthen international institutions working with trade related issues. The purpose of the macro level institutional arrangement is to devise and enforce general

principles that supports cosmopolitan objectives. However, the EU will recognise the need for the self-determination of diverse groups of people. As a consequence, the EU will seek to establish institutions at the micro level with autonomy to enforce these principles in manners consistent with local communities' special needs and distinct ways of living.

Conclusion

The conception of justice as non-domination is the theoretical point of reference in the framework. As mentioned, the social trade policy of the EU is assessed against how it addresses the dominant relationships between institutions and individuals. This is a particularly useful framework because asymmetrical power relations and arbitrary control are common features in the international trade system.

The three sets of expectations are all supposing that the EU, in some way, is seeking to mitigate dominating relationships. They are all reasonable because of the increased focus on the negative impacts of globalisation and trade liberalisation. The three different perspectives on global justice make it possible to capture how the EU might be prioritising with regard to state sovereignty, the autonomy of the individual, and support for self-determination of those who are affected by market liberalisation.

I use the indicators of the framework to assign observations to the three perspectives of global justice. I then use the underlying theories to assess, from the three conceptions of justice, what the strengths and weaknesses of sustainable development chapters are. I elucidate this in more detail in the following chapter on research design and methodology. This chapter also provides a more thorough operationalisation of the key indicators in the aforementioned theoretical perspectives.

Chapter 4

Research design and methodology

This report has an interpretative objective, as it seeks to describe the distinctive features of the EU's sustainable development chapters. It is deductive in nature, as the point of departure is the theories on global political justice elaborated in the previous chapter. A theory guided case study design is utilised in order to unpack the distinctive features of the EU's sustainable development chapters. However, this report does have ambitions that extend beyond the mere description of an event. The primary aim is to evaluate the EU's approach to sustainable development standards in trade on the grounds of theories on global political justice. By linking the empirical findings with the theoretical perspectives, my aim is to enable a theoretically grounded assessment of how the EU promotes sustainable development standards in preferential trade agreements. This report relies on congruence analysis method for making this assessment. Congruence analyses depend on comparisons between theoretically derived indicators and empirical findings. This chapter also presents the sources of data that make out this report's empirical material. Then it addresses the main validity concerns that are relevant for this report. Finally, key indicators are operationalised.

Case study research design

This report examines a spatially delimited phenomenon observed at a single point in time. The phenomenon of interest is the sustainable

development provisions in EU trade agreements. This is a case of normative trade policy. The preliminary research question asks what characterises the EU's approach to a normative trade policy. Consequently, the study has not as a primary purpose to achieve comparability and generalisability to similar cases. This aim diverges from the common understandings of a case study as 'an intensive study of a single unit [...] for the purpose of understanding a larger class of similar units' (Gerring 2007: 37). It better conforms to Gerring's understanding of a single outcome study, where the aim – in statistical terms – is to explain 'the point score for a single case rather than a range of values across a population of cases' (Gerring 2007: 187).

The prospect of an intensive study is to acquire a lot of knowledge about one single event. In order to focus the study, a theoretical framework has been formulated prior to the investigation. In a theory-guided case study, the conceptual framework directs attention towards relevant aspects of the case – according to the particular theory (Levy 2008: 4). This structured use of theory provides better explanations and understandings of the key aspects of those cases. As mentioned in the previous chapter, by utilising political theories of republican justice, the emphasis is directed towards power relationships and arbitrary control rather than distributive outcomes.

The process has not been purely deductive. Modifications have been made to the theoretical framework throughout the process. This has been particularly important in order to fit an existing framework to a new phenomenon. For this particular study, this has led to changes in the operationalisation. For example, by operationalise the key variables according to Halldenius' (2010) *Structure of Rights Claims*.

A case study must be limited in time and space (Gerring 2007: 28). The temporal delimitation of this study is not immediately clear, as the EU has linked sustainable development goals to its trade policy for decades. However, two recent changes in EU trade policy have made it necessary to choose units from the period after the 2006 Global Europe strategy. There were significant changes in the EU's trade strategy in 2006 following the Global Europe strategy (Meunier 2007). Further, the 2009 Lisbon Treaty gave the European Parliament veto powers over future external trade agreements – consequently changing the decision making procedure for external trade agreements in a substantial manner (Araujo 2016). As a result, this report focuses

on those agreements where negotiations were initiated after the Global Europe Strategy (the so called new generation trade agreements), and which have been negotiated under the Lisbon Treaty decision making procedure. The purpose of the delimited temporal scope is enhanced equivalence of the units that are examined (van Deth 2009: 7).

The new generation of trade agreements includes sustainable development provision in dedicated trade and sustainable development chapters. This report's spatial delimitation is these chapters of the agreements. This further limits the scope of the study. It can be argued that broader aspects of the EU's trade policy should be included, in order to explain the trade and sustainable development nexus more fully. In essence, all aspects of EU trade policy affects sustainable development since the concept itself encompasses economic growth, social policy and environmental policy. However, as argued by Young A.R. and Peterson (2014: 23), the complexities of EU trade policy is best overcome by directing the attention at more specific facets of trade policy, and then potentially make generalisations to the wider EU trade policy context. Nevertheless, the implications of the narrow scope is lack of control for incoherence with other aspects of the EU's trade agreements. It is widely understood that different elements of the EU's external policies often undermine each other (Young A.R. and Peterson 2013; Elgström and Pilegaard 2008).

Conducting single case studies for the purpose of confirming theoretical expectations pose some noticeable scientific challenges (Moses et al. 2012: 130). Among them are pit falls such as selection bias and over-generalisation (George and Bennet 2005: 22-34). Proving that an explanation fits the evidence is insufficient and must be complemented with evidence that the explanation is a better fit than alternative explanations (Levy 2008: 7). This is commonly achieved by testing the explanation on comparable cases. An alternative approach is to rely on within case variation. This report relies on variation in congruence between multiple theoretical expectation and the single outcome case as the method of generating competing evidence.

Congruence method

The congruence method addresses broader theoretical discourses. By taking this approach, concrete expectations deduced from a variety of theories are matched with empirical findings (Blatter and Blume 2008: 325). This makes it possible to draw inferences about the explanatory

strength of different theories. This report follows the four steps of congruence analysis as formulated by George and Bennet (2005: 200-1). Firstly, the three abstract theoretical perspectives of global political justice have provided the foundation for concrete expectations for how the EU might approach the notion of sustainable development norms in trade agreements. I have specified what six key aspects (indicators) of these approaches would be according to the theoretical perspectives of global political justice. Secondly, I have identified the sustainable development chapters of the EU's new generation of preferential trade agreements as cases where these theories can be tested. Thirdly, in the succeeding chapter (5), the theoretically derived expectations have been matched with the outcomes of the empirical case. It is important to pay particular attention to those outcomes that do not fit with the overall theoretical expectation (George and Bennet 2005). The key findings in this study are observations with great discriminatory power. Findings that affirm one expectation and at the same time unambiguously rejects alternative expectations.

While the mechanism of control in co-variation studies are a plurality of cases, it is the variety of theories that function as the main mechanism of control in the congruence method (Blatter and Blume 2008). A precondition for this approach is a multitude of coherent theories. Basing the theoretical expectations on an existing theoretical framework strengthens the coherence (George and Bennet 2005). The GLOBUS framework has been applied in a variety of recent research papers in the fields of: foreign policy (Tonra 2018); climate policy (von Lucke 2017); and migration (Olsen 2018; Fassi and Lucarelli 2017).

There are some challenges associated with conducting a study using congruence analysis. Firstly, it requires having a plurality of theories that are operationalised correctly. A great variety of theories allow for better control, as the theories act as the mechanism of control to test for alternative explanations (Blatter and Blume 2008). There is considerable variance in the different conceptions of justice. Nevertheless, they do not encompass conceptions of justice as distributive- nor liberal justice. This restriction limits the measure of control to a certain degree. A second important aspect of congruence analysis, is the need for multiple assumptions that relate to the fundamental part of the theory (assumptions about the most important actors, their perceptions and motivations). This is important in order to assure a better comparison of theory and empirical findings. These

issues have been of particular concern for the operationalisation of the theoretical perspectives.

Operationalisation is key because the theoretical deducted assumptions must correspond to an outcome related to the actual theory that the assumption is derived from. The congruence method therefore requires an intense reflection on the relationship between abstract concepts and concrete observations on behalf of the researcher (Blatter and Blume 2008: 320). Issues relating to concept validity are addressed in greater detail the succeeding section on validity.

George and Bennet's (2005) fourth step of congruence analysis is process tracing. They argue that process tracing is crucial in order to determine whether the congruence is spurious, and to control for intervening causal processes. Process tracing can also explain why a theory incorrectly predicts certain outcomes of a case. This report undertakes an in-depth analysis of the India-EU free trade negotiations. Process tracing, defined as 'the systematic examination of diagnostic evidence selected and analysed in light of research questions' (Collier 2011: 823), is used to examine the formal considerations made by the EU when linking trade and sustainable development objectives. The process which is examined, is the EU's demand for the inclusion of a sustainable development chapter as an integrated part of its bilateral free trade agreements. The India-EU negotiations are a particularly useful case because India has been highly critical of the inclusion of labour and environmental standards in the WTO rules. As a result, the EU is required to justify its actions towards India. This is based on the assumption that contested norms require more justification than norms that are taken for granted (Finnemore and Sikkink 1998: 897).

The sources of data

In this report, the EU's trade and sustainable development agenda is examined from two perspectives. The first is through the trade and sustainable development chapters, and the second is through the case study of India-EU trade negotiations. These two perspectives require different approaches in regard to data collection.

The main sources of data in the study of the trade and sustainable development chapters are the actual texts of the agreements. These texts are official documents produced by the EU and its trading

partners. The agreements included in this study are the EU's trade agreements with South Korea, Vietnam, Singapore and Canada. As with all official documents, authenticity of these texts are high (Bryman 2012: 549). They have not been produced at the request of the researcher. Furthermore, the Chapters are written as legal documents, and not as a communication to an audience. Interpretative skill is required to ascertain the meaning of the material. Secondary literature in the form of legal analyses of EU trade agreements are used in order to support the interpretations of the clauses in the agreements

In the case study of the EU-India trade negotiations, data is collected through official documents, speeches given by Indian and EU officials, and newspaper articles. This triangulation of data sources are particularly important in a process tracing case study because the official documents might be reactive to how the EU and India wish to portray themselves to the readers (Bryman 2012: 552).

Validity

The primary validity criterion in a congruence analysis is concept validity (Blatter and Blume 2008). It is imperative for the analysis that '[...] the predicted observations express the meaning of the abstract conceptualisation in a correct manner' (Blatter and Blume 2008: 319). As already mentioned, basing the indicators on pre-existing indicators enhance the validity and the comparability of the analysis. However, it is crucial that the indicators are operationalised according to the particular research subject. The operationalisation of the indicators follows Adcock and Collier's (2001) shared standards of qualitative and quantitative research. Their four levels of conceptualisation and measurements have been central for the operationalisation of the theoretical framework. The four levels describe the association between concepts and observations. These four levels are: (1) Background concept, understood as '[t]he broad constellation of meanings and understandings associated with a given concept'; (2) Systematised concepts, understood as a specific and fully explicated choice of one of the many possible meanings of the background concept; (3) Indicators understood as 'measures' and 'operationalisations'; and (4) Scores of cases understood as 'results of qualitative classification' (Adcock and Collier 2001: 531). Following this model, a valid result is achieved when the qualitative classifications (4), are true expressions of the systematised concept (2).

The possibility of spuriousness, causal priority and causal depth are relevant validity issues in congruence analysis (George and Bennet 2005: 185). In the case of sustainable development norms in preferential trade agreements, it is possible that such norms are merely symbolic commitments or are being promoted economic interests on the part of the EU. These are possible causes of spuriousness. I have chosen not to derive alternative explanation to control for these alternative explanations. These questions are mostly related to the EU's underlying motivations for including labour rights and environmental standards in preferential trade agreements. These questions are related to *why* and not *how* the EU approaches questions of sustainable development in trade, and are consequently outside the scope of this report.

Operationalisation

The background concept in the theoretical framework is political justice. The GLOBUS framework, as outlined in chapter 3, provides three systematised concepts of global political justice: justice as non-domination, impartiality and mutual recognition. These concepts do not cover the whole range of possible meanings of global political justice. Additionally, they are all grounded in the idea of justice as the absence of arbitrary interference. Consequently, the theoretical perspectives cover a constrained range of the possible meanings of the background concept. Furthermore, the conceptions are skewed to favour approaches to political justice that emphasise international regulations. However, they provide explanatory nuance on the part of the spectrum that is most likely to correspond with the approach of the EU, as it is widely understood that the EU acts as some sort of regulatory power in international trade politics (Young A.R. 2015b; Drezner 2007).

Whether EU's approach to sustainable development standards in trade conforms to the background concept of global political justice (answering the question whether or not EU's approach is just) is not a concern of this paper. This study limits itself to address congruence between the systemised concepts and EU's approach to trade and sustainable development.

The indicators of the systemised concepts are outlined in Table 3.17 (Sjursen 2017). I have chosen to focus on the three indicators that are related to Halldenius' *Structure of Rights Claims*. The three indicators are: Rightful claimant of justice, Legal structure and Institutional form.

Rightful claimant of justice

There are three alternatives within the theoretical perspectives for who a claimant of justice might be. States in the non-domination perspective; individuals in the impartiality perspective; and groups, individuals and states in the mutual recognition perspective. In order to determine who is enabled to claim justice in the monitoring and implementation mechanisms in the trade and sustainable development chapters, I borrow from Bohman's (2010) idea of communicative status and -power in republican theory. To be a fully legitimate claimant of justice require both communicative power and status in an institutional system. An actor with communicative status is recognised as a member of an institutional body and are enabled to engage in dialogue. Communicative status is achieved by having access to institutions where issues relating to trade and sustainable development are discussed.

Communicative power is understood as 'regularised access to influence in an authoritative institution' (Bohman 2010: 432). An actor's status as rightful claimant of justice is heightened if it has the capacity to raise concerns towards the signatories of the trade agreement. An actor with communicative power are in addition to being enabled to engage in deliberation on issues relating to the sustainable development chapters, also enabled to cause institutional change. The actor with communicative power must be enabled to hold the parties responsible for the commitments made in the sustainable development provisions. This is primarily achieved by having the capacity to trigger dispute settlement mechanisms.

Legal Structures

The operationalisation of the indicator Legal Structure, is based on Rainer Forst's (2015: 98) idea of a *Basis of justification*. The basis of justification in an institutional system are those rules and norms claimants of justice can appeal to when they consider that their

⁷ The indicators are: Reason for action; Rightful claimants of justice; Main concern; Core organisational principle of global politics; Institutional form; and Legal structure.

sovereignty, individual rights or entitlement for differential treatment have been violated. The legal structure in the conception of justice as non-domination is international law; cosmopolitan law in the impartiality conception of justice; and democratic cosmopolitan law in the mutual recognition conception. In according to the *Structure of Rights Claims* the legal structure determines what legitimate justice claims are.

International law

The purpose of international law is first and foremost to protect the sovereignty of the state. International law in the justice as non-domination sense, are laws that are the result of multilateral deliberation, commonly agreed upon by sovereign states. Consequently, these laws are found in the conventions and declarations of multilateral bodies such as the UN, WTO and ILO. International law function to increase the 'sovereign liberties' in the international system. Since human rights do not trump sovereignty, few labour rights and environment standards in trade are part of international law (Eriksen 2016). The exception might be laws that prevent the exhaustion of common resources (Pettit 2014: 164).

Cosmopolitan law

In the impartiality perspective, the common basis for justification is cosmopolitan laws. These are laws that protect the rights of individuals and the environment. Cosmopolitan law is typically codified in the different conventions and declarations of international environment and labour organisations. In an institutional system in accordance with the impartiality perspective, a legitimate claim to justice is derived from breaches of international human rights and environment conventions. These are standards that are agreed upon by the international community and have a particularly strong status as common basis for justification.

Democratic cosmopolitan law

In order to base the sustainable development provisions in democratic cosmopolitan law, the EU is required to engage in dialogue with its trade partners, and certain groups representing labour and indigenous people in the initial stages of the negotiations. This is based on the view that 'justice is the product of practical interaction and contestation of how to regulate common affairs' (Eriksen 2016: 19). To achieve this, the EU will have to set up forums for deliberation on issues related to trade

and sustainable development. Consequently, sustainable development provisions will be based on the outcomes of these negotiations. Consequently, laws according to the mutual recognition perspective do not dictate how the signatories are implemented them. Furthermore, democratic cosmopolitan law requires deliberation between interested parties before they are institutionalised. This requires the EU to engage in deliberation with interested parties prior to implementing sustainable development standards in preferential trade agreement.

Institutional form

The addressee of justice claims is operationalised according to the indicator *institutional form*. The addressee of rights claims in the sustainable development chapters are the enforcement mechanisms. These bodies are enabled to function as arbitrators in cases where the sustainable development provisions are violated.

Multilateral

Multilateralism in the non-domination perspective, are international forums for deliberation between states with equal standing (Pettit 2015). These institutions must have a consensus based decision making procedure and not have capacities to penalise non-compliance. The bilateral agreements in this study are by definition not part of a multilateral institutional structure. However, the institutional framework established in the trade and sustainable development chapters can be underpinned by the aforementioned institutional principles. In a bilateral agreement, an institutional body in according to these principles are intergovernmental. Further, references to participation in multilateral institutions in the agreements do also count as multilateralism. In cases where such references are made, it is crucial that they do not come with additional obligations. For example reference in the agreement to participation in ILO with the option to sanction failure of compliance.

Supranational

The trade and sustainable development chapters underpin a supranational institutional form if the responsibility to assure compliance to the sustainable development provisions is delegated from the signatories to an impartial authority. A supranational authority must first of all be independent of government control, which enables it to make impartial reviews of the behaviour of states. Secondly, such an

institutional form must have a capacity to sanction non-compliance, even in cases where it interferes with a state's sovereignty. Supranational enforcement mechanisms can be set up in the agreement as standing bodies. The parties can also delegate authority to existing bodies like the WTO Dispute Settlement Panel

Collaborative

A collaborative institutional form shares some common characteristics with the aforementioned intergovernmental form. However, there is a greater emphasis on the right of sub-state units such as municipalities and cultural groups to be self-determinate in how these laws are applied in their local communities. The purpose of a collaborative institutional form is to provide all interested parties with a due hearing, and to channel the voice of vulnerable groups.

Chapter 5

Sustainable development chapters in EU trade agreements

This chapter identifies the distinctive features of the EU's approach for entrenching labour and environment standards with preferential trade agreements, by examining the sustainable development chapters of four trade agreements signed between 2010 and 2015 – the agreements with South Korea, Singapore, Vietnam and Canada, respectively. In so doing, it utilises unstructured comparisons with sustainable development provisions in the agreements of other OECD countries. The comparisons highlight the characteristics of EU's approach. The Chapter is structured as follows: First, it identifies the distinctive features of the sustainable development chapters by examining: the substantive content of the provisions in the Chapters; the bodies responsible for the implementation and monitoring of the signatories' compliance with the provisions; and the dedicated enforcement mechanisms that are tasked with mediating between the signatories. Second, it presents a case study of the trade negotiations between India and the EU. The negotiations are examined in order to explicate what formal considerations the EU is taking when promoting sustainable development provisions. Finally, the findings are summarised and compared with the three key indicators.

Distinctive features

The trade and sustainable development chapters differ substantially from the other chapters of the EU's external trade agreements. The

primary aim of the commercially focused parts of the agreements are to increase the exchange of goods and services by both reducing tariffs and coordinating domestic regulations in areas where they obstruct trade (Young A.R. 2007: 795). In contrast, the objective of the sustainable development chapters, as stated in their introductory articles, is to promote international trade in a manner that contributes to sustainable development through the interlinking of economic development with social development and environment protection⁸. In short, trade shall be conducted in accordance with the principle of sustainable development.

The structure and content of the sustainable development chapters do not follow a formally recognised template. However, after 2010 and the signing of the EU-South Korea agreement, the EU has established a precedence for how sustainable development standards are implemented in preferential trade agreements. The chapters are instituting commitments on environment protection, climate change and labour standards based on the core conventions of the ILO, the Multilateral Climate Change Conventions of the United Nations Framework Convention on Climate Change (UNFCCC) and a breadth of environment protection agreements. These provisions are accompanied by institutional bodies that monitor compliance with the sustainable development provisions, and the social and environmental impact of trade opening.

The sustainable development chapters are in all instances exempted from the sanction based dispute settlement mechanisms that cover the rest of the agreements. Instead, a provisional, non-binding consultative mechanism is applied. The dispute settlement mechanism only offers mediation in cases of non-compliance. As will be identified, some differences in language together with variation in specific commitments occur in the various agreements.

Content

The content of the sustainable development chapters represents the *basis of justification* that an actor can appeal to when claiming justice. There are in particular three aspects of the content of the chapters that

⁸ EU-South Korea Free Trade Agreement Article 13:1; EU-Vietnam Free Trade Agreement Article 1; EU-Singapore Free Trade Agreement Article 13.1; The Comprehensive and Economic Trade Agreement between EU and Canada [CETA] Article 22.1

matter. The first is the substantive content of the obligations, which determines what behaviour is regulated. In the case of the sustainable development chapters, the provisions encompass general clauses on trade and sustainable development, clauses relating to labour rights, and environmental standards and climate change policy. The second aspect, is the obligation of the provisions. Provisions are obligatory when they are anchored in legally binding documents, and, conversely, lacks obligation when they are merely formulated as aspirational aims (Abbott, Keohane, Moravcsik, Slaughter & Snidal 2000: 409). The third important aspect is the precision of the provisions. It matters whether norms are expressed as precise rules or vague principles. For example when norms are encoded in binding law rather than being stated as aspirational goals in best endeavour clauses (Abbott et al. 2000: 413).

General clauses

The sustainable development chapters contain some general clauses that aim to prevent the abuse of labour standards and environmental protection for protectionist purposes. Similar clauses are committing the parties to not lower standards in order to attract trade and investment. By including these clauses, the EU ensures that the sustainable development chapters are not inconsistent with the 'obligation to pursue trade liberalisation in the context of the CCP', as stated in Article 207 of the TFEU (Araujo 2016: 71).

Further, the trade and sustainable development chapters in EU agreements, recognise the right of the parties to regulate and set their own levels of protection⁹. Moreover, the South Korea and Singapore agreements explicitly state that harmonisation is not desired¹⁰. This is an indication that the provisions in these agreements are intended to function as a minimum level of labour rights and environmental protection. Furthermore, it serves to preserve the regulatory autonomy of the parties. The sustainable development standards are representing a regulatory floor that the partner countries' labour rights and environmental protection standards cannot drop below without violating the principle of sustainable development. The chapters are

⁹ EU-South Korea 13.3; EU-Vietnam 2.1; EU Singapore 13.2; CETA 23.2 and 24.3

¹⁰ EU-South Korea 13.1.3; EU-Singapore 13.1.4;

also including provisions where the parties commit to strive for further strengthening of its policies in the related areas¹¹.

Labour standards

The EU is not diffusing its own labour standards through the sustainable development chapters. The labour standard provisions in these chapters are based on references to international standards and agreements – primarily the fundamental conventions of ILO. While there has been common practice for EU trade agreements to include references to general labour standard norms in the past, these have until 2008 and the signing of the Cariforum agreement¹² been restricted in scope, and without legal enforceability (Van den Putte, Orbie, Bossuyt & De Ville 2013: 44).

A number of aspects of the EU's approach are distinct from the approach of other high-income economies. The U.S. and Canada apply one common sanctioned based dispute settlement mechanism for both commercial and sustainable development provisions in their agreements (Draper et al. 2017). Consequently, violations of labour provisions might result in sanctions and the renunciation of trade privileges. Further, the U.S. diffuses its domestic labour laws in areas like health and safety standards for workers (Postnikov 2018: 9). The European Free Trade Association (EFTA) and Japan, on the other hand, only include minimal references to labour rights (Heydon and Woolcock 2014: 73-4).

The labour standard provisions are based on multilateral conventions. Mainly the ILO Declaration on Fundamental Principles and Rights at Work (1998). The sustainable development chapters also include commitments to a wide range of UN declarations. Among them, the UN Ministerial Declaration on Full Employment and Decent Work (2006). The UN Decent Work Declaration recognises the broad international challenges of labour rights, from gender inequality and youth unemployment to export subsidies. It does not, however, include legalised obligations.

¹¹ South Korea 13.3; Vietnam 2(2); Singapore 13:2.2; CETA

¹² Economic Partnership Agreement between the EU and 16 Caribbean states

The ILO Declaration on Fundamental Principles and Rights at Work, on the other hand, establishes four fundamental labour rights. These rights are explicitly referred to in the sustainable development chapters¹³. The fundamental labour rights are: (i) Freedom of association and right to collective bargaining; (ii) the abolition of forced labour and (iii) child labour; and (iv) the elimination of discrimination in respect of employment and occupation. The four principles are commonly referred to as the 'Core Labour Standards'. The labour standards in the new generation of bilateral agreements, incorporate concrete references to international agreements on labour protection. By linking labour standards with international treaties and applying a legalised language, the norms become legally enforceable (Van den Putte et al. 2013). This is in contrast to best endeavour clauses of previous agreements.

The chapters on labour standards are also reaffirming the parties' commitment to the eight fundamental conventions of the ILO, where the parties are signatories¹⁴. These conventions encompass freedom of association, forced labour, discrimination in the work place and child labour. For those fundamental ILO Conventions where the partner countries are not signatories, the agreement creates a strong commitment to make 'sustained and continued efforts' for the parties to become signatories to these conventions¹⁵. The commitment to adhere to agreements that the parties are not signatories to, have important implications. It means that the provisions are not only reinforcing obligations, but also creating new ones. It suggests that the EU is making its trade partners alter their domestic regulations in ways they might not have done. All of the EU's 28 Member States are signatories to the eight fundamental ILO conventions. As Table 5.1 shows, Canada is the only country who – only recently – has signed all of the eight fundamental ILO Conventions.

¹³ EU-South Korea 13.4.3; EU-Vietnam 3.2; EU-Singapore 13.3.3; CETA 23.3.1

¹⁴ EU-South Korea 13.4.3; EU-Vietnam 3.5; EU-Singapore 13.3.3; CETA 23.3.4

¹⁵ EU-South Korea 13.4.3; EU-Vietnam 3.3; EU-Singapore 13.3.4; CETA 23.3.4

Table 5.1: Fundamental ILO-Conventions signed by country (ILO 2017)

Convention Country	Freedom of Association		Forced Labour		Discrimination		Child Labour	
	Right to organise (No. 87)	Collective Bargaining (No. 98)	Forced and Compulsory Labour (No. 29)	Abolition of Forced Labour (No. 105)	Equal Remuneration (No. 100)	Discrimination (No. 111)	Minimum Age (No. 138)	Worst forms of Child Labour (No. 182)
EU	X	X	X	X	X	X	X	X
Canada	1972	2017	2011	1959	1972	1964	2016	2000
India	-	-	1954	2000	1958	1960	2017	2017
Singapore	-	1965	1965	-	2002	-	2005	2001
S. Korea	-	-	-	-	1997	1998	1999	2001
Vietnam	-	-	2007	-	1997	1997	2003	2000

Notes: "X" = EU Member States have individually signed the ILO conventions; " - " = not signed; "yyyy" = year signed

Environmental standards and climate change

The other policy areas encompassed by the sustainable development chapters, are environment protection and climate change. As with labour provisions, early EU trade agreements only included best endeavour environmental provisions with weak legalisation. The new generation of trade agreements, on the other hand, include binding obligations that cover a broad range of environment related policy areas.

There are a far broader range of commitments to multilateral agreements in EU agreements than those of the U.S. (Jinnah and Morgera 2013). A further distinction between U.S. and EU agreements is that the U.S. agreements do not contain commitments to climate change agreements at all. Climate change provisions are, on the other hand, an important part of the EU's trade and sustainable development agenda. Moreover, the EU agreements does not dictate how domestic legislation should be altered in order to meet the obligations in the provisions. The U.S. agreements are much more detailed in that regard. The most recent U.S. agreements outline specific policy changes related to the implementation and enforcement of specific environmental protection agreements (Jinnah and Morgera: 330).

There is greater variance in the depth and breadth of the environmental provisions than the labour provisions in the trade and sustainable development chapters of EU's trade agreements. The agreement with South Korea mostly contain environmental clauses with weak legalisation. The commitments are limited to encourage adherence to general trade and sustainable development principles. One example is the commitment to 'strive to facilitate and promote trade in goods that contribute to sustainable development'¹⁶. The Vietnam, Singapore and Canada agreements, contain more precise and binding provisions on trade in timber products¹⁷ and marine resources¹⁸. The commitments in these clauses are expressed in a binding legalised language. However, they have a rather low precision as they do not dictate specific measures that the parties need to take in order to comply with the provisions. Examples are clauses like: 'promote the conservation of forest resources and combat illegal logging related to trade' (EU-Vietnam article 7(d)), and ensuring the

¹⁶ EU-South Korea 13.6(2)

¹⁷ EU-Vietnam 7; EU-Singapore 13.7(d); CETA 24.10

¹⁸ EU-Vietnam 8; EU-Singapore 13.8; CETA 24.11

conservation and management of fish stock by adopting 'effective monitoring and control measures to ensure compliance with conservation measures, such as appropriate Port State Measures' (EU-Singapore article 13.8(c)). These clauses outline precise objectives but are open ended. This enhances the regulatory autonomy of the parties, as each signatory is self-determinate in how to comply with the provisions.

The environmental section of the Chapters is also creating commitment to a variety of international environment protection agreements. While the South Korea agreement only includes provisions on effective implementation of the 'multilateral environmental agreements to which [the signatories] are party'¹⁹, the later agreements include provisions on a wide range of multilateral environmental protection agreements. These are primarily on biological diversity, and trade in fish and timber. In regards to biodiversity and trade in timber, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and in the Convention on Biological Diversity²⁰ are referenced. CITES regulates trade in animals and plants – and products derived from them – with the aim of protecting endangered species.

With regards to climate change, the substantive commitments are primarily asserting the parties commitments to UNFCCC and its Kyoto Protocol, and future framework agreements²¹. The obligation does not go beyond the mere reconfirmation of the commitments all EU trade partners have already made to the UNFCCC.

Implementation and monitoring

The sustainable development chapters establish multiple institutional bodies for the purpose of monitoring and implementing the obligations in the chapters. The competences of these bodies, as defined in the Chapters, determine which actors are given the status to engage in dialogue on issues related to the chapters, and effectively challenge non-compliance by triggering dispute settlement mechanisms. Hence, they effectively determine who are given status as a rightful claimants of justice. The monitoring mechanisms ability to

¹⁹ EU-South Korea 13.5(2)

²⁰ The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (Art. 1)

²¹ EU-South Korea 13.5.3; EU-Vietnam 5.1; EU-Singapore 13.6.3; CETA 24.4

be accountable and effective requires a high degree of institutionalisation (Abbott et al. 2000). The mechanisms must be a binding part of the agreement, and its objectives must be clearly stated (Abbott et al. 2000: 416).

Both governments and civil society are represented by respective bodies of the implementation and monitoring mechanisms. Governments are represented by the Committee on Trade and Sustainable Development²². The Committee is comprised of senior officials from the 'relevant administrations' and is responsible for monitoring the implementation of the provisions in the chapter²³. The Committee shall meet within the first year of the agreement entering into force, and from then on at regular but unspecified intervals. The Committee's mandate is to discuss and review the sustainable development implications of the trade relations.

The agreements establish two types of bodies that represent civil society in the monitoring process – domestic and transnational. The former, entitled Domestic Advisory Group, is comprised of civil society groups from the respective country. The Group represents the interest of civil society in the monitoring of the impact of trade liberalisation on labour standards and the environment. The Group shall provide balanced representation of business, employer, labour, and environment stakeholders²⁴. In the review process, the Committee on Trade and Sustainable Development has to consider the advice provided by the Domestic Advisory Groups, when formulating the annual report. However, it is not explicitly stated in the agreement whether the views of the Domestic Advisory Groups have to be taken into consideration in the final publication (Van den Putte & Orbie 2015). The Domestic Advisory Groups are also enabled, at any time, to posit their views and recommendations on the implementation of the chapter to their respective National Governments²⁵.

The Civil Society Forum²⁶ is a transnational body. The Forum has a broad mandate to discuss every aspect of the implementation of the

²² Called 'Board on Trade and Sustainable Development' in the EU-Singapore agreement

²³ EU-South Korea 13.12.2; EU-Vietnam 15.3; EU-Singapore 13.15.2; CETA 22.4.1

²⁴ EU-South Korea 13.12.4-5; EU-Vietnam 15.4; EU Singapore 13.15(4); CETA 22.5(2)

²⁵ EU-Vietnam 15.4; EU-Singapore 13.15(5); CETA 23.8(4) and 24.13(5)

²⁶ EU-South Korea 13.13.1; EU-Vietnam 15.5; CETA 22.5.1

sustainable development chapters. The Forum is primarily comprised of the members of the Domestic Advisory Groups of the partner countries. However, the Forum can also consult stakeholders other than those who participate in the Domestic Advisory Groups. The result of the discussions are to be submitted in a report to the Committee on Trade and Sustainable Development, and thereafter to be made publicly available. The forum meets once a year.

Only the EU-South Korea agreement has been active long enough for the monitoring mechanisms to become active. In a comparative study of the EU and the U.S. civil society monitoring mechanisms in trade agreements with South Korea, Lore Van den Putte (2015) makes some tentative conclusions on the actual workings of these bodies. The U.S. mechanisms are designed to monitor multiple agreements and therefore lack the capacity to function effectively, as committee members have to divide their attention between as many as ten agreements. The EU mechanisms, on the other hand, are restricted to single agreements. Secondly, in the EU agreement, the South Korean Domestic Advisory Group was initially only comprised of academics with government affiliation. However, the EU has been successful in coercing South Korea into accepting participation by the Korean Confederation of Trade Unions. Thirdly, the greater institutionalisation of EU mechanisms makes the government bodies more attentive to the opinions of civil society groups, and less affected by political constellation. A study of EU's co-operative approach finds that labour rights regulations in trade partner improve due to through learning by civil society actors (Postnikov and Bastiens 2014).

Enforcement

The purpose of dispute settlement mechanisms is to attain compliance with the obligations enshrined in a trade agreement (Allee and Elsig 2015). The enforcement bodies are the addressees of justice-claims. Dispute settlement is effective when it allows an injured party to challenge non-compliance (Allee and Elsig 2015). Legalised dispute settlement mechanisms in international agreements assure compliance with the obligations in its agreements, but interferes with the autonomy of the signatories (Jo and Namsung 2012). This is in contrast to soft and diplomatic mechanisms that prompt dialogue, but lack the competence to prosecute non-compliance. A dispute settlement mechanism is legalistic when it enables third party review, produce legally binding rulings, and consists of standing permanent arbitration

bodies and courts (Jo and Namsung: 1044-5). Accordingly, the design of dispute settlement mechanisms is a trade-off between 'political discretion' and 'treaty compliance' (Smith 2000: 147).

The provisions in the chapters on trade and sustainable development in EU's preferential trade agreements are enforced by a two stage ad-hoc enforcement mechanism. This is a separate mechanism from the one that is outlined in the Dispute Settlement Chapter of each agreement, and which covers the commercial aspects. This is in contrast to the typical Canadian and U.S. approach where sustainable development provision are enforced through the ordinary dispute settlement mechanism (Draper et al. 2017).

The first instance in the enforcement mechanism of the sustainable development chapters is a Government Consultation body²⁷. The body's competences are restricted to facilitate dialogue between the signatories' governments on issues pertaining to the chapter. In the government consultations, representatives of the parties are able to conduct discussions to mediate on issues of disagreement. The consultations are facilitated by the Committee on Trade and Sustainable Development²⁸. There is thus no neutral party involved in these consultations. However, advice can be sought with relevant organisations and persons during the consultations at the initiative of the parties²⁹ (According to the EU-South Korea agreement, only the Domestic Advisory Group and Civil Society Forum are to be consulted³⁰). The parties are obliged to strive towards reaching a mutually satisfactory resolution. When a mutual agreement is reached through the government consultations, it is issued as a publicly available resolution. The resolution is not enforceable in the case of non-compliance. This first instance of the enforcement mechanism indicates a concern for political discretion rather than treaty compliance, as it is a provisional body, exclusively intergovernmental and lacks competences for sanctioning the signatories.

²⁷ EU-South Korea 13.14; EU-Vietnam 16; EU Singapore 13.16; CETA 23.9 and 24.14

²⁸ EU-South Korea 13.14(3); EU-Vietnam 16(4); EU-Singapore 13.16(4); CETA 23.19(4) and 24.14(4)

²⁹ EU-Vietnam 16(5); EU-Singapore 13.16(5); CETA 23.9(4) and 24.14(4)

³⁰ EU-South Korea 13.14(4)

If the parties fail to reach an agreement within 90 days³¹, one of the parties can issue a request for a Panel of Experts to examine the issue at hand. The members of the panel are selected by the Committee on Trade and Sustainable Development, but must be independent and not take instructions from governments and other organisations³². This second and final instance is less legalised than the ordinary dispute settlement mechanism, as the Panel is not a standing institutional body, and its rulings are not legally binding. However, it is more legalised than the Government Consultations body, as the panel provides third party review, and is comprised of neutral persons without affiliation to the parties involved.

The Panel of Experts' mandate is 'to examine, in the light of the relevant provisions of the sustainable development chapter the matter referred to in the request for the establishment of the Panel of Experts, and to issue reports in accordance with [the relevant paragraph] that makes recommendations for the resolution of the matter^{33 34 35}'. The reports to be issued are one interim report and one final report. These reports are to present the findings of the Panel and provide recommendations on the appropriate measures to be taken. It is then up to the respective parties to decide how to respond to the rulings made by the Panel of Expert. As with the Government Consultation resolution, there is no option for sanctioning non-compliance. During the review process, the Panel is encouraged to seek information, advice and perspectives from the international organisations relevant for the issue, and the civil society groups that participate in the Civil Society Forum and Domestic Advisory Groups.

Some argue that the labour provisions can be enforced by the regular dispute settlement mechanism under the pretext of the essential elements clause, due to the close connection between Core Labour Rights and Human Rights (Van den Putte 2015a). Former trade

³¹ 120 days in the EU-Vietnam and EU-Singapore agreements

³² EU-South Korea 13.15(3); EU-Vietnam 17(5); EU-Singapore 13.17(4); CETA 23.10(7) and 24.15(7)

³³ EU-Vietnam: 17(6); EU-Singapore 13.17(6)

³⁴ There is a slight and different wording in CETA due to the fact that this agreement deals with labour standards and environmental protection in separate chapters. The relevant articles in the CETA are: Article 23.10(8) and 24.15(8)

³⁵ In the EU-South Korea agreement the mandate of the Panel of Experts is to "examine the matter that has not been satisfactorily addressed through the government consultations" (EU-South Korea Article 13.15(1))

commissioner, De Gaucht, has indicated that this might be a possibility in cases of serious violations on fundamental labour rights (Leeg 2018: 14). However, there is no history of the essential element clause being utilised to enforce labour standards. Further, there is presumably a consensus among the EU and its partners that labour standards fall outside the essential element clause (Van den Putte et al. 2013). In conclusion, the enforcement mechanisms must be regarded as non-binding and promotional.

Conclusion

The EU bases its provisions on internationally recognised standards, international law is the basis of the sustainable development provisions in EU trade agreements. This demonstrate a sensitivity towards the sovereignty of its partners and their right to determine their own regulations. However, state sovereignty does not trump the rights of the individual in this system. The sustainable development chapters make binding commitments for trade partners to ratify the fundamental conventions of ILO. In so doing, the EU is interfering in the domestic regulations of its trade partners by demanding commitment to international agreement to which some of its partners are not subscribing to. Further, the EU establishes institutional structures for monitoring and enforcing the implementations of the sustainable development provision. The monitoring institutions go beyond intergovernmentalism. The EU takes a collaborative approach as the monitoring bodies engage a wide range of civil society actors, and enables them to make comments and recommendations on the parties adherence to the provisions. Consequently, other actors, beside states, are authorised to address injustices through these arrangements.

The parties of the agreements are not enabled to issue fines or suspend the trade agreements as a result of lack of compliance to the provisions in the sustainable development chapters. However, the consultative enforcement mechanisms oblige the parties to engage in dialogue, together with civil society groups, in the case of non-compliance. This approach maintains the parties' ultimate sovereignty over domestic regulation relating to the provisions of the chapter. However, it establishes a mechanism that facilitate dialogue, and which might put pressure on a non-compliant partner.

Sustainable development in the context of India-EU trade relations

This section seeks to examine the India-EU trade negotiations that were initiated in 2007. The emphasis is on the EU's demand for the inclusion of a trade and sustainable development chapter in the final agreement. The purpose of this case is to illuminate some of the considerations the EU makes, and provide a secondary perspective on the EU's trade and sustainable development agenda. The EU-India case is a particularly useful case in that regard, given the EU and India's opposing view on the trade and sustainable development nexus.

India is one of the fastest growing economies on the globe, with an impressive growth rate of about 6-percent a year. This has led to an increase in the country's middle class, counting approximately 300 million people. However, India is also a site of great income disparity: 80 percent of the population make less than the country's Gross National Product of 1.700 dollars and 22 percent of the income pool is absorbed by 1 percent of the population (The Economist 2018). India's vast population of low income families and other fundamental societal issues mean that the country is very much an emerging economy, with a mounting need to enhance infrastructure and improve the quality of life of millions of its citizens. The combination of economic prospect and power, and developing needs mean that India is negotiating with the EU on more equal terms, at the same time as they have very different perspectives on a number of issues in the preferential trade agreements (Jain 2011: 226). Among these contentious issues is the EU's demand for the inclusion of a dedicated trade and sustainable development chapter.

India in international trade and relations with the EU

India has a history of challenging the rules set by Western countries in international politics. As noted by Ian Hall (2017: 113): '[d]uring the 1970's, along with other states in the global south, [India] tried and largely failed to rewrite the rules of the global economic order to redress the imbalance of wealth between developing and developed economies'. India has sought to achieve its aims from within of the international system. This is evident from their history as an active participant in the international organisations. India was one of the original signatories of GATT, and participated in the establishment of the UN Conference on Trade and Development. By heading coalitions

of similarly minded countries, India has led the resistance against the inclusion of issues like environment protection and labour standards in the international trade system (Narlikar 2017: 96).

India was one of the first countries to establish relations with the European Economic Community in the early 1960's. However, it was not before the liberalisation of the Indian economy following the 1991 reforms, and the subsequent spur of economic growth, that India became an attractive economic partner for the EU (Jain 2011). Since the 1990's, India and the EU has signed a multitude of cooperation agreements. Yet, both sides regard the outcome of the economic cooperation as unsatisfactory. To address this issue, negotiations on a Broad Based Trade and Investment Agreement was initiated in 2007. The negotiations have now been ongoing for ten years without being successfully concluded – despite the fact that both parties recognise that a potential agreement would have significant positive effects on their respective economies (CARIS and CUTS 2007). The EU is India's largest export market, and an important destination for trade in textiles, agricultural products and services. On the other hand, trade with India is of less significance to the EU economy measured in proportion of total trade. Nevertheless, the potential in India's market due to continuous economic growth, and the country's position as a regional leader in Asia are adding important dimensions to the relationship. It is recognised that the agreement has both a strategic and an economic dimension for both parties (EP 2013: 8). Furthermore, India and the EU have signed multiple bilateral agreements in recent years, proving the parties' continued commitment to further market liberalisation.

Preliminary negotiations (2004-2007)

Joint partnership Agreement

India and the EU signed a Strategic Partnership Agreement in 2004. The initial ambitions of this partnership is outlined in the India-EU Strategic Partnership Joint Action Plan. The Joint Action Plan asserts that India and the EU have shared values like democracy, human rights and the rule of law together with common experiences as multi-cultural, -religious and -lingual societies (Council 2005). The parties see these commonalities as the foundation for the exchange of experience through strengthened dialogue. It is also recognised that common goals are best served through cooperation in multilateral negotiations

in different bodies of the UN and the WTO. The Partnership Agreement encompasses a vast number of policy areas. The Action Plan points to security, non-proliferation, fight against terrorism, migration, cultural cooperation, science and technology, and environment to name a few. All in all, over a hundred areas of prospective cooperation are listed in the agreement.

Central to the partnership agreement is the goal to improve the economic relations between the two parties, and to investigate the potential for a preferential trade agreement. The concluding chapter of the Joint Action Plan suggests eight steps for enhancing what the parties see as trade and investment flows 'below potential' (Council 2005). These steps include: to prioritise the conclusion of the Doha Development Agenda; establishing an Expert Group for promoting Public Private Partnership; exchange information on Intellectual Property Rights policy, with special emphasis on Geographical Indicators; and setting up a working group for conducting dialogue on Technical Barriers to Trade and Sanitary and Phytosanitary Standards. The Action Plan also establishes a High Level Trade Group (HLTG), with the mandate to 'explore ways and means to deepen and widen [India and the EU's] bilateral trade and investment relationship' (Council 2005: 22).

The Joint Partnership Agreement highlights the keen interest by the EU and India to improve their relations on a broad range of issues. It is interesting that these issues include environment, social rights and trade, as this indicates that both parties view international cooperation in these areas as desirable.

High-Level Trade Group

The HLTG report was submitted to the Helsinki summit in October 2006. The Group based its work on six background papers – none of them on sustainable development issues. It identifies nine issues that both parties agree should be included in the potential bilateral agreement. These are: (i) trade in goods, where the aim is to achieve elimination of 90 percent of tariffs; (ii) trade in services with substantial sector coverage and liberalisation in all modes of supply (Modes 1-4 in GATS); (iii) Investment, with a dedicated investment chapter; (iv) trade facilitation to improve supply chains and trade logistics between the parties; (v) public procurement by improving reciprocal market access in each other's public procurement market; (vi) technical

regulations; (vii) intellectual property and geographical indicators; (viii) competition policy; (ix) and a dispute settlement chapter with a binding state-to-state settlement mechanism.

In the report, sustainable development issues are only brought up as aspirational aims, through vague statements on the importance of supporting a 'social form of economic growth' (HLTG: 2). Adding to this, the fact that none of the background papers for the preliminary negotiations were on sustainable development topics, indicates the subordinate importance of this issue. The strong emphasis on the commercial aspects of EU-India trade relations are also reflected in a speech given by Trade Commissioner Mandelson to the Confederation of Indian Industry (Mandelson 2005). While sustainable development was a minor issue, the HLTG report adds a tenth point that establishes both parties' right to include other topics in the agreement. In its conclusions the High-Level Trade Group recommends the initiation of negotiations on a trade and investment agreement 'covering a broad range of trade-related areas' (HLTG: 11). At the 2006 Helsinki Summit, Indian and EU leaders acknowledged the recommendations of the HLGT as they agreed to initiate formal negotiation (Council 2006).

The preliminary negotiations between India and EU took place at a time when the EU was making fundamental changes to its trade policy. The moratorium on bilateral trade agreements was ended by Trade Commissioner Mandelson, who succeeded Lamy just months before the signing of the India-EU Strategic Partnership Agreement. Stagnation in Doha had led the EU to realise that it had to make use of bilateral agreements in order to broaden its trade policy (Meunier 2007). This is reflected in the wide range of policy areas envisaged to be part of a future bilateral agreement by the HLGT report. Further, the Global Europe strategy had explicitly singled out ASEAN, South Korea, Russia and the Gulf States, together with India as key potential trade partners due to their high level of protection, trade relations with EU competitors and market potential (EC 2006a: 11). The fact that the Joint Action Plan addressed social policy, climate change and trade as separate issues, indicates that it is the interlinking of the issue areas that accounts for the disagreement on a sustainable development chapter in the trade agreement. Not international cooperation on environment protection and labour rights in itself.

Formal negotiations (2007-2013)

The negotiations on the India-EU preferential trade agreement were formally opened in 2007. The trade negotiations with India were initiated simultaneously with the negotiations with several East Asian and South American countries. On the issue of trade and sustainable development, the Commission's recommendation for the opening of free trade negotiations with these potential partners, states that the negotiating directives will include '[...] a specific chapter on trade and sustainable development, addressing the trade inter-face with the latter's economic, social and environmental dimensions' (Council 2006b: 3).

However, the EU did not raise the issue of trade and sustainable development in the first round of negotiations with India (Bhuyan 2007). Moreover, the Indian Commerce Minister, is quoted saying that the inclusion of this issue would be a 'deal breaker' (Bhuyan 2007). Furthermore, Indian officials made strong objections against the inclusion of the standard *essential elements clause*, which has been an obligatory part of every external EU agreement since 1992 (Bartels 2013). The purpose of essential elements clauses has been to enable suspension of external agreements in cases of serious human rights violations (Bartels 2013).

The Directorate General for Trade seemed more than ready to comply with India's demands, as Mandelson's spokesman was quoted saying that '[g]iven how much both countries can get out of it, we feel we should forge ahead on the basis of strict economic criteria, leaving more political considerations for other agreements' (Powel, cited in Johnson 2007). The readiness of the Commission to disregard the Parliament's resolution on *Human rights and Democracy Clause in EU Agreements* (EP 2010) indicate that the Commission was setting the agenda independently of the interest of the European Parliament in regards to the link between trade and normative standards in the early phase of the negotiation. While the 1994 EU-India Cooperation Agreement include an *essential element clause*, this would not cover an India-EU trade agreement (Bartels 2013). A potential preferential trade agreement would subsequently be truly without labour right and environmental aspects if it were successfully signed in the early stages. That is, the EU pursued a trade agenda on commercial grounds only, much in line with the objectives of the Global Europe trade strategy.

Between 2008 and 2010 the Commission seemingly changed its position on labour and environmental standards in the agreement. Following the publication of a Sustainable Impact Assessment on the potential effects of an India-EU trade agreement in 2010, Commission services issued a position paper on the India-EU FTA where it noted:

Negotiations have proved difficult due to India's reluctance to include a Trade and Sustainable Development Chapter in the FTA [...] The EU therefore advocates the inclusion in all its new FTAs of a trade [and] sustainable development chapter that contains inter alia commitments on key issues with appropriate references to ILO core labour standards and Multilateral Environmental Agreements, coupled with commonly agreed monitoring mechanisms [...] The Commission services recognise the importance of developing common commitment and encouraging high standards and levels of protection while leaving both parties the freedom to regulate according to their own preferences.

(Commission Services 2010: 2)

The position paper goes on to underline the cooperative and dialogue based quality of its approach, and emphasises that regulatory harmonisation is not an objective but to 'make [...] economic and trade-related endeavours sustainable in the long term' (Commission Services 2010: 2).

The Indian response was rather unmistakable, as the Commerce Secretary of India was quoted in *The Hindu Business Line*, days after the issue of the Commission's position paper, stating that 'If they don't accept [Free Trade Agreements] without social clauses, then I'd say tough luck' (Arun 2010). The renewed emphasis on trade and sustainable development can most likely be traced to the European Parliament's increased competences in trade policy following the 2009 Lisbon Treaty (Leeg 2014).

Following the Treaty of Lisbon an internal debate in the EU was launched on the role of sustainable development standards in trade agreements. The issue was also discussed in the specific context of the India-EU trade negotiations. The importance of the treaty changes for the renewed emphasis on the terms of the agreement were highlighted in the opening statement of the Chair of the Committee on International Trade, Vital Moreira, in the 2011 Plenary Debate on the

EU India trade negotiations. The Chairman underlined the Parliament's duty to monitor negotiations and make political interventions through hearings and resolutions (EP 2011a). On the issue of trade and sustainable development, Trade Commissioner Karel De Gucht, who was present at the plenary, stated that:

We must remain realistic. We need to see what will ultimately be possible with a partner like India. We need to find a solution which satisfies our expectations but also takes into account the specific situation of India. So yes, there will be a chapter on sustainable development that will be part and parcel of the agreements, that will recognise the importance of relevant international standards and be based on cooperation, but we also need to be clear that a sustainable development chapter which would allow the use of trade restrictions linked to social or environmental issues will not be acceptable to India. This would also not be in accordance with the model we are advocating in our trade agreements in general. We are not pursuing sanctions but cooperation in this area.

(EP 2011a)

The major political groups within the Parliament, with the exception of ALDE (Alliance of Liberals and Democrats for Europe) and ECR (European Conservatives and Reformist Group), supported inclusion of an enforceable sustainable development chapter addressing labour standards and environment protection (EP 2011a). Two concerns were given particular weight in the debate. The first was the issue of child labour. The high levels of child labour in Indian agriculture and manufacturing sectors have been sources of concern for members of the Parliament. Secondly, Parliamentarians also voiced an explicit concern for the competitiveness of European businesses vis-à-vis Indian firms with comparatively lower standards.

The aforementioned concern for vulnerable groups and competition with markets with lower standards are reflected in the Parliament resolution on the India EU Free Trade Agreement (EP 2011b). According to the resolution, a sustainable development chapter is an essential part of a potential agreement, and should cover compliance with fundamental ILO conventions and environmental standards (EP 2011b). However, the 2011 resolution is far less encompassing on sustainable development issues than a similar resolution passed in

2009. The 2009 resolution addressed problematic aspects of child labour in greater detail, and asks for commitments by India to enact specific labour laws. The 2009 resolution also addressed unacceptable working conditions for certain indigenous peoples in India (EP 2009).

As the Commission had committed itself to adding sustainable development standards in the agreement following the EU-South Korea model, the Parliament moderated its position. The 2011 resolution shows lesser concern for vulnerable groups, softer enforceability mechanisms, and no demands for specific regulatory reformation of Indian labour law. The reasons for opting for this approach are partly pragmatic, and partly a result of the concern for the structural impact of trade liberalisation on the populations of the EU and India. In the case of India there is also a special concern for the impact on child labourers.

The reasons for the halt in negotiations

In the negotiations between India and the EU, it is important to note that commercial issues have been the dominant concern for all parties. This includes the European Parliament which has been the strongest supporter of normative standards. It is disagreement on these issues that also have represented the greatest challenge for a successful agreement. The parties have struggled to come to agreement on issues like liberalisation of trade in services, intellectual property protection, data protection; and liberalisation in sectors like agriculture, the automotive industry and tariffs on wines and spirits (For overviews on contentious commercial issues see: Wouters, Goddeeris, Natens & Ciortuz 2013; Khorana & Garcia 2013; Nataraj 2016).

Continuing informal negotiations after the breakdown (2013-present)

Since the breakdown of the formal negotiations, the parties have continued to address a deepening of their trade relations outside of formal trade negotiations. The issue is regularly addressed at EU-India summits. If the 2015 trade strategy 'Trade for all' is indicative of the development of the Commission's vision for sustainable development standards in trade, then it certainly seems like the Commission's view now is on par with the Parliament.

After the initiation of negotiations on the India-EU preferential trade agreement in 2007, twelve annual summits were held between the two

parties before negotiations came to a standstill in 2013. It was allegedly a mismatch between the ambitions of the two countries that in the end halted the talks (EC 2017c). In 2015, Joao Cravinho, EU ambassador to India at the time, stated in the newspaper *The Hindu Business Line* that the still existing problems were 'relatively small', and that a deal could be concluded 'within a few months' if negotiations were to be revived (Johny 2015).

In 2016, a summit was held in Brussels on the strategic partnership. In a joint statement published after the meetings, India and EU declared that they had 're-engaged in discussions with a view to considering how to further the EU-India [Broad-Based Trade and Investment Agreement] negotiations' (EU-India Summit 2016). Implicit in these two statements, is the notion that a bilateral trade agreement still is considered to be in the interest of both parties, and that a common ground exists between them.

Conclusion

In the early stage of the negotiations it is evident that the EU was cautious in introducing the demand for labour rights and environmental standards in the negotiations with India. Even though a dedicated sustainable development chapter was part of the negotiation mandate from the beginning. The willingness on the part of the Commission to even exclude the *essential elements clause*, strongly indicates that the Commission was ready to keep political issues outside of the trade agreement. The weak commitment to sustainable development provisions seems to be underpinned by a concern for potentially jeopardising a beneficial agreement.

The change in the position of the EU towards a more firm demand for sustainable development provision is subsequently an even more interesting observation, taking the Commission's initial stance on the issue into consideration. This is interesting because it means that the EU acknowledges that it puts a potentially beneficial agreement at risk over sustainable development standards.

It is clear that there is no uniform opinion about the trade and sustainable development nexus in the EU. It is the European Parliament who has been advocating the inclusion sustainable development provisions in the trade agreement between the EU and India. The Parliament has challenged the more commercially driven and pragmatic agenda of the

Commission. The European Parliament has been concerned with the consequences of market liberalisations on vulnerable groups in the Indian society. In particular the high number of children working in manufacturing. The Parliament has also voiced concerns for the increased competition European businesses would face as a consequence of the low standards of labour rights in India.

Summary of findings

This chapter has examined the EU's approach to sustainable development standards in preferential trade agreements. This section summarises the findings according to how the trade and sustainable development chapters are congruent with the operationalisation of the *structure of rights claims dynamic*. It proceeds by firstly examining the rightful claimant of justice; secondly, legitimate justice claims; thirdly, the addressees of justice claims in the monitoring and implementation mechanism of EU's sustainable development chapters.

Rightful claimant of justice – states/individuals

The legitimate claimants of justice are those who are enabled to address injustice. Three types of institutional bodies are tasked with monitoring the implementation of the sustainable development provisions: The Board on Trade and Sustainable Development, representing the government of the respective signatories; the Domestic Advisory Groups, representing national civil society in the respective countries; and The Civil Society Forum, functioning as a transnational forum for civil society dialogue. These bodies enable the signatories' governments and civil society in the respective countries to make justice-claims.

Considerable attention is put on the equal sovereignty of the states in the implementation and monitoring mechanisms. While both states and civil society bodies are enabled to engage in dialogue on issues relating to the sustainable development aspects of the trade agreements (communicative status), only states are enabled to trigger the dispute settlement mechanism, which is a precondition for having communicative power. Therefore, states maintain the full status as rightful claimants of justice while civil society groups are limited to exercise oversight and engage in dialogue. This system conforms with Pettit's criteria for multilateral institutions where decisional power should remain with the state, but where civil society should be allowed to monitor state behaviour and voice complaints. Although, the

monitoring system is by definition bilateral – as it is set up in bilateral agreements – it replicates many of the qualities of a multilateral system in the conception of justice as non-dominations as seen by the convergence between the monitoring bodies and the non-domination perspective. From an impartiality perspective, the civil society bodies lack communicative power as they are not able to trigger the dispute settlement mechanism. Congruence between the *Rightful Claimant of Justice* and the impartiality conception would have required the signatories to delegate real authority to an impartial arbitrator. From the mutual recognition perspective, there is a lack of emphasis on vulnerable groups as claimants of justice.

Legal structure – international law

By grounding the sustainable development provisions in international standards, the EU is promoting a rule based international order of institutions that regulate environment and labour law. The core labour rights and environmental agreements referenced in the agreement establish a minimal set of rules that the EU and its trade partners are equally obliged to adhere too. The EU is consequently establishing a shared structure of public justification among all its trade partners. Legitimate claims of justice made by the monitoring bodies, are in this system violations of these minimum standards

Reinforcing its trade partners' commitments to this system creates obligations for which states are equally responsible. It is to a degree interfering with the regulatory autonomy of its trade partner. This is incompatible with a conception of justice where non-interference is the main concern, but it might be warranted if individuals are the units of ultimate concern (Sjursen 2017). Given that increased trade liberalisation has negative effects on some individuals international system using international standards to underpin the substantive content of the provisions in the sustainable development chapters have some important implications on their relations to global justice. Another aspect of EU's approach is the fact that all of the EU's trading partners are members of the international organisations which negotiate these standards. This means that the EU's trading partners have access to the decision making procedures determining the international standards.

Institutional form – collaborative

The addressee of justice-claims arising under the sustainable development provisions are in the first instance the Government Consolation body, and secondly the Panel of Experts. The Government Consolation body is fully coherent with the principle of the equal sovereignty of states. It enables deliberation between the concerned partner states, but is restricted from creating binding resolutions. This is reflected by the fact that the Government Consultation body is the weakest form of dispute settlement mechanism (Jo and Namsung 2012). It prioritises full political discretion over treaty compliance.

As explained in the section on enforcement in this chapter, the Panel of Experts falls between a fully legalistic dispute settlement mechanism and a diplomatic mechanism. It allows for third party review, but does not have the competence to sanction non-compliance. From a state centric perspective, the inclusion of third parties such broad range of actors in the dispute resolution mechanism of trade relations might pose challenges to state sovereignty. However, it enables individuals and civil society groups to address problematic aspects of the trade relations between EU and its trade partners. The Panel of Expert is a collaborative mechanism in the agreement that enables individuals and groups to address injustices.

Chapter 6

Discussion and summary

The sustainable development standards in the EU's preferential trade agreements set social and environmental criteria for trade liberalisation. In chapter 5, the distinct features of how the EU promotes such criteria in preferential trade agreements were identified. This chapter draws on the theoretical conceptions in order to make a normative assessment of the EU's trade and sustainable development agenda, based on the findings in the previous chapter. The purpose is to examine whether EU's approach can be deemed reasonable from the perspective of global political justice. This objective is linked to the primary research question: on what ground, if any, can the European Union's approach to trade and sustainable development be justified?

The discussion is structured as follows: The first question is to what extent sustainable development standards in preferential trade agreements are a form of dominance. This question is examined by highlighting how the EU establishes common obligations for itself and its trade partners. Second, I look at whether or not the EU pays sufficient attention to the common concerns of the parties involved when implementing sustainable development standards in trade agreements. Third, I discuss the arguments for more regulated trade

liberalisation from the three theoretical perspectives. A conclusion and summary of the report are provided in the final section.

Common obligations

The most noticeable aspect of the EU's trade and sustainable development agenda, is the very fact that the EU pursues sustainable development objectives in tandem with bilateral trade. The bilateral – rather than multilateral – implementation of sustainable development standards in international trade, raises some particular concerns in relation to global political justice. These concerns are amplified by the fact that the EU exercises far greater leverage than most of its partners in trade negotiations due to the size of its economy.

The EU does not force its trade partners to sign trade agreements. However, obligations to sustainable development norms in trade agreements are often negotiated from asymmetrical positions of power when the EU is involved. This raises concerns of dominance (Eriksen 2016). Bhagwati's main argument against the inclusion of labour and environmental standards in trade agreements rests on the idea that such standards remove low-income countries' ability to utilise their legitimate competitive advantage from having lower standards, as a reflection of their level of development (Baghwati and Hudec 1996). This view resonates with much of the critique posed by Indian officials in negotiations with the EU. India is claiming that the EU's linking of labour and environmental standards with trade agreements is a form of dominance because it challenges India's regulatory autonomy. This echoes the reasoning of Bhagwati, in so far as the EU is replacing the option of India's businesses to utilise what India regards as a legitimate competitive advantage from having labour standards that reflect the country's level of development. The India-EU preferential trade agreement is yet to be concluded. Hence in the case of India, the EU has not exercised active dominance.

Economic pressure can be a source of dominance by virtual interference (Pettit 2014: 172). The Commission ultimately arbitrates access to an attractive market. A study commissioned by the Indian Institute of Foreign Trade (Chakraborty, Chaisse & Kumar 2012) demonstrates how India has diverted away from signing preferential trade agreements with high income economies, and towards agreements with countries in its region. This is partially explained by the fact that the high income economies' trade agreements are

incompatible with the interests of India due the inclusion of labour standards (Chakraborty et al. 2012). However, the preferential agreements with India's regional neighbours do not adequately fulfil India's need to grow its exports in advanced products. Moreover, India is dependent on preferential agreements with high income countries in order to attract necessary foreign direct investments (Chakraborty et al.: 19). This is coupled with the fact that India's preferential access to the Internal Market through the General Scheme of Preferences, is expiring as India is slowly moving into the middle income segment of countries. As a result, India might experience considerable pressure to concede to the EU's demand for accepting compliance to sustainable development provisions in its trade agreements, which may constitute dominance on a conception of justice that emphasises state sovereignty.

As Bohman (2015) points out, an agent that utilises its normative power to create common obligations is performing dominating agency if it does not sufficiently take into considerations the common concerns of the parties involved. In the agreements with South-Korea, Vietnam, Singapore and Canada, the EU has successfully demanded the inclusion of sustainable development provisions in bilateral trade agreements. In these agreements, the EU is establishing common obligations both for itself and for its trade partners. It is explicitly stated in the sustainable development chapters that the provisions are equally binding for the signatories. But the common obligations in the sustainable development chapters demand little, if any, changes to EU Member States' regulations, which are already attuned with ILO Conventions and UN's Multilateral Environmental Agreements. For the EU, the sustainable development provisions are merely reinforcing commitments to international conventions to which its Member States are already in compliance. Consequently, adherence to these obligations represent little cost on the part of the EU, but does entail cost for its trade partners.

As in the case of all the aforementioned agreements, many of the EU's trade partners have not ratified all major ILO Conventions. Adhering to the obligations created by the EU does not only entail reconfirmation of international commitments; it also creates new obligations at the cost of regulatory change, and potential loss of competitive advantage on the global market. Thereby, the obligations imposed by the EU have substantially different implications for the EU itself than for many of its trade partners. Taking into consideration the market power of the

EU, linking access to a large market with sustainable development standards puts potential trade partners in a position where they might have to accept interference in their domestic regulations against their sovereign interests, in order to gain preferential access to its largest export market. Without taking a stand on whether or not the interference is arbitrary, it is reasonable to conclude that the EU exercises both active and virtual interference by including sustainable development chapters in preferential trade agreements.

The EU might even draw some potential economic benefits from the inclusion of sustainable development provisions (Drezner 2007). Convergence towards international standards makes labour and environmental standards in partner countries more congruous with the EU's own standards. There are, however, no criteria of altruistic motivations in theories of global political justice. The fact that an actor might benefit from common obligations does not in itself constitute dominance. However, the potential economic benefits from diffusing international standards have been grounds for suspicion over the EU's motive.

The claim that the intentions of the EU, as stated in its official communications, are questionable has been at the heart of India's critique towards the inclusion of a sustainable development chapter in the proposed trade agreement. The EU, on the other hand, asserts that sustainable development standards are a prerequisite for trade relations that do not pose an unnecessary strain on the environment and the rights of workers. In part, the EU's inclusion of sustainable development standards does seem to result from a concern for the adverse effects of globalisation on its own citizens, and the citizens of its trading partners. The Parliament is frequently referring to the poor conditions of Indian workers, and in particular child labourers, when justifying the inclusion of a sustainable development chapter in the India-EU trade agreement. This testifies to an understanding of an obligation of justice that is determined to a larger extent by interdependent relationships and concerns for vulnerable groups, and less by the associative affiliation to a nation state.

As the preceding section demonstrates, the EU establishes reciprocal obligations. It does so in bilateral trade agreements where its partners are more exposed to economic pressure, and less capable to counterweigh the EU's market power. There are also concerns within some of the EU's trade partners that such obligations would negatively

affect their competitiveness and economic growth. Moreover, countries like India, claim that the inclusion of sustainable development standards are veiled protectionism, meant for keeping products from low-income countries outside the Internal Market.

The truthfulness of accusations of protectionism are of course difficult to determine. Nevertheless, in the republican theories of justice, the question of protectionism is not the most fruitful question to ask, in order to determine whether or not the inclusion of sustainable development standards in preferential trade agreements are justifiable or not. A more appropriate question is to what extent the EU is adequately taking the affected parties' concerns into consideration when implementing normative standards in trade agreements. This opens up the question of who the EU sees as affected parties – individuals or states. To what extent the EU is taking the opinion and interests of its partners into consideration when implementing sustainable development standards in the agreements, is addressed in the succeeding section.

Common concerns

The EU is subscribing to a predefined template for promoting sustainable development provisions. The structure and content of the chapters are to a large extent the same in the agreements with high income economies like Canada, South Korea and Singapore, as in the agreement with Vietnam. The sustainable development chapters only opens up for limited differential application of the provisions in accordance with the developmental status of the signatories and therefore represents an unwillingness on the part of the EU to allow significant non-reciprocal commitments. Hence, it does not seem like the signatories are enabled to affect the structure and content of the chapters prior to their implementation in any significant way. The EU's approach to sustainable development standards in preferential trade agreements is a one size fits all approach, with restricted differentiation pertaining to the developmental status of the signatories.

In one sense, the EU takes the role as rule maker when it promotes sustainable development standards in its trade agreements. The one size fits all approach indicates that the EU has a rather clear understanding of what fair sustainable development standards in trade are, before engaging in negotiations with potential partners. The EU is to some extent determining the definition of justice in these

negotiations (Eriksen 2016: 19). Consequently, the sustainable development chapters put the EU's trade partners in the position of rule takers. The rule maker/ rule taker relationship established in the way the EU conducts its trade and sustainable development policy might be regarded as a sign of dominance. This denies the EU's trade partners the opportunity to engage in dialogue on what the appropriate method of incorporating labour and environmental standards in the agreement is, prior to the signing of the agreements. The consequence might be that the sustainable development chapters become based on an understanding of justice which is incompatible with the state of the different partner countries. This view is particularly relevant from a conception of justice as mutual recognition, which emphasises due hearing. From a conception of justice as impartiality, whether or not the EU's approach constitutes as dominance relies to a larger degree on the universality of the norms it promotes, and whether the EU regards individuals, and not states, as the primary affected parties in the agreement.

The fact that the EU's normative standards are grounded in international conventions is at least increasing the universality of the content of the sustainable development provisions. Moreover, all of the EU's trade partners are participants in the various organisations behind the standards of the agreements. Furthermore, the monitoring and enforcement mechanisms enable the partners to engage in dialogue on whether or not they satisfactorily comply with the predefined norms.

Concern for the equal standing of states

On a question in the Indian lower house on whether the Indian Government could accept the inclusion of a sustainable development chapter in the preferential trade agreement with the EU, points out the central aspect of why the non-domination conception is less compatible with the incorporation of normative standards in the agreement. The Indian critique is that there are already existing multilateral institutions that address labour standards and environmental issues, and that these institutions are more appropriate forums for addressing such issues. As already mentioned, multilateral forums are preferable for discussing international rules because states have a more equal standing in these organisations.

The non-domination conception recognises that the adverse effects of trade liberalisation are challenging the sovereign liberties of states.

However, this perspective highlights the harmful consequences of establishing sustainable development standards in trade bilaterally rather than multilaterally. On the one hand, by diverting from the WTO as a forum for international rule-making in trade, the EU and the U.S. have been much more effective in establishing labour and environmental standards in international trade. On the other hand, by entrenching normative standards bilaterally, the EU and U.S.' trade partners are less able to counterweigh their hegemonic power. In this sense, the EU's trade partners are dependent on the EU's willingness to take their interest into consideration.

One of the most crucial mechanisms for incapacitating dominating agency, especially in the non-domination perspective, is the ability of less powerful states to form coalitions in order to counterweigh the powers of hegemonic actors (Petit 2015). This is exactly what happened in the WTO in relation to the trade and sustainable development nexus. In both the Singapore Ministerial Conference and the Doha Development round, the Group of 77 was successful in resisting the EU and U.S.' demands of including standards for environmental protection and labour rights in the multilateral trade system. By negotiating trade agreements that include normative standards bilaterally, the EU has removed one of the mechanisms that are set to incapacitate dominating agency and consolidate the equal standing of states in the international system. The EU is thus making it more costly for its partners to reject the linking of normative standards with trade liberalisation. The EU might be accused of taking controversial issues to the bilateral level to gain leverage in the negotiations. From a non-domination perspective, the very fact that an issue is subject to interstate dispute is a strong reason for allocating it to the multilateral level owing to the concern for the equal standing of states.

Concern for protection of individual rights

As the aforementioned section shows, the EU is supporting a system where individuals have equal fundamental rights. This is indicative of a conception of justice as impartiality. The impartiality conception requires that a political system must be kept responsible by citizens' ability to 'challenge and reconstitute those institutions that enable globalisation to occur' (Bohman 2004: 340). From a impartiality perspective, this would require that individuals are enabled to challenge the rules and processes that affect them.

The EU has unsuccessfully tried to link social and environmental standards to the WTO. It is evident from EU trade strategies, communiques and trade agreements that the multilateral system of trade is the EU's preferred institution for trade liberalisation, and for entrenching normative standards. Only after the stagnation of the WTO has the EU started to implement binding sustainable development provisions in its trade agreements. Seemingly, due to institutional deficiencies, the EU has chosen to implement sustainable development standards bilaterally. If the EU has a responsibility to address norm violations resulting from the liberalisation of trade, then it might be obligated to establish a law based order to prevent this from happening.

To promote normative standards in bilateral trade agreements through predefined chapters may seem more reasonable from a conception of global justice where the primary concern in the international system is the autonomy of the individual. In particular, Rainer Forst's (2015: 91) principle of general and reciprocal justification. According to this principle, the EU has a moral obligation to establish institutions that generate discursively justified norms to make sure that its citizens and the citizens of its trade partners, to the degree that they belong to a structured social context, are being respected as equals under similar laws and standards. Liberalised trade is increasing the structural connectedness, understood as a context where others are affected by one's actions. The sustainable development chapters establishes a set of reciprocal rules and minimum standards in areas affected by increased trade. The labour rights and environment standards are rules that all parties are equally responsible for. From the perspective of impartiality, the EU is addressing institutional deficiencies in the international trade system by implementing sustainable development chapters in preferential trade agreements.

A potentially problematic aspect is to what degree the EU's partners have a sufficient say in the articulation of these standards. According to Bohman (2015: 76), the 'exercise of normative power can [...] be dominating in virtue of the lack of a capacity of those who are subjected to exercise antipower'³⁶. The sustainable development provisions are imposed impartially on the signatories, and they might even be for the common good. The remaining question is whether the

³⁶ Anti-power is understood as the capacity to influence the obligations that one is subjected to.

EU's trade partners, have a capacity to influence the obligations articulated in the sustainable development provisions.

This would have been more problematic if the EU used its domestic standards as a basis for the sustainable development provisions. However, the EU partially overcomes this issue by grounding the provisions in multilateral conventions. Multilateral institutions like the ILO and UNFCCC are international institutions that come close to performing what Forst (2015: 104) refers to as 'the first task of justice'. This task is to function as institutional bodies where members (states) can decide on common agreeable rules that incapacitates arbitrary interference. If we accept that the fundamental declarations of the ILO, UNFCCC agreements, and CITES conventions represent such first order principles, then the EU has an obligation to conduct trade according to these principles.

As the EU is more effective in institutionalising these principles bilaterally than multilaterally, the EU is right in diverting its trade away from the multilateral system – focusing on preferential trade agreements instead of a stagnant multilateral system. What the institutional structure of the sustainable development chapters is missing in order to impartially implement the labour and environmental standards, is a robust enforcement mechanism.

Concern for the right to special and differential treatment

The EU has demonstrated little concern for the right to differential treatment when instituting trade and sustainable development chapters. This would have required stakeholder meetings with a broad range of civil society groups at the initial stages of the negotiations. This has allegedly not been the case in the context of the EU-India trade negotiations (Leeg 2014: 351). The content of the sustainable development chapters should then have been a reflection of these such stakeholder deliberation. However, as already mentioned, the EU follows established precedence when entrenching core labour rights and environmental standards in the agreements. This denies the affected parties codetermination in defining what rights in the context of a preferential trade agreement are. Such concerns are addressed in Corporate Europe's report (Eberhardt & Kumar 2010) on the EU-India trade negotiations. In the report it is argued that the lack of participation of 'the most affected groups' will lead to 'devastating impacts for those who are already on the lowest rung of the socio-

economic ladder – whether they are farmers, workers or poor patients. The result is also a grave violation of the most basic democratic principles in the two self-proclaimed largest democracies of the world.’ (Eberhardt & Kumar 2010: 37).

Arguing for the trade and sustainable development nexus

Despite the above-mentioned criticisms and objections toward the interlinking of sustainable development standards and trade policy, there are some rather strong arguments for why the establishment of a regulatory regime in accordance to sustainable development principles is reasonable in the international trade system. International domination, both by state and transnational actors, ‘is made possible by the *absence* of international regulation (Laborde and Ronzoni 2015: 293). The lack of international regulations in the areas of labour and environment have enabled powerful economic actors to alter domestic regulations in business-friendly ways. This limits states’ ability to perform self-government and is consequently pertinent in both the statist and cosmopolitan perspectives of global political justice.

Minimum labour- and environmental standards in trade agreements might be a reasonable measure for protecting the sovereign liberties of states, protecting basic individual rights, and securing distinct peoples’ claim to differential treatment. Powerful private economic actors’ exploitation of differential environmental protection and labour rights legislation obstructs sovereign states’ ability to independently regulate (Pettit 2014: 164; Laborde and Ronzoni 2015). The sustainable development chapters underpin a regulatory regime that sets minimum standards on labour and environment regulation, and commits economies to not lower regulations in order to attract trade and investment. These rules incapacitate powerful private economic actors from undermining domestic regulations, and might therefore strengthen the sovereign liberties of states. This shows – contrary to what might seem apparent – that there might be a greater affinity between state centric perspectives of global political justice and the entrenchment of some minimum regulatory standards in preferential trade agreements. Nevertheless, whether or not international labour and environmental standards actually strengthen sovereign liberties of states is beyond the scope of this report, and an issue that might require further inquiry.

In the two cosmopolitan perspectives, regulatory standards in preferential trade agreements might be a prerequisite for equitable trade. This is an argument which has been advanced by John Ruggie on behalf of the UN. In the *UN Protect, Respect and Remedy Framework for Business and Human Rights*, Ruggie argues that states have a primary responsibility to protect individuals from corporate abuse, particularly when states have close trade relation.

Where States lack the technical or financial resources to effectively regulate companies and monitor their compliance, assistance from other States with the relevant knowledge and experience offers an important means to strengthen the enforcement of human rights standards. Such partnerships could be *particularly fruitful* between States that have *extensive trade and investment links*.

(Ruggie 2008: 13, italics added by author)

The *UN Protect, Respect and Remedy Framework* presents a list of obligations, remedies and recommendations for how states and corporations must uphold basic human rights, including entrenchment of core labour rights in external policies.

In conclusion, there is a strong argument that can be made for accompanying preferential trade agreements with some form of regulatory standards. Including sustainable development provisions in bilateral trade agreements *might* be considered reasonable in the non-domination conception, and *are* a reasonable measure in the impartiality and mutual recognition conceptions

Summary of report

The international trade system might be seen as intrinsically unjust, both at the multilateral and bilateral level. The sustainable development chapters illuminate some of the priorities the EU makes when trying to mitigate some of these injustices. This report has analysed what these priorities are, and discussed to what extent they can be justified from a perspective of global political justice.

By including sustainable development chapters in its bilateral agreements, the EU is creating a stronger commitment to labour rights and environmental protection standards in trade agreements. The sus-

tainable development chapters are underpinning a rule-based international trade policy based on commitments to normative standards in trade. This is in contrast to the agreements of Japan and the EFTA states, which are characterised as being non-binding and aspirational. Binding commitments might be more likely to induce the desired changes in the way states engage in trade. On the other hand, it also heightens the possibility of domination. The sustainable development chapters represents a shift away from Pascal Lamy's *Harnessing Globalisation* doctrine where social and environmental standards were addressed in a multilateral institutional setting. By implementing sustainable development chapters bilaterally, the EU has on the one hand been more successful in pursuing its trade and sustainable development agenda. Nevertheless, the EU is through its bilateral approach, challenging the equal standing of states, as it inevitably achieves its aim through the leverage of its market power.

The EU's approach to labour and environmental standards in trade can also be described as partly cooperative. The EU engages civil society in the monitoring and implementation of the sustainable development provisions. Furthermore, the partner countries are enabled to discuss disputed issues by participating in government consultations. However, the cooperative approach is restricted, and civil society and partner countries seem to have little influence over the formulation of sustainable development provisions in the trade agreements. Subsequently, the EU's approach is cooperative in the implementation and monitoring of trade and sustainable development agenda, but not in the initial formulation of the provisions. The EU partly overcomes this issue by basing the provisions on international standards.

The main conclusions in this report are that including sustainable development standards in preferential trade agreements is a reasonable measure to mitigate the negative effects of globalisation. Having a common set of rules on issues that are widely considered as being global in their implications, such as climate change and core labour standards, might incapacitate the ability of powerful private economic actors to undermine the regulatory autonomy of states. However, by implementing sustainable development standards through bilateral agreements the EU is challenging the equal standing of states as it addresses these contentious issues bilaterally rather than multilaterally. Further, the EU's emphasis on 'soft' dispute settlement mechanisms fails to guarantee a neutral and unbiased enforcement of

the sustainable development provisions. Lastly, by relying on a more or less predefined template, the EU's sustainable development chapters might prove unsuited for the specific contexts they are applied in because the EU fails to engage in dialogue with its trading partners.

This report has provided an empirical contribution to the literature on sustainable development standards in the EU's preferential trade agreements, by identifying key features of the EU's approach. The report complements the already existing legal analyses that address this issue, by approaching the EU's trade and sustainable agenda from a normative perspective. This has enabled a critical assessment of the considerations the EU makes when including labour rights and environmental protection standards in its preferential trade agreements.

This report has also provided a methodological contribution by demonstrating how global political justice theories can be applied at the actor level. This has been achieved by operationalising the different theoretical conceptions justice of according to the *Structure of Justice Claims*. In turn, this has facilitated a theoretically grounded discussion on the strength and weaknesses of international actors' external behaviour.

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GLOBUS Reports

- 2: Joachim Vigrestad: "Partnerships for Sustainable Trade? The EU's Trade and Sustainable Development Chapters in the Context of Global Justice"
- 1: Enrico Fassi and Sonia Lucarelli (eds): "The European Migration System and Global Justice: A First Appraisal"

Sustainable development standards have become an integral feature of all EU external trade agreements. According to all new European external trade agreements, trade in goods and services must conform to international standards on labour rights and environmental protection. This report seeks to identify the institutional structure of the EU's Trade and Sustainable Development Chapters. The report further asks what principles of global political justice the EU is applying when promoting its trade and sustainable development agenda. These questions are addressed through the analysis of free trade agreements between the EU and Canada, Singapore, Vietnam and South Korea, and the ongoing India-EU trade negotiations.

The report finds that the EU is prioritising cooperation and dialogue on internationally recognised sustainability norms. However, the EU's emphasis on 'soft' dispute settlement mechanisms fails to guarantee a neutral and unbiased enforcement of the sustainable development provisions. The report also finds that by relying on a more or less predefined template, the EU's Sustainable Development Chapters might seem unsuited for the specific contexts they are applied in.

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