

PAPERS IN EUROPEAN AFFAIRS SERIES # 10

Stephanie Govaerts, *The EU's exclusive competence of common commercial policy: a case study of the free trade agreement CETA* (June 2020)

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The EU's Exclusive Competence of Common Commercial Policy: A Case Study of the Free
Trade Agreement CETA

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Final Paper

Date: 11 June 2020

Tutor: Rob Boudewijn

Word Count: 4065 words

Historical Overview of the European Union's Exclusive Competence with Trade

The European Union (hereinafter referred to as the EU), is an economic and political union of 27 sovereign member states. The EU is a supranational organization, which means that the EU has the competence to make binding decisions that transcend national legislation. The only way the EU is able to do this is because member states have voluntarily decided to transfer parts of their sovereignty to the EU institutions in certain policy areas where it has been deemed logical to work together. This is known as the 'principle of conferral', whereby the EU can only act within the limits of the competences that are being conferred and the powers that are being attributed to them by the member states.

The EU is based on two principal treaties which are binding to their member states; the Treaty of Rome, established in 1958, which is now called the Treaty on the Functioning of the EU (TFEU), and the Treaty of Maastricht, established in 1993, which is now called the Treaty on the EU (TEU) (European Union, 1995-2020a). The Treaty of Rome created the European Economic Community (EEC), which aimed to deepen economic integration between the 6 original member states (France, Germany, Italy, Benelux) through trade. This was made possible with the creation of a common market which allowed the free movement of goods, services, capital and labor (European Union, 1998-2020a). It was thought that countries that traded with each other were less likely to go to war with each other. When it comes to trade, the EU has exclusive competence over this policy area. The nature of the EU's competence is divided into three main categories; exclusive, shared, and supporting competences. Article 3 of the TFEU states that the EU shall have exclusive competence with common commercial policy, meaning that only the EU may legislate and adopt legally binding acts and can negotiate and conclude international trade agreements based on the

World Trade Organization (WTO) rules (European Union, 1998-2020b). The member states may do so only if the EU allows it. The aim of the EEC, common market and common commercial policy was to improve the circumstances of trade and production and serve as a vehicle for becoming ‘an ever-closer union’, both economically and politically (European Union, 1998-2020a). The way this would be achieved was by eliminating trade barriers, gradually prohibiting restrictions on international trade with a common trade policy and guaranteeing balanced trade and free and fair competition. Furthermore, a customs union was introduced abolishing customs duties and quantitative restrictions (i.e. quotas) between the member states. It also established a common external tariff on imports from outside the EEC (European Union, 1998-2020a). It was and still is crucial for member states to have uniform conduct and a level playing field when it comes to trade in order for their citizens to benefit and be protected, and for trade to be more efficient and flourish.

To put it generally, there are three main types of EU trade agreements: customs unions, free trade agreements (FTAs), and partnership and cooperation agreements (PCAs) (European Commission, 2020a). This paper will solely focus on FTAs, which are agreements with developed countries that enable the reciprocal opening of new markets for mutual benefit (The Council of the EU and the European Council, 2019). The FTA this paper will make a case study on is The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The question this paper will aim to answer is, “to what extent are the protests about CETA justified?” The paper will first explore why trade is so important for the EU, then examine how the EU’s trade policy functions, next an introduction to CETA and the problems it possesses will be covered, afterwards an analysis of the effectiveness of the trade agreement will be made, followed by a policy evaluation through the means of a SWOT analysis in which solutions will be proposed. Lastly, the paper will end with a conclusion.

Why Trade is so Important for the EU

Trade is one of the most important pillars in the EU. In fact, free trade among the member states was one of the EU's core founding principles and the EU aims to also carry this into larger-scale global trade as well. Globalization has caused an increase in international trade, hence causing an increased interdependence between countries' economies as well. The enlargements of the EU coupled with the further consolidation of the common market made the EU an attractive partner to engage in trade with, bilaterally and multilaterally (European Union, 1998-2020c). The EU has the largest economy in the world, home to over 500 million consumers and is the biggest trading bloc in the world, giving it the utmost relevance when it comes to helping facilitate this growing interdependence in the most mutually beneficial way (European Commission, 2020b). The EU is able to have this much power on the international stage because the member states have allowed the EU to speak on their behalf and represent them when it comes to trade. Member states benefit from this increased bargaining power as they have more weight with bilateral negotiations rather than if they were to do it by themselves (European Union, 1995-2020b). This is evidenced by the 72 partners the EU has trade agreements with from all over the world (European Commission, 2020b). Trade makes up $\frac{1}{3}$ of the EU's national income, making it essential for the European economy.

Additionally, over 36 million jobs in the EU are dependent on the exports from outside the EU (European Parliament, 2019). It is clear that the EU creates trade deals in order to create more jobs for its European citizens and to strengthen and grow the economies. Furthermore, the EU works very closely with multinational bodies such as the WTO in creating a framework of international trade rules to foster trade and avoid barriers between WTO members (European Union, 1995-2020b). Arguably one of the most crucial aspects of the EU's trade policy, is the fact that their trade agreements focus heavily on exporting their values to third parties. For example, the EU promotes their values of democracy, equality, the

rule of law, human rights and wellbeing, working conditions, sustainable development and the environment through trade agreements (European Commission, 2019).

How the EU's Trade Policy Works

Common Commercial Policy, laid out in Article 207 of the TFEU states that it “shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies” (European Union, 2008, p.0140-0141). By enforcing uniform principles and prohibiting restrictions that affect trade and eliminating trade barriers, the EU's trade policy aims to increase trading opportunities and investment and to ensure free and fair trade practices for the economic benefit of the parties involved. Trade agreements allow European businesses to easily export abroad and for citizens to access a wider variety of products and have more choice (European Commission, 2019). Next to that, consumers are able to get better quality products at lower prices due to the effective competitive pressure businesses face. One of the main ways the EU helps to guarantee open and fair trade is by working very closely with and strongly supporting the WTO. The Commission represents the EU within the WTO (European Union, 1998-2020a). The WTO's goal is to keep international trade predictable by enforcing uniform rules and principles between parties when it comes to trade (European Parliament, 2019). The EU even uses the WTO's dispute settlement system whenever trade disputes are present.

When it comes to trade and decision-making, the Commission is the spokesperson for the member states and negotiates trade deals on their behalf (European Commission, 2020b).

The decision-making process with trade policy has a multi-level character because the direction of trade policy is decided by the Commission, the Council, and the Parliament, all working together. The standard voting system in the Council is qualified majority voting (QMV) when it comes to trade policy. The ordinary legislative procedure is followed in regard to trade policy. The Commission has to first request permission and make a proposal to the Council to negotiate a trade agreement. Once this is approved, the Commission negotiates with the trading partner on behalf of the member states and reports back to the Council and the European Parliament with the completed deal. The Council and the EP are co-legislators and therefore have to examine the deal and either approve it, in which the deal becomes adopted, or they send it back to the Commission to be amended. If the Commission then makes the proper amendments, sends it back to the Council and EP and these two bodies are satisfied, then the trade agreement can be signed (European Commission, 2019). One of the trade agreements which was signed between the EU and another trading partner is The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. This trade agreement has been highly controversial and has been praised by some but criticized by others.

CETA

The Comprehensive Economic and Trade Agreement (CETA) is a free trade agreement between the EU and Canada. Negotiations started in 2009 and were concluded five years later. The agreement was signed in 2016 but only entered into force provisionally in 2017 (European Commission, 2017). This means that the bulk of the agreement has been provisionally applied. Before the agreement can wholeheartedly enter into force, member states' national parliaments need to ratify the agreement, which is an ongoing process. Although trade policy is an exclusive competence, some FTAs need to be approved by the

member states, especially when it comes to investment protection (Migliorini, 2018). One of the things that is stopping member states from fully ratifying CETA regards the creation of the International Court System (ICS), which was created as one of CETA's provisions to handle disputes between governments and investors. What is problematic for member states about the ICS is that it will be required to interpret EU law in order to conclude if there have been any violations of the agreement, and the fact that the ICS will only hear cases from multinational corporations, favoring them enormously compared to citizens and governments (Migliorini, 2018; ETUC, 2016). If big businesses are privileged and receive too much power, they can potentially compromise states from acting in the public interest, which is a big problem for the EU's commitment to the rule of law.

Despite some of the criticisms it gets, CETA is still known as the most progressive and ambitious trade deal to ever be signed by the EU. Canada and the EU share very similar values and views about how trade should be conducted, hence this deal helped to strengthen their alliance. CETA was created with the aim to open up possibilities for companies and consumers in Europe and Canada and simplifying access to both markets and boosting trade by abolishing over 98% of customs duties (European Commission, 2017). By removing these barriers, the EU has claimed that this will save EU businesses approximately 590 million euros a year (European Commission, 2017). CETA is committed to supporting growth and jobs, upholding standards and safety of products, and protecting labor rights and the environment (European Commission, 2017). However, CETA has received a lot of backlash from European citizens, especially in 2016 and 2017 when a surge of protests spread across Europe leading up to the agreement being voted on by the EP. One of the things people were protesting about was being worried that a deal with Canada would lower European standards on food due to Canada's very close relationship with the United States and their notorious unhealthy food habits and procedures (IATP, 2017). Both the US and Canada's food systems

differ considerably from the EU's. They have weaker food safety regulations and rely heavily on chemically enhancing their products. They have also both criticized the EU during WTO dispute settlement procedures for their ban on growth hormones (IATP, 2017). The protesters were also concerned about labor and environmental protection with the implementation of CETA. They argued that a deal between the EU and Canada would allow the unfair prospering of businesses at the expense of working people, farmers and smaller businesses and would hurt the EU's environmental standards. Protestors claimed that investor rights were being protected more than labor rights, and that this would lead to the exploitation of people and erosion of laws that should protect them. The people protesting were also vocal about the ICS and how this will allow Canada to challenge the EU on some of the important food, health and safety procedures they have in place (IATP, 2017; Boffey, 2017). When it comes to the environment, European citizens were adamant that CETA's environment chapter had shallow promises that did nothing to really encourage their commitments to the Paris Climate Agreement and that there were no enforcement mechanisms to make sure these promises were going to be carried through (ClientEarth, 2016). Despite all of these allegations and the protests happening right outside the building where the agreement was being voted on in Strasbourg, the EP voted to pass the deal. CETA truly divides peoples' opinions when it comes to whether it is a good or a bad agreement. Some celebrate it as a great achievement in times of increasing protectionism, while others see it as an overly ambitious deal that is too focused on profits and cutting costs rather than important factors such as health, safety, workers' rights and the environment.

Analysis

In order for the EU and Canada to garner more support for the somewhat controversial trade agreement, they made quite some significant changes and important steps. In regard to

the ICS controversy, the European Court of Justice (ECJ) was asked to judge if the ICS was compatible with the EU treaties. This decision was pending for a long time and therefore explains some member states hesitancy to ratify the trade agreement. However, in April 2019, the ECJ ruled that the ICS under CETA was compatible with the EU treaties (Titievskaja, & Zachariadis, 2019). This landmark decision is likely to ease some of the member states' worries and encourage them to ratify the rest of the agreement. It is noteworthy that although the ICS was not deemed perfect, it was a considerable improvement from the previous dispute settlement system that was in place. The EU replaced the old investor-state dispute settlement (ISDS) system with the ICS in order to have more transparency and allow appeals, which is something the ISDS never did. Their procedures and decisions were never public, nor did they allow appeal (Titievskaja, & Zachariadis, 2019).

In regard to the concerns over environmental protection and sustainable trade under CETA, it can be said that they are trying to make improvements in this area as well. In fact, France set up a highly qualified committee of experts to examine the environmental impacts of CETA and they came to the conclusion that there was not enough work being done to achieve their environmental promises (Titievskaja, & Zachariadis, 2019). However, what the EU and Canada have done is reaffirm their commitments to the Paris Agreement in the context of CETA and they organized a CETA conference on climate action in 2019 (Titievskaja, & Zachariadis, 2019). Although these actions are not binding, they are at least a step in the right direction. Unfortunately, this might not be enough for the civil society that was very vocal about making sure this trade agreement was upholding the EU's environmental values and commitments. Thus, CETA could be expecting significant backlash once again.

The European Trade Union Confederation (ETUC) and the Canadian Labor Congress (CLC) examined CETA in depth and decided that it was not a good deal for workers or their

rights. Thus, what the EU and Canada have done to address the issue of labor rights is to implement a Joint Interpretative Instrument (JII). This instrument is legally binding and aims to provide high levels of labor protection by making sure CETA ratifies the fundamental conventions of the International Labor Organization (ILO) and that in case of a violation of this commitment, the victims are entitled to remedies by their government (Council of the European Union, 2016).

Since the three years CETA has been provisionally entered into force, the EU and Canada have been committed to making sure their food safety regulations are intact and compatible and that the quality of the products is maintained. There were many queries about the standards of food products in the EU dropping due to the differences between the EU and Canada, however since CETA began, both parties have worked to ensure that healthy norms are upheld (Titievskaja, & Zachariadis, 2019). The EU and Canada have reaffirmed that food quality and safety remains safeguarded under CETA.

For the most part, CETA has been very effective in achieving what it set out to do, which was, to boost trade and investment and remove barriers to trade. They have successfully removed over 98% of tariffs from the day it was provisionally entered into force, meaning lots of consumers have already reaped the benefits of this and it has saved the EU a lot of money. CETA has also made a 4.5% increase in bilateral trade between the EU and Canada, totaling €72 billion and profiting millions of people (Titievskaja, & Zachariadis, 2019).

The EU and Canada have been very receptive to complaints from the parties involved and those affected and have done a lot of work to improve CETA in order to be more beneficial to everyone. Of course, there is room for improvement, certain regulations can be tighter and there can be more binding instruments in place as well as sanctions to make sure that what is set out in the agreement is respected and becomes realized. The French report on

CETA points out some substantial areas that need improvement. It declares that the environment and health is not a priority for CETA, although they have provisions for it (Food Watch, 2017). It also describes how the agreement’s vague wording when it comes to food safety could potentially lead to the arrival of products in the EU market that are not approved under EU regulations (Food Watch, 2017).

SWOT Analysis

<p>Strengths:</p> <ul style="list-style-type: none"> -Trade increased -Generate jobs and growth -Tariffs reduced enormously for exporters and importers -Helps smaller companies export more -Improved market access (larger consumer market) -Relieves Canada from depending too much on the United States -Increased Transparency with the ISC over the ISDS -Reduces paperwork, simplifies trade -Standards of products are not likely to drop due to Canada’s similar economic position to the EU -Due to the 98% of abolished customs duties, the EU will save up to €590 million annually -Mutually beneficial -European qualifications are recognized in Canada and vice versa (facilitating the flow of labor more easily) -Helps the EU influence the rules governing global trade -Alliance strengthened with Canada in an era 	<p>Weaknesses:</p> <ul style="list-style-type: none"> -A two-way trade brings challenges -Labor rights are not as protected as investor rights -Environmental and food safety not prioritized -CETA not fully entered into force yet -ICS gives too much power to multinational businesses -CETA serves business not the environment or small companies
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<p>of protectionism</p> <p>-Creating a level playing field in Canada for EU companies of all sizes</p>	
<p>Opportunities:</p> <p>-A two-way trade brings opportunity</p> <p>-Creates competition resulting in more choice, lower prices and overall better products</p> <p>-Encouraging Canadian companies to invest more in Europe</p> <p>-Use CETA as a model for future trade deals</p> <p>-People can still lobby the European Commission and the Canadian Government for more safeguards</p> <p>-JIIT</p>	<p>Threats:</p> <p>-The EU's 500-million-person market could undermine Canada's 35-million-people market and potentially interfere too much</p> <p>-EU standards of products could drop due to the vague working of the agreement and the fact that the EU and Canada have very different policies when it comes to food regulations (EU is stricter on hormones and chemically modified products)</p> <p>-It is not possible to entirely exclude the risk of jeopardizing the EU's strict standards</p> <p>-ICS needs to interpret European Union law, which could threaten the EU's commitment to the rule of law</p>

Although millions are already reaping the strengths and opportunities of CETA, there are still many weaknesses and threats that need to be addressed in order to improve it. Even though the ICS was ruled compatible with EU treaties by the ECJ, member states might still decide not to ratify the agreement and reject it for their own personal political gains, in which case CETA would theoretically and technically need to be stopped altogether. This is highly problematic as the agreement has been provisionally entered into force for the past three years, drastically changing things for the better in most cases. It would be devastating for the economies, for companies in general, and for the relationship between the EU and Canada if this agreement was to be completely reversed. An alternative solution is for the EU and Canada to drop the section on investment protection and the ICS, which are the only two topics which the member states need to unanimously decide on, as this would allow the rest of CETA to formally enter into force and become legally binding without the member states'

explicit approval (Migliorini, 2018). Upon this analysis it is clear that the effectiveness and influence of EU policy making in this area is effective in the sense that practically the entire agreement is in effect and the EU is able to secure ambitious trade agreements with partners in a quick manner, however at the same time it is not that effective because all 27 of the member states have to agree before it can fully enter into force.

In order for CETA to be an even more successful free trade agreement, there definitely needs to be more environmental, food, and labor safeguards in order to prevent irresponsible use of natural resources, the distribution of unhealthy products, and poor working conditions. In order for CETA to be used as a model for future trade deals, there needs to be a comprehensive review of the environmental and sustainable development chapters and that they are enforced with sanctions when they are violated. In order to ensure this, there needs to be greater transparency and ongoing supervision. To make sure that labor rights are not being neglected, meaningful discussions with civil society and trade unions need to be had, especially because when labor rights are violated, they may seek reparations but there are no sanctions in place for the violators (Carr, 2017).

Conclusion

This paper aimed to answer the research question, “to what extent are the protests about CETA justified?” The answer to this question is that they were justified to a large extent due to the considerable changes that the EU and Canada needed to make to improve CETA. The protestors main opinions while objecting this trade deal surrounded the fact that the focus of it surrounded cutting costs and maximizing profits while neglecting workers’ rights, health, safety and the environment. Although many important changes were made to the agreement, there are still more improvements that can be made which were mentioned above, and until

workers' rights can be upheld with sanctions in place for the violators and food safety and environment protection can be guaranteed, their protests were valid to a high extent. Although it takes a while before the protestors can see if changes have really been implemented, if there had not been any protests or outcries about the need for CETA to reform to begin with, then the agreement would not be where it is today. Due to the fact that other bodies such as ETUC and CLC were also actively lobbying for improvements also shows that the people protesting against CETA were not being irrational or unreasonable. Despite all the speculation about CETA, the deal has been a milestone in the EU-Canada alliance and has been able to afford both EU and Canadian citizens enormous benefits, but until improvements are made, people will continue to protest and fight for their rights.

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