

## **To what extent can the EU externalise its labour standards through free trade agreements? A case study of CETA.**

### **1. Introduction**

Since the European Union (EU) launched its ‘Global Europe’ strategy in 2006,<sup>1</sup> the EU has sought to establish a number of ‘new-generation’ Preferential Trade Agreements (PTAs) with various trade partners.<sup>2</sup> This paper looks at one of those agreements, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which establishes a free trade area between the EU and Canada.<sup>3</sup> CETA was voted in favour of by the European Parliament on 15 February 2017 and thus provisionally entered into force.<sup>4</sup> It currently awaits ratification by the EU national parliaments.<sup>5</sup> The agreement strives to eliminate or reduce barriers in nearly all sectors and aspects of trade between the EU and Canada, including trade in services and labour mobility. It also, *inter alia*, contains an extensive chapter on investment protection. This has caused concern among trade unions and civil society on both sides that the agreement will harm the interests of workers by allowing the interests of investors to take precedent over the parties’ right to regulate labour matters.<sup>6</sup> According to the EU and Canada, the agreement embodies their commitment to “free and fair trade”<sup>7</sup>, however, and will be implemented in a manner that not only protects their labour standards but also “enhances” their levels of protection.<sup>8</sup> In addition, the European Commission (EC) has stated that CETA is a “truly progressive” agreement that sets global standards on the protection of labour rights and commits the parties to cooperate to “encourage others around the world – particularly developing countries – to raise their own [labour standards]”.<sup>9</sup> For all of these ends, the main tool for the EU to utilise is chapter 23 of CETA, devoted to ‘Trade and Labour’.

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<sup>1</sup> EC, ‘Global Europe’, (ec.europa.eu, 2006),

<[http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130376.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf)> accessed 17 April 2017.

<sup>2</sup> The World Trade Organization (WTO) distinguishes between ‘PTAs’ and ‘RTAs’ (Regional Trade Agreements). This paper, in line with many other actors and commentators, refers to PTAs as a variety of unilateral and bilateral trade arrangements that establishes preferential reciprocal or non-reciprocal schemes, including free trade agreements (FTAs).

<sup>3</sup> Consolidated CETA Text, 14 September 2016, available at:

<<http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/>> accessed 11 April 2017.

<sup>4</sup> European Commission [EC], ‘In Focus, CETA’ (ec.europa.eu, 16 February 2017),

<<http://ec.europa.eu/trade/policy/in-focus/ceta/>> accessed 11 April 2017.

<sup>5</sup> Ibid.

<sup>6</sup> See, e.g. ETUC, ‘Letter to Chair of the EU Trade Council’, (etuc.org, 2016) available at: <<http://www.uni-europa.org/wp-content/uploads/2016/05/letter-to-chair-EU-Trade-Council-Minister-Ploumen.pdf>> accessed 5 May 2017.

<sup>7</sup> Council of the European Union [CEU], ‘Joint Interpretative Instrument’, 13541/16 (27 October 2016), p.1.

<sup>8</sup> CETA, preamble.

<sup>9</sup> EC, *supra* note 4.

This paper looks at whether the EU through CETA, as an example of a free trade agreement (FTA), is likely to externalise core labour standards to Canada and third state parties, as has been suggested by the EC.<sup>10</sup> Externalisation refers to the process by which one state or entity, such as the EU, is capable of influencing law, policy or conduct beyond its territorial borders.<sup>11</sup> Apart from the claims made by the EC, there is a common assumption in much of the academic literature dealing with the EU as a global actor that the EU is an influential global regulator and trade partner that promotes its regulatory preferences through bilateral trade agreements.<sup>12</sup>

For this reason, this paper begins with briefly outlining some of the main reasons behind the assumption that the EU will attempt to export its labour standards in its external trade relations (section 2). It thereafter outlines the relevant labour provisions of CETA (section 3). This section demonstrates that the EU has opted for a non-coercive cooperative regulatory approach with regard to labour protection under CETA. While it is beyond the scope of this paper to explore the reasons behind this approach, the paper highlights findings which show that it is consistent with the other new-generation FTAs of the EU (section 4). CETA thus provides one recent example of how the EU intends to use trade policy to export its labour standards abroad and reveals the tools, or mechanisms, it is utilising to do so. By analysing relevant provisions of CETA and official statements made by the EC, this paper demonstrates that for these purposes the EU relies heavily on what has been termed ‘socialisation processes’ in academic literature on policy diffusion.<sup>13</sup> As such, the prospect of externalisation is mainly dependent on the EU’s normative power in the world. For reasons outlined in section 4, this paper argues that the EC may have overstated the current ability of the EU as a normative power to externalise labour standards through FTAs like CETA.

## **2. The EU’s external policy on the inclusion of labour provisions in trade agreements**

There are several reasons to expect that the EU will try to export its labour standards through its trade policy. Firstly, the 2009 Treaty of Lisbon (TL) explicitly made the promotion of and respect for labour standards part of the EU’s external trade relations. While reinforcing the EU’s external commercial competence,<sup>14</sup> TL set out that any aspect of EU external policy, including trade policy, should “consolidate and support democracy, the rule of law, human rights and the principles of international law”.<sup>15</sup> The treaty thereby codified a practice that the

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<sup>10</sup> EC, ‘Press release – European Commission proposes signature and conclusion of EU-Canada trade deal’, available at: <[http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.pdf](http://europa.eu/rapid/press-release_IP-16-2371_en.pdf)>, p. 2.

<sup>11</sup> B. Kleizen, ‘Externalizing EU law, policy and values’, RENFORCE Working Paper Series 2015(1), p. 4.

<sup>12</sup> A. R. Young, ‘Liberalizing trade, not exporting rules: the limits to regulatory co-ordination in the EU’s ‘new generation’ preferential trade agreements’, *Journal of European Public Policy* 22, 9 (2015) 1253-1257, p. 1255.

<sup>13</sup> B. Kleizen *supra* note 11, p. 1.

<sup>14</sup> Article 3(1)e TFEU and Articles 206, 207 and 218 TFEU.

<sup>15</sup> Articles 3(5) and 21(2) TEU.

EU has in fact engaged in since the mid-1990s, where it incorporates human rights (including social rights) clauses, so-called ‘essential elements clauses’, into bilateral trade agreements.<sup>16</sup>

Secondly, there are several practical examples of where the EU has used trade policy to promote such non-trade policy changes. In EU’s PTAs with neighbouring states, the agreements often urged the other party to harmonise its national standards with those of the EU.<sup>17</sup> In EU’s GSPs with African, Caribbean and Pacific states, the agreements enabled the EU to temporarily withdraw trade privileges in the case of breaches of the ban on forced labour.<sup>18</sup> Through the so-called GSP+ system, the EU further attempted to induce policy change abroad by granting developing states enhanced market access if they, for instance, acceded to the International Labour Organization’s (ILO) fundamental conventions.<sup>19</sup>

Thirdly, the EC has repeatedly reemphasised its commitment to this trade-labour standards linkage in its policies. The EC’s 2010 Communication on Trade, Growth and World Affairs states that the aim of the EU is to encourage its partners to promote the respect of, *inter alia*, labour standards through trade.<sup>20</sup> Its 2015 ‘Trade for All’ strategy, states that the EU treaties ‘demand’ that the EU promote high labour standards in its trade agenda.<sup>21</sup> A fourth reason to expect the EU to export its labour standards through its new-generation PTAs is because of their forms of negotiations. The EU negotiates its PTAs with its potential trade partners through bargaining with the possibility of market exclusion. This type of international regulatory cooperation has been identified by several commentators as a form of negotiation through which the party with the most stringent rules is most likely to be able to exports its rule.<sup>22</sup>

### 3. The labour provisions of CETA

In accordance with the TL provisions on EU’s external policy, CETA contains a chapter dedicated to the protection of labour standards in the context of EU-Canadian trade relations: chapter 23 on ‘Trade and Labour’. However, Young effectively demonstrates that there is nothing in the text of CETA that suggests that the EU has sought to persuade Canada to harmonise its labour standards in accordance with EU labour standards.<sup>23</sup> Instead, the two

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<sup>16</sup> J. Orbie, ‘Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?’ in R. Whitman (ed.) *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave Macmillan UK, 2011) 161-186, p. 166.

<sup>17</sup> A. R. Young, *supra* note 12, p. 1270.

<sup>18</sup> M. García, “Are the EU’s new Trade and Sustainability Chapters fit for purpose?” (oefse.at, no date specified), available at:

<[http://www.oefse.at/fileadmin/content/Downloads/tradeconference/Garcia\\_Trade\\_and\\_Social\\_Impacts\\_Are\\_the\\_EUs\\_new\\_Trade\\_and\\_Sustainability\\_Chapters\\_fit\\_for\\_purpose.pdf](http://www.oefse.at/fileadmin/content/Downloads/tradeconference/Garcia_Trade_and_Social_Impacts_Are_the_EUs_new_Trade_and_Sustainability_Chapters_fit_for_purpose.pdf)>, p. 7.

<sup>19</sup> A. Panagariya, ‘EU preferential trade agreements and developing countries’, *The World Economy* 25, 10 (2002), 1415-1432, p. 1423.

<sup>20</sup> S. Velluti, ‘The Promotion and Integration of Human Rights in EU External Trade Relations’ (2016) 32(83) *Utrecht Journal of International and European Law*, 41-68, p. 41.

<sup>21</sup> EC, ‘Trade for All’, (ec.europa.eu, 2015), available at:

<[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)> accessed 5 May 2017, p. 22.

<sup>22</sup> See, e.g. A. R. Young, *supra* note 12, p. 1254.

<sup>23</sup> *Ibid*, p. 1256.

parties have pursued regulatory cooperation in the form of ‘convergence’, where both parties commit themselves to amend national rules in accordance with existing international standards; those of the ILO.<sup>24</sup> In chapter 23, the parties pledge to respect core standards set by the ILO, respect their previous ILO commitments, as well as to make efforts to ratify and implement the ILO’s eight fundamental conventions (article 23.3). The chapter further obliges both parties to respect each other’s right to further regulate on labour matters (article 23.2) and refrain from lowering labour standards in order to promote trade (article 23.4). It thereafter specifies, non-exhaustively, enforcement procedures that the parties need to have in place: a system of labour inspection that satisfies their international commitments and effective administrative and judicial proceedings available to people who maintain that their labour rights have been infringed (article 23.5).

For the purpose of enforcement between the parties, they express their ‘understanding’ that the provisions of chapter 23 are binding upon them (article 23.11.3). The procedures available to the parties are, however, limited to cooperative activities (article 23.7), such as dialogue, information-sharing, cooperation between themselves and in relevant international fora, and a dispute resolution procedure set out by the chapter. Notably, article 23.11 explicitly excludes disputes over CETA’s labour provisions from the binding dispute settlement mechanism set out CETA’s chapter 29. In contrast to chapter 29, disagreements between the EU and Canada over issues related to labour standards therefore are to be resolved by the parties through a consultative procedure (article 23.9) If the parties are unable to find a solution in between themselves, the chapter provides that the Committee on Trade and Sustainable Development, a Panel of Experts chosen by the State parties, and civil society advisory groups will be included to find a mutually agreed solution. The procedure, however, can only be initiated by the State parties (article 23.9) and it leaves open the question what will occur if the parties ultimately are unable to reach a solution (see article 23.10).

#### **4. The prospects of externalisation of EU’s labour standards through CETA**

The section above suggests that chapter 23 of CETA, all together, reflects a non-coercive and cooperative regulatory approach chosen by the parties. Despite this, the findings above do not exclude the possibility that the EU has to some extent exercised regulatory influence over Canada, which Young acknowledges as well.<sup>25</sup> Since entering into negotiations with the EU, Canada has in fact, whether or not due to pressure from the EU, ratified two of the ILO’s fundamental conventions.<sup>26</sup> CETA furthermore commits Canada to make efforts to ratify the eighth, the Right to Organise and Collective Bargaining Convention (No. 98).<sup>27</sup> The EC has declared CETA a “truly progressive agreement” in terms of its protection of labour standards, partly because of this commitment by the parties to uphold these international standards and partly due to their commitment of non-retrogression; the pledge not to retract from labour

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid, p. 1257.

<sup>26</sup> See ILO, ‘Ratifications for Canada’, (ilo.org, no date specified), <<http://www.ilo.org/dyn/normlex/en/>> accessed 16 April 2017: the Forced Labour Convention (No. 29) and the Minimum Age Convention (No. 138).

<sup>27</sup> CETA art. 23.3.4.

standards for the sake of commercial interests.<sup>28</sup> Moreover, the EC has stated that the deal is progressive because it sets “global standards” on the protection of labour rights.<sup>29</sup> In relation to this, the EC has emphasised that CETA commits the EU and Canada to cooperate with civil society to encourage other around the world, “particularly developing countries”, to raise their own labour standards.<sup>30</sup>

These comments reveal, firstly, that the EU intends to use CETA to diffuse core labour standards to Canada. Secondly, that the EU believes that the framework established by chapter 23 of CETA will additionally empower the EU and Canada to influence standards in third states. This positive outlook on EU’s potential to diffuse its labour standards through a form of non-coercive regulatory cooperation finds both support and opposition in scholarship. There is now considerable literature from different academic fields devoted to the study of rule transfer in the external affairs of the EU.<sup>31</sup> This literature has established concepts to explain and analyse the processes and mechanisms by which the EU, intentionally or unintentionally, may influence law and regulatory practice abroad. The following sections engage with this literature to evaluate whether the EU through CETA is likely to generate an impact on labour protection abroad.

The fact that Canada has during the time of the negotiations of CETA committed itself to international labour standards that it previously was unwilling to adopt<sup>32</sup> indicates that the EU has successfully diffused certain core labour standards to Canada. Section 3 demonstrated, however, this concerns a limited amount which do not match the level of the standards set internally by the EU. Nevertheless, documents from the final CETA negotiations suggests that the EU persuaded Canada to at least incorporate labour issues into the FTA, which Canada originally opposed in favour of having a separate and non-integral side-agreement on labour matters.<sup>33</sup> Such persuasion is a form of negotiation strategy – a form of diplomatic tactic through which officials from one side actively attempt to influence the rational decision-making process of the other side.<sup>34</sup>

To ensure that such diffusion of labour standards also occurs in practice, chapter 23 of CETA puts several tools and mechanisms at the disposal of the EU. As seen in section 3, these mechanisms are the cooperative activities and the consultative procedure of article 23.9. These are, again, mainly persuasion tactics; chapter 23 at most enables the parties to publicly

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<sup>28</sup> EC, ‘Press release, European Commission proposes signature and conclusion of EU-Canada trade deal’, (ec.europa.eu, 5 July 2016), available at: <[http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2371_en.htm)> last accessed 2 May 2017, p. 2.

<sup>29</sup> See C. Malmström, C. Freeland, ‘For Canada and Europe, now is the time for bridges, not walls’ (theglobeandmail.com, 7 July 2016), available at: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/for-canada-and-europe-now-is-the-time-for-bridges-not-walls/article30793922/>> accessed 2 May 2017; EC, *supra* note 10.

<sup>30</sup> EC, *supra* note 28.

<sup>31</sup> See B. Kleizen, *supra* note 11.

<sup>32</sup> T. Healy, ‘Canadian and European Unions and the Canada-EU CETA Negotiations’, *Globalizations* 11, no. 1 (2014), 59-70, p. 63.

<sup>33</sup> EC, ‘CETA – Summary of the final negotiating results’, (ec.europa.eu, February 2016) available at: <[https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152982.pdf](https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf)> last accessed 5 May 2017, p. 17.

<sup>34</sup> B. Kleizen, *supra* note 11, p. 5.

shame each other into maintaining and potentially raising their labour standards. Although the Joint Interpretative Instrument agreed upon by the two parties in 2016 clarifies that the provisions of chapter 23 are intended to be binding and enforceable, there is, ultimately, a lack of a strong enforcement mechanism.<sup>35</sup> The lack of such mechanism stands in contrast with the previous practice by the EU to introduce enforceable labour provisions into its GSP+ system,<sup>36</sup> so-called conditionality or spurred emulation strategies,<sup>37</sup> although the effectiveness of such strategies has been questioned as well.

Due to this cooperative, or ‘soft’, regulatory approach of the EU to CETA, García argues that the agreement, as well as the other new-generation FTAs, are clear examples of institutional frameworks set up to encourage socialisation.<sup>38</sup> Socialisation refers to the process where the EU attempts to diffuse rules through the socio-political sphere: naming-and-shaming tactics, but also, as is evident from the EC’s statements, by ‘socialising’ or encouraging third parties to adopt CETA standards.<sup>39</sup> Socialisation processes depend largely on the normative – rather than the civil, economic or military – power that the EU posits.<sup>40</sup> Manners, who introduced this *Normative Power Europe* (NPM) perspective into the study of the external affairs of the EU, claims that such normative dimensions can be more effective than solely coercive or material motivations.<sup>41</sup> From this perspective, impacts achieved by dialogue and consultation are likely to be more sustainable, since such ‘soft’ approaches encourage partnership and ownership over the issues for the involved parties.<sup>42</sup> Authors for the NPM perspective thus provide convincing arguments for adopting a long-term perspective when evaluating the EU’s trade-labour standards approach taken in CETA and other new-generation FTAs.<sup>43</sup> As such, when assessing the prospect of such mechanisms, it is necessary to oversee momentary failures in achieving an impact abroad.<sup>44</sup>

This long-term perspective is clearly not yet available for studies on CETA, which only recently and partly entered into force. Nevertheless, the NPM literature, like most other literature on the external affairs of the EU, sees that there are different factors which are more or less conducive to diffusion.<sup>45</sup> While significant disagreement exists as to which factors are the most conducive, unsurprisingly, partners with similar regulations and standards to the EU – such as Canada in many regards, have been found to be more likely to accept the EU’s

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<sup>35</sup> CEU, *supra* note 7, pp. 7, 9.

<sup>36</sup> M. García, *supra* note 18, p. 10.

<sup>37</sup> B. Kleizen, *supra* note 11, p. 1.

<sup>38</sup> M. García, *supra* note 18, p. 11.

<sup>39</sup> B. Kleizen, *supra* note 11, p. 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> I. Manners, ‘The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective’, *European Foreign Affairs Review* 14, 5 (2009), 785-803, p. 793.

<sup>42</sup> *Ibid.*, p. 796.

<sup>43</sup> *Ibid.*, p. 786.

<sup>44</sup> *Ibid.*

<sup>45</sup> B. Kleizen, *supra* note 11, p. 8.

regulations and norms than others.<sup>46</sup> Furthermore, a bilateral agreement like CETA sets up an institutionalised link between the parties, which further increases the chances of diffusion.<sup>47</sup>

However, most authors studying diffusion processes agree that the external effects of EU law are often the result of several processes.<sup>48</sup> While CETA places only socialisation mechanisms at the disposal of the EU to raise labour standards in third states, the rationale behind the EC's statements above appear to be that the EU, together with Canada, will be more able than before to exert such influence ("particularly" on developing countries). Since CETA mainly reaffirms the parties' commitments to the ILO, it is questionable however whether the agreement has provided the parties with any tools for this purpose that they did not already possess.

Further interesting in this regard is the body of literature that demonstrates the existence of an increasing resistance by the EU's trading partners towards including EU social rights and sustainable development issues into FTAs.<sup>49</sup> This literature is notable because it highlights that such resistance has existed in most FTA negotiations,<sup>50</sup> including those with Canada.<sup>51</sup> As shown above, this has resulted in that labour and sustainable development provisions of the EU's new-generation FTAs are mainly coupled with 'soft' socialisation mechanisms.<sup>52</sup> If compared to the EU's earlier trade-labour linkage practice, this literature thus suggests that the negotiation strategies employed by the EU in order to export its standards have either become weakened due to widespread external rejection. Or, as suggested by Bailey and Bossuyt, that the EU is consciously choosing a pragmatic approach where it adapts its normative demands to what might be acceptable to its partners, in order to achieve market expansion but maintain a discourse of legitimisation.<sup>53</sup> García's findings regarding the EU's in fact softening approach, together with arguments made by a variety of other authors that the EU in its trade policy is ultimately more concerned with economic and political goals than human (or social) rights per se,<sup>54</sup> suggest that the current approach by the EU might be a result of both. Either way, there appears to be a limit on what the EU, as a *Normative Power Europe*, is currently able to achieve in terms of influencing labour standards abroad, which does not correspond to the assertive statements made by the EC.

## Conclusion

This paper has demonstrated that the EU has opted for a 'soft' approach with regard to the protection and promotion of core labour standards through CETA, relying mainly on its

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<sup>46</sup> S. Lavenex, F. Schimmelfennig, 'EU rules beyond EU borders: theorizing external governance in European politics', *Journal of European Public Policy* 16, 6 (2009), 791-812, p. 805.

<sup>47</sup> I. Manners, *supra* note 42.

<sup>48</sup> B. Kleizen, *supra* note 11, p. 21.

<sup>49</sup> M. García, *supra* note 18, p. 14.

<sup>50</sup> *Ibid.*, p. 18.

<sup>51</sup> *Ibid.*, pp. 22, 24.

<sup>52</sup> *Ibid.*, p. 11.

<sup>53</sup> García, *supra* note 18, p. 24; D. Bailey, F. Bossuyt, 'The European Union as a conveniently conflicted counter-hegemon through trade', *Journal of Contemporary European Research* 9, no. 4 (2013), 560-577, p. 572.

<sup>54</sup> S. Velluti, *supra* note 20, p. 41.

normative power to influence labour regulation in Canada and third states. The NPM perspective shows that there are reasons to assume that institutionalised links, such as the cooperative procedures established by CETA, increase the chance of diffusion of standards between the parties; especially when regulatory practices between the cooperating parties are already similar. Since this perspective further advocates for assessing the long-term effects of the mechanisms of the EU's new-generation FTAs, it remains to be seen whether this approach will be more effective than that chosen by the EU under its GSP+ system. However, the labour chapter of CETA provides no clear answer as to what will occur if one of the parties decisively chooses to divert from the established standards. It furthermore provides little new in terms of cooperative mechanisms that can be used by the EU and Canada at the international level. These factors combined, it is difficult to conclude that CETA provides any tools for handling a growing resistance or scepticism of third states towards EU's trade-labour standards linkage. As such, it is questionable whether the EC is entitled to speak about the CETA's labour provisions with such optimism.