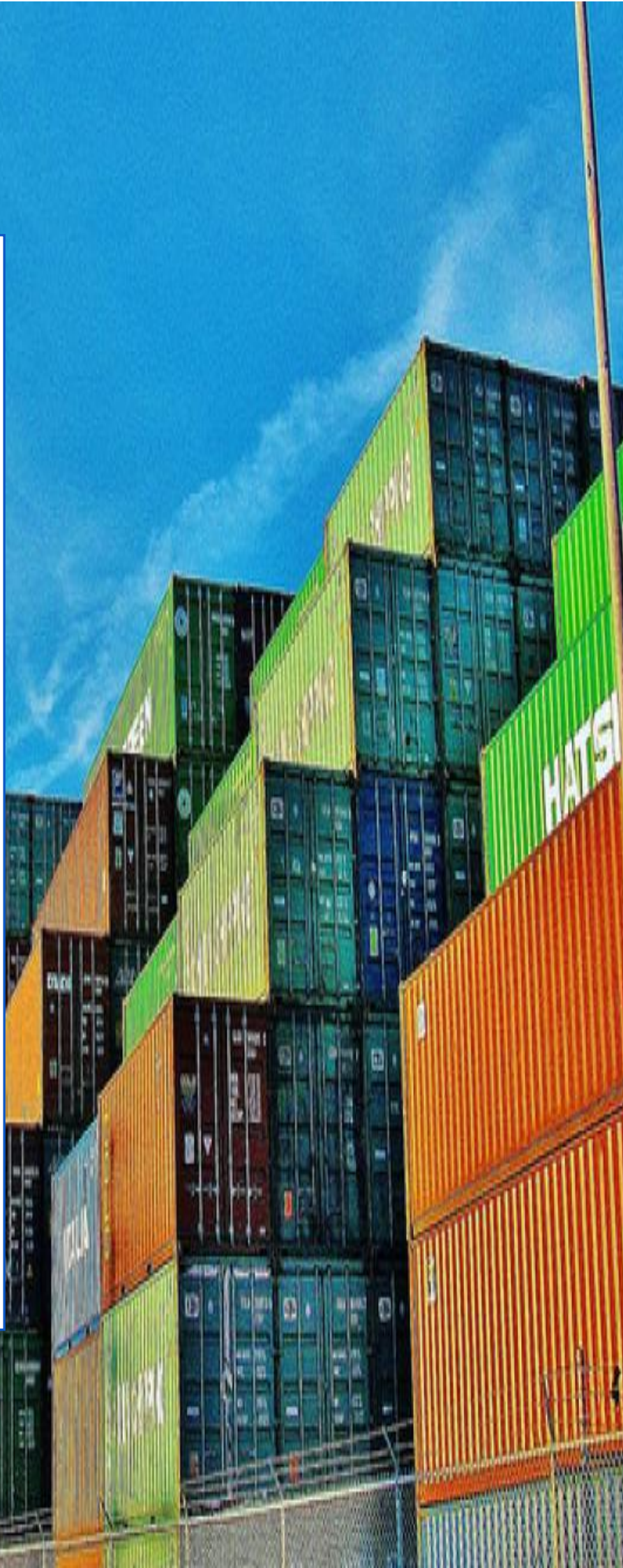


More than just Trade

NTPOs in CETA and the EU-Japan
Economic Partnership Agreement: A
Comparative Study

3 June 2021

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I hope you enjoy reading this thesis. Any errors that remain are my sole responsibility.

1. Introduction

The European Union (EU) prides itself of being at the forefront of Human rights, Rule of Law and Environmental protection. Internally, the EU advances these values through internal policy and legislation. Externally, the EU is legally bound to conduct its external relations in accordance with these values as has been laid down in law through article 21(1) of the Treaty on the European Union (TEU)¹ which reads:

‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’

If the EU wants to promote these goals outside the Union, the EU legislation naturally cannot be used. EU legislation is not binding to anyone outside of the Member States. In relation to the outside world a more traditional ‘soft power’ approach e.g. diplomacy and conferences are the instruments to pursue these values. However, being one of the largest economies in the world² the EU has another instrument at its disposal: it has started to use this large economic size to its advantage in trade agreements. In the preferential trade agreements (PTA) between the EU and third countries³ preferential access to the European market is often made conditional on the inclusion of non-trade policy objectives (NTPO) in the agreement. NTPOs are formulated in provisions that bind both parties to observe a certain level of human rights protection, rule of law standard and/or environmental protection. The consequences of non-compliance can take various forms, with the most impactful one being termination of the agreement.⁴

¹ Treaty on the European Union 2012, OJ C 326 13–390

² Eurostat, ‘The 2017 results of the International Comparison Program’, News release 84/2020, 20 May 2020

³ Third countries are countries that are not part of the European Union.

⁴ Ingo Borchert and al., ‘The pursuit of Non-Trade Policy Objectives in EU Trade Policy’, (2020) Robert Schuman Centre for Advanced Studies, No. RSCAS 2020/26 8

From the 1990s onwards the number and variation of NTPOs has steadily increased in the EU trade agreements.⁵ Although there has been extensive literature discussing the inclusion of these NTPOs from an economic, legal and political point of view most literature has focused on the NTPOs itself; how the adoption works, the effectiveness of the provisions and the discussion of what forms of NTPOs exist. A relatively under researched part of this subject are the factors leading to the inclusion of specific NTPOs in EU trade agreements.⁶ With this thesis I aim to fill this void by examining internal and external factors that have influenced the non-trade provisions in two recently signed EU trade agreements. I intend to identify and qualify these factors and give a meaningful contribution to the overarching research of NTPOs.

Understanding this process is important because of the differences of the NTPOs in separate trade agreements. The fact that trade agreements between EU and third countries differ depending on the third country, its size, geographical location, economic power and political “attitude” regarding the EU, is not surprising. Nor is the fact that the so-called ‘harshness’ of NTPOs varies depending on the reputation and status of human, labour rights and environmental protection in the third country. What is interesting though is the difference in NTPOs in trade agreements made with comparable third countries.

In this contribution a comparison will be made between two comparable countries and their trade agreements with the EU: Canada (CETA) and Japan (EPA). Two economically strong countries with good ties to the European Union. The two countries have a comparable reputation regarding human and labour rights, and environmental protection. With this in mind it is also interesting to recall that the NTPOs are often considered non-negotiable.⁷ With this stance of the EU and the nature of the two countries one would expect the NTPOs to be highly similar, if not identical. However, as will be shown in later chapters there are some interesting differences between the NTPOs included in the CETA and EPA. In order to understand the true nature of the EU’s strategy and priorities in this regard it is important to

⁵ Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Bloomsbury Publishing Plc 2017)

⁶ Lisa Lechner, ‘The domestic battle over the design of non-trade issues in preferential trade agreements’ (2016) *Review of International Political Economy* 23:5, 840-871

⁷ Isabella Mancini, ‘Fundamental Rights in the EUs External Trade Relations: From Promotion “Through” Trade Agreements to Protection ‘In’ Trade Agreements in: Eva Kassoti and Ramses Wessel (eds.), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER Paper 2020/1)

examine these differencing provisions. Therefore, the research question for this thesis will be: ‘What causes have contributed to the differences in the NTPOs in the Preferential Trade Agreements of CETA and EPA, and what does this say about the EU’s trading policy?’.

First the term NTPO will be explained and a framework for comparing CETA and EPA will be set. Secondly, the two trade agreements will be compared on various non-trade categories. Thirdly, the internal or external reasons for the EU as to why these differences exist will be described. This contribution will conclude with a general conclusion to the question posed above.

2. Literature Review

2.2. Types of NTPOs

NTPOs are often divided in three groups: civil and political rights (CPR), environmental protection (EP), economic and social rights (ESR).⁸ An additional group recognised is ‘Security’ that is sometimes excluded as a NTPO⁹ and sometimes considered to be part of them.¹⁰ In this study, we consider Security as an NTPO.

The bulk of the literature has focused on the traditional human rights, so CPR’s and ESR’s, and then mostly labour conditions. This is not surprising as these rights have been the first to be implemented and remain the most prominent provisions within the EU trade agreements.¹¹

2.3. Reasons for NTPOs

Why does the EU strive for Non-Trade Policy objectives? The basic answer is that the EU has a genuine interest in the advancement of the non-trade provisions for the benefit of the EU citizens and of the citizens of third countries. This is the reasoning that the EU publicly gives for NTPOs.¹² The protection of human rights and environmental protection are of course noble causes to strive for and to protect. However, in literature also other reasons are suggested.

⁸Borchert, (n4) ; Lechner (n.6)

⁹ ibid

¹⁰ Nuno Limão. “Are Preferential Trade Agreements with Non-Trade Objectives a Stumbling Block for Multilateral Liberalization?” (2007) *The Review of Economic Studies*, 74(3) 821–855.

¹¹ Susan Aaronson and Jamie Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (Cambridge, Cambridge University Press 2008) 133

¹² See: <https://ec.europa.eu/trade/policy/policy-making/sustainable-development/>

An early theory is that protectionism is the cause of these NTPOs.¹³ This theory argues that NTPOs are no more than a façade for the countries to claim righteous intentions while actually putting more hurdles in place that will make it more difficult to trade.

In addition to these theories other authors hold political institutions responsible for the surge of NTPOs in the recent decades.¹⁴ What this entails is that the increased proliferation of political institutions motivates them to show themselves as champions of human rights and other subjects considered important by civil society. This increases the size and legislation of NTPOs. In case of the European Parliament (EP)¹⁵ Meissner and McKenzie¹⁶ have researched this theory and have stated that in case of CETA the EP pushed for strong and unconditional inclusion of Human Right clauses because it saw it as an opportunity to increase its political profile as a Human rights champion and its political power.

Although the EP presents itself as protecting NTPOs in the European trade policy it has been noted that this was never a 'red line' in negotiations with third countries.¹⁷ For example, in the negotiations with Singapore the EP 'was specifically passive on human rights conditionality'.¹⁸ That raises the question why the EP insisted on the human rights conditionality and the overall 'harshness' of the NTPOs in the CETA agreement. This was done even though 'the EP did not expect that the conditionality clause would be necessary in Canada's case'¹⁹ Moreover, it was not out of idealism that the EP took such a tough stance. In fact, MEPs mentioned the shared values between the EU and Canada often and publicly.²⁰

¹³ Jagdish Bhagwati and Robert Hudec, eds (1996). 'Fair Trade and Harmonization: Prerequisites for free trade?', *Economic analysis*. Massachusetts Institute of Technology. Vol. 1. Paul Krugman, 'What Should Trade Negotiators Negotiate About?' (1997) *Journal of Economic Literature*, 35(1) 113–120.

¹⁴ Evgeny Postnikov and Ida Bastiaenes. 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements.' (2014) *Journal of European Public Policy*, 21(6) 923–940.

¹⁵ Katharina L. Meissner and Lachlan McKenzie, 'The paradox of human rights conditionality in EU trade policy: when strategic interests drive policy outcomes', (2018) *Journal of European Public Policy*

¹⁶ F Scharf *Games Real Actors; Actor-Centered Institutionalism in Policy Research* (1997 Westview Press Boulder)

¹⁷ Lore van den Putt, Ferdi de Ville and Jan Orbie, 'The European Parliament as an international actor in trade. From power to impact' in Stelios Stavridis and Daniela Irrera (eds), *The European Parliament and its International Relations* (2015, Routledge) 64

¹⁸ Meissner (n14) 843

¹⁹ Meisner and Mckenzie (n 17) 10

²⁰ *ibid.*

2.4. Effectiveness of NTPOs

NTPOs are being included in preferential and bilateral trade deals because of the failure to incorporate these, mostly labour standards, in the WTO and thus multilateral system. Without the WTO treaties regulating human, civil and labour rights or environmental protection, countries take it upon themselves to include them in their trade agreements. Additionally, in recent years the multilateral system has not been functioning well enough, many multilateral treaties don't get signed anymore. In contrast, bilateral trade agreements are an instrument that has been used for centuries and continues to be agreed upon around the globe.

The inclusion of NTPOs in the EU trade agreements is made possible by the economic size of the EU.²¹ The fact that these provisions are being included in trade agreements is because it is the most efficient manner to do so. Stronger nations have been able to make treaties fall in their favour throughout history. It is therefore nothing new that the EU is doing so in the area in which it is a superpower: Economics and trade.

The second distinguishing feature in literature are the reasons authors identify why NTPO's are included in preferential trade agreements.

For the EU to pursue its NTPOs, it must choose an effective instrument to make an impact. The EU uses the instrument that best suits its relative strength: EU trade. EU trade policies is a powerful instrument because the EU represents a large number of Member States (with their economic weight) that act as one; EU trade is also a widely used instrument: The EU has over 70 trade agreements or partnerships concluded, with even more pending ratification.²²

Additional to the theories as to why NTPOs are included in the trade agreements, there is also the question as to how effective the non-trade provisions can be.²³ Even if EU's Trade power

²¹ Karolina Milewicz, and other., 'Beyond Trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements?' *Journal of Conflict Resolution* (2016) 62 (4), 743-773

²² The full list can be found at: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place

²³ Liam Campling and others, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) *International Labour Review* 155(3) 357-382; Susan Ariel Aaronson and Michele Rioux. 'Striking a proper match? Strategies to link trade agreements and real labor rights improvements.' *Executive Summary: Labour Global Governance* (2008).; Ingo Bochert et al. 'EU trade policies: Carrot-and-stick mechanisms in the pursuit of non-trade policy objectives' *Vox EU*, 5 May 2020; Maryna Rabinovych, 'The Rule of Law as Non-trade Policy Objective in EU Preferential Trade Agreements with Developing Countries' (2020) *HJRL*; Robert Basedow, , et al. 'EU Trade and Non-Trade Objectives: New Survey Evidence on Policy Design and Effectiveness.' (2020) No. 14835. *CEPR Discussion Papers*,.

and broad use are uncontested, still some civil society groups doubt the effectiveness of the NTPOs²⁴. EU policymakers on the other hand strongly support the notion that trade policy helps achieve the non-trade objectives.²⁵ A great advantage of the inclusion is that it gives the EU a legal option to react in case of a violation of an NTPO. Moreover, there has been evidence of the Human rights clauses to have worked. Such as the case with ‘article 96 Consultations’ under the EU-ACP Cotonou Agreement.²⁶ EU Domestic Advisory Groups, can have some impact on Labour provisions in EU trade agreements.²⁷ Naturally, there has also been evidence stating the contrary.²⁸

2.5. Adaptivity of NTPOs

Interestingly, although the official stance of the EU is that the non-trade objectives are non-negotiable, in practice the design and enforcement measures differ for different trading partners. This implies that the NTPOs are a result of negotiations and of the relative priorities that the EU places in its relationship with different trading partners. This shows that NTPOs are an active and dynamic instrument in EUs foreign policies. The variation of NTPOs in EU trade agreements, gives the opportunity to analyse what drivers has led to this variation.

2.6. Why investigate NTPOs?

The literature in this subject generally focuses on the reasons why NTPOs are included in the trade agreements and how effective these NTPO’s are after the trade agreements have been adopted and are in force. I believe that examining the underlying reasons for the form of NTPOS is important to understand the position of NTPOs within EU Trade Agreements.

The relevance for examining the NTPOs in trade agreements of the last decade increases because of the growth in the number and diversification of these provisions. In recent years environmental protection has become a greater concern throughout the world. This concern is reflected in the internal policies and political discourse of the EU which has influenced

²⁴ Bochert (n 22)

²⁵ Ibid.

²⁶ Tobias Dolle, ‘Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights – Advantages and Disadvantages’ in Norman Weiss and Jean-Marc Thouvenin (eds) *The influence of Human Rights on International Law* (2015 Springer) 215

²⁷ Lars Engen, ‘Labour Provisions in Asia-Pacific Free Trade Agreements’ Background Paper no.1/2017, United Nations ESCAP

²⁸ Alessandro Ferrari and others, ‘EU Trade Agreements and Non-Trade Policy Objectives’ 2021 EUI Working Paper RSC 2021/48

provisions of trade agreements.²⁹ Because this trend of more environmental protection clauses is expected to continue, it is only logical to give this changing aspect attention in my contribution.

2.7. Approach

The differences in those NTPOs can be a good test for the theoretical framework. By examining the process behind two specific trade agreements, the CETA and EPA and the NTPOs included in these agreements one can gain a deeper insight how the practice fits to the theory. By choosing two agreements with two similar countries the differences in NTPOs can be a test as to the theories outlined above. Is it protectionism that drives the EU? Political institutionalist activism? Or are external factors the main cause for differ NTPOs?

This contribution will clarify the reasons that lead to the inclusion of specific NTPOs in Trade Agreements. This explains the priorities of the EU in pursuing the provisions' effectiveness.

3. What are non-trade provisions

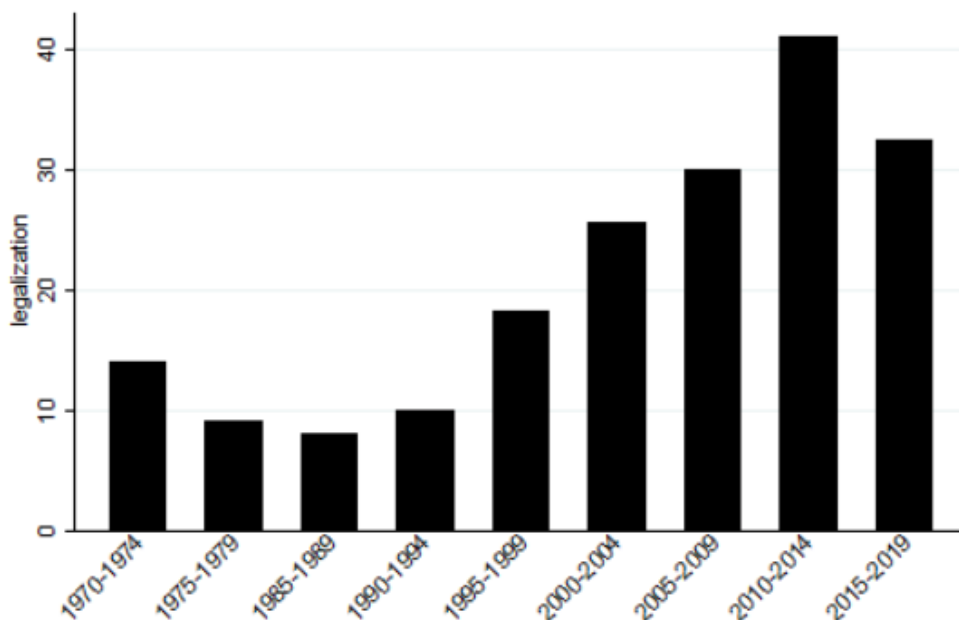
Non-trade objectives are provisions in preferential trade agreements that are not directly linked to the trade itself. These objectives can be the protection of economic and labour rights, political rights or environmental protection.³⁰ With the inclusion of these objectives, the trade agreement in which they are included becomes wider and more extensive: Not only trade objectives are protected and regulated but the trade agreement now has legally binding provisions on non-trade objectives such as human rights, labour rights and environmental protection. NTPOs have been part of the European Free Trade Agreements since the 1970s. From 2011 onwards there has been a large surge in legalisation of these objectives within the trade agreements. Legalisation means that the non-trade objective is laid down in a separate provision. These provisions are legally binding and thus can be invoked by a party in order to hold the other accountable. Previously, non-trade objectives were often put in the preamble, a part of treaties of which the legal status of the considerations therein is far more uncertain. Putting the objectives in clauses instead of the preamble can be attributed to the codification

²⁹ Dominique Blümer and others., 'Environmental provisions in trade agreements: defending regulatory space or pushing offensive interests?' (2020) *Environmental Politics* 29(5) 866-889

³⁰ Lechner (n 6) 847

of the general objectives of EU external action by the Treaty of Lisbon³¹. Because these fundamental rights have been given legal status and thus can be actively enforced, a growth in NTPOs is a logical consequence.

Additionally, the failure of the Doha negotiations has made the European Union shift its strategy of focusing on multilateralism to a more bilateral approach. At the same time, the EU has started to realise the strategic possibility of using these bilateral agreements. With the strong economic power of the EU behind it, trade agreements can be used for far more than just the promotion of trade between the two parties. According to Lechner³² the EU has shifted its focus in trade policy from multilateral cooperation to concluding bilateral treaties. Over the last few decades, the number of NTPOs has risen in EU trade agreements. From the 2000's onwards the number of economic, social and labour rights, and environmental provisions has doubled.³³ From approximately ten provisions regarding Non-trade objectives per EU trade agreement in the 1970s, the number has risen to nearly 40 in recent years.³⁴



³¹ Maryna Rabinovych, 'The Rule of Law as Non-trade Policy Objective in EU Preferential Trade Agreements with Developing Countries', (2020) 12 Hague Journal on the Rule of Law 487

³² Lechner (n 6) 862

³³ Borchert (n 22)

³⁴ *ibid*

(Bochart, 2020)

This rise in prominence of these provisions is only expected to grow. In fact, the new President of the European Commission, Ursula von der Leyen, explicitly stated that trade is not only an end to itself: 'It is a means to deliver prosperity at home and to export our values across the world. [with] the highest standards of climate, environmental and labour protection, and a zero- tolerance policy on child labour'.³⁵ A few years before, Commissioner for Trade Cecilia Malström made a similar statement: '[The EU will use] trade agreements and trade preferences programmes as levers to promote, around the world, values like sustainable development human rights'³⁶ Although one must keep in mind that EU trade policy and the EU itself are mostly concerned with increasing trade and improving free trade globally, these statements show that the EU can and will use their trading policy and thus their trade agreements as instruments, not just as the goal itself. This was already identified by Sapir³⁷ who stated that trade policy is 'the principal instrument of foreign policy for the EU'. The possibilities have been known but trade agreements have now become actively used by the EU to push for certain standards around the world. Therefore, one can make the prediction that the number of NTPOs will grow and become more divers in the future.

4. Types of NTPOs

The NTPOs that have been included in the EU trade agreements are of different types which all came to prominence at a different time.

4.1. Civil and Political rights

Civil and political rights (CPRs), also called traditional rights, are provisions in the trade agreements in which the obligations of the parties are laid down on: human rights, democracy and the rule of law. Human rights were first included in the Lomé IV convention.³⁸ Over the

³⁵ Ursula von der Leyen, 'A Union that strives for more, My agenda for Europe' Political Guidelines for the Next European Commission 2019-2024

³⁶ Cecilia Malström, 'Trade for All: Towards a More Responsible Trade and Investment Policy' the European Union 2015

³⁷ Andre Sapir, "The Political Economy of EC Regionalism", (1998) *European Economic Review* 42 717-732.

³⁸ Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', (2013) *Legal issues of Economic Integration* 40(4) 298

years they have been included in trade agreements more regularly³⁹, although set sanctions were not yet part of the agreements. The clauses became more prominent and more strongly worded over the years and sanctions became a measure of last resort to be included in the agreements.⁴⁰ In 1992, these CPR's were declared to be an essential part of EU trade agreements. When a provision in an agreement is declared as 'essential', under the law governing treaties⁴¹ a trading agreement can be terminated in case of violation of those essential provisions. The qualification of the civil and political rights in the EU trade agreements as essential raised their status. After 2009 and the treaty of Lisbon these rights have become a vital part of the EU trade policy.⁴² This entails that the CPRs often are seen as essential elements of the trade agreements.⁴³ The economic agreements made by the EU with a third country are often accompanied by a political agreement. These agreements are linked by this cooperation clause on CPRs. If a party severely violates the rights laid down in the political agreement this could have consequences for the economic agreement made parallel. However, one must keep in mind that this is a possibility, not a regular occurrence.

4.2. Economic, Social Rights and Environmental Protection

Economic, social rights and Environmental Protection are often put under the same part of the trade agreements as 'trade and sustainable development'. The first trade agreement mentioning sustainable development was the trade agreement between the European Communities and Hungary.⁴⁴ With the Treaty of Lisbon in 2009 the European Union laid down in their treaties that sustainable development was to be promoted through the EU's external relations.⁴⁵ With this legal focus the new generation of EU trade agreements have all included a chapter on sustainable development in which labour and environmental standards were established. In those chapters there are three types of provisions that concern this sustainable

³⁹ Samantha Vellutic, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) *Utrecht journal of International and European Law*, 32, 57

⁴⁰ Vaughne Miller, 'The Human Rights Clause in the EU's External Agreements' House of Commons Library, Research Paper 04122.

⁴¹ Vienna Convention art. 60

⁴² Laura Beke and others, 'Integration of Human Rights in EU development and Trade Policies' (2014) European Commission

⁴³ Daniela Donno and Michael Neureiter 2018, 'Can human rights conditionality reduce repression? Examining the European Union's economic agreements' *The Review of International Organizations*, Springer 13(3) 336

⁴⁴ Europe Agreement establishing an association between the European Communities and their Member States and the Republic of Hungary, (1993) art. 70 (2)

⁴⁵ TEU art. 3(3), Art. 21(2)(d); TFEU art. 11

development. The substantial part of these provisions establishes the minimum standards that both parties agree to uphold.⁴⁶ For labour standards this is often the ILO standards. Similarly, the environmental provisions often refer to the multilateral agreements signed by both parties. The procedural side establishes a softer obligation upon the parties to commit to dialogue, transparency and co-operation.⁴⁷ This is essential a promise from both parties to keep each other informed of any changes.⁴⁸

One of the distinguishing features of the EU approach on labour provisions is that the EU tries to be promotional. These are clauses that contain only cooperation elements and weak enforcement mechanisms. Whereas clauses with strong enforcement provisions are known as conditional clauses. The conditional approach has been described to be often used by the USA and Canada.⁴⁹

4.3. Security

A last type of NTPOs that deserves being mentioned is that of security. The EU does not only use its trade agreements to uphold the human, labour or environmental rights but also has a certain geo-political aim.⁵⁰ A very prolific clause often laid down in EU trade agreements is one to counter the usage and production of Weapons of Mass Destruction (WMDs). The first time a WMD clause was included as an essential element clause is in the EU-South Africa agreement of 2009⁵¹. Other security clauses included in the trade agreements can concern e.g., Terrorism, fight illegal drug smuggling, corruption or cybercrime.⁵² These provisions are adapted in nearly all agreements but do not have the same status as the provisions regarding WMDs.⁵³

⁴⁶ James Harrison and others, 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' *JCMS*, 57(2) 262

⁴⁷ *ibid*

⁴⁸ *Ibid* 265

⁴⁹ Lars Engen, 'Labour provisions in Asia-Pacific Free Trade Agreements' (2017) Background no.1 United Nations ESCAP

⁵⁰ Bochart (n 22)

⁵¹ European Commission, Proposal for a Council Decision on the signing of an Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, amending the Agreement on Trade, Development and Cooperation, 4 Feb. 2008 Lina Grip, 'The European Union's Weapons of Mass Destruction Non-proliferation Clause: a 10-Year Assessment' (2014) *Non-Proliferation Papers* (40) 2

⁵² *ibid*

⁵³ Bochart (n 22)

This is a general overview of the security clauses included in the trade agreements. It is possible that the EU also *uses* the signing of trade agreements themselves as a security asset in various ways. This will come back in the discussion of case study but is an important note to mention beforehand.

5. Case study Trade agreements

The two European trade agreements that will be examined in this contribution are the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA)⁵⁴ and the Economic Partnership agreement between Japan and the EU (EPA)⁵⁵. These two agreements lend themselves for a case study precisely because of the similarities between the two countries. This allows us to better compare and thus understand the NTPOs and identify the reasons behind their differences. Before a comparison between the different agreements can be made, it is important to establish how Canada and Japan relate to each other on the important NTPO subjects and to establish just how similar they are.

5.1. Rankings Canada and Japan

Canada and Japan are two countries with a generally good record on NTPOs. Violations in both countries are not often and therefore it might be difficult to rate them on a scale. For the purpose of this contribution there will be several international rankings discussed on which Canada and Japan are represented.

The Paris Principles were adopted by the United Nations Generally Assembly in 1993⁵⁶. They pertain to National Human Rights Institutions (NHRIs) that have the responsibility to protect and promote human rights in their respective country. As of 2018 Canada had one institution in compliance with the Paris Principles, Japan did not. Moreover, even at the time of writing Japan still legally had capital punishment.

⁵⁴ Comprehensive Economic and Trade agreement (ceta) between Canada, of the one part, and the European Union and its Member States, of the other part

⁵⁵ Agreement Between The European Union And Japan For An Economic Partnership

⁵⁶ UN General Assembly Resolution 48/134 1993

The Freedom House Index assigns each country a rank and status. It considers ‘people’s access to political rights and civil liberties’. From 2016 onwards the score of Canada has been 99 or 98 out of a 100 on global freedom. Japan in the same time span has scored no lower than 96.⁵⁷

The International Trade Union Confederation publishes a report each year that includes a ranking of the countries in regards to the protection of the rights of workers from 5+ (no guarantee of rights due to the breakdown of the rule of law) to 1 (sporadic violations of rights).⁵⁸ Canada and Japan have consequently ranked in the same category, category 2 (repeated violations of rights). The Member States of the EU rank from rank 5 (Greece) to rank 1 (Austria, Denmark, Germany, the Netherlands). One must keep in mind that this ranking is being made by a Trade Union Confederation that is very sharp on the violations and might consider some violations that would be debatable.⁵⁹ Despite this, we can consider that Canada, Japan and the EU are comparably ranked.

In regard to environmental performance the same picture emerges. Throughout the negotiation rounds of both trade agreements the rankings of both countries have been comparable on the Environmental Performance Index released by Yale and Colombia University. Both Canada and Japan routinely rank in the low 20s⁶⁰ with the countries periodically switching positions.

From these instruments and the rankings of the two countries we can draw a few conclusions. One is that both countries have a comparable track record when it comes to human right, labour rights and environmental protection. From the broad instruments used the picture emerges from two countries that perhaps are not at the forefront of protection of these rights but are certainly better than most of the rest of the world. With that knowledge we can consider that both countries can improve but also that the countries are comparable to the European Union as a whole. Environmental, labour and human rights are areas where the EU positions and presents itself as the frontrunner and enthusiastic advocate. While this might

⁵⁷ The internet freedom score of Japan was and is significantly lower at 75/100. However, this falls outside the scope of this thesis.

⁵⁸ ITUC global rights index 2015-2020

⁵⁹ E.g. in its 2020 report the ITUC considered the conviction of the organiser of a strike that caused major traffic obstruction despite the absence of individual guilt in Belgium to be a violation of the right to strike. One could see how this could be cause for debate.

⁶⁰ Environmental Performance Index 2006-2020

be true for certain areas and Member States within the EU, the conglomerate actions and policies that naturally comes with having 27 member states places the EU in a far more average position than it would like to admit. What this means is that both Japan, Canada and the EU are at a comparable level when it comes to the areas discussed. With this basis in mind we now turn our attention to a more specific analysis of the CETA and EPA.

Each agreement will first be examined separately where the NTPOs in the different categories will be highlighted. After this exercise, some conclusions will be drawn as to how the NTPOs in the two trade agreements compare to each other.

5.2. Canada (CETA)

The first bilateral trade agreement between the EU⁶¹ and Canada was the 1976 Framework Agreement for commercial and economic cooperation. This agreement paved the way for multiple bilateral (political) agreements to be signed, such as the Declaration on Transatlantic Relations in 1990 cumulating in 2004 with the EU-Canada Partnership Agreement. In the latter agreement the wish for further economic cooperation was laid down. The two parties acted on this wish by starting negotiations for the Canada-European Union Trade and Investment Enhancement Agreement although these were suspended in 2006 with the parties not coming to terms in several areas⁶² and with the anticipated Doha rounds of the WTO coming up. However, after the failure of the Doha rounds the EU and Canada revisited the possibility of a new bilateral agreement through a joint study.⁶³ The study concluded that the GDP of both parties would grow significantly, with the EU expected to gain \$18.6 billion in annual GDP and Canada \$13.1. As a result, negotiations truly started in May 2009 on the Comprehensive Economic and Trade agreement. In 2014 the final text was agreed upon with signing taking place in 2016 after overcoming some difficulties in the Wallonian Parliament. With EP approval taking place in 2017, the agreement has been provisionally applied since September 2017. CETA will fully enter into force when all national and regional parliaments have ratified it, as is needed for a mixed agreement. The liberalisation of the trade of goods is quite

⁶¹ EEC back then

⁶² Foreign Trade Information System 'CETA' Organization of American States

⁶³ Concluded in the 2013 report 'Assessing the Costs and Benefits of a closer EU-Canada Relationship.'

substantial with 98.6% of Canadian and 98.7% of EU tariffs lines to be removed.⁶⁴ It was regarded as the 'golden standard' of EU trade deals that represented a new beginning for the EU trade policy.⁶⁵ However, it is important to note that CETA was highly controversial even up to the last vote in the EP. Several parties highlighted, what they considered to be, the subpar environmental protection and the power of the ICS mechanism among others⁶⁶

Background

During the negotiations there were many similarities between the EU and Canada. In both cases trade liberalisation was favoured by the federal actors (Canadian Federal Government and the Commission), sub-federal actors (provinces and Member States)⁶⁷ and business organisations with their lobby groups being a large presence in the negotiations process. Still, civil interest groups caused some considerable problems in the final phase of the negotiations.⁶⁸

One of the innovating concepts included in the CETA is Chapter 19, which has clauses on public procurement. The chapter 'specifies the areas where EU and Canadian businesses can provide goods and services for each other's governments, at every level of government – national, regional and local.' With that, the possibilities for companies to open these previously closed markets have increased. This has been typified as the second major success of the EU in the CETA.⁶⁹

5.3. Japan (EPA)

The GDP of the EU and Japan combined would amount to 30% of the world's production of goods and services. As a result, the EU-Japan Economic Partnership Agreement is the largest bilateral trade agreement ever concluded.⁷⁰ The start of this Agreement was the 2011 EU-

⁶⁴ 98,2% and 97,7% respectively have been removed immediately.

https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf

⁶⁵ Rapporteur Artis Pabriks, EU parliament debate: https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004_EN.html

⁶⁶ Anne-Marie Mineur, EU parliament debate: *ibid*; Yannick Jadot: *ibid*

⁶⁷ In Canada the main proponents were Quebec and Ontario, in the EU the UK, Germany and France

⁶⁸ Kurt Hübner, Tugce Balik and Anne-Sophie Deman, 'CETA: The Making of the Comprehensive Economic and Trade Agreement Between Canada and the EU' (2016) Notes de l'Ifri

⁶⁹ Cecilia Malmström, 'CETA: Europe's Next Trade Step', European Commission, 9 December 2015

⁷⁰ Sonali Chowdhry, André Sapir and Alessio Terzi, 'The EU-Japan Economic Partnership Agreement', (2018) Bruegel Special Report 7

Japan summit, where the two parties agreed to increase their economic relationship. After an impact assessment⁷¹ official negotiations started in 2013. After 18 rounds of negotiations an agreement on the text the EU-Japan Economic Partnership Agreement was reached in 2017. After the endorsement of the Council and the Parliament the EPA was signed on 17 July 2018.

The EPA was seen not just as an economic cooperation but also as a strategic opportunity. Both the EU and Japan have negotiated with the USA in order to gain more market access to the biggest economy of the world. However, in recent years the USA has been taking a more protectionist stance on world trade. With the withdrawal of the United States from the TTIP⁷² and the TPP⁷³ this agreement was a form of political and economic compensation for both parties.⁷⁴

6. Comparison of NTPOs in CETA and EPA

In the following section the different non trade provisions in both CETA and EPA will be discussed and compared.

6.1. Human Rights

CETA

CETA is accompanied by a Strategic Partnership Agreement (SPA)⁷⁵ a political agreement that accompanies the economic and trade agreement that CETA is. In the SPA human rights integrity is clearly held in a high regard to both parties. In fact, article 28(7) of the Strategic Agreement explicitly links CETA with the human rights standards by stating: ‘[T]he Parties recognise that a particularly serious and substantial violation of human rights or non-proliferation, as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Article 30.9 of that Agreement.’. It has an extensive scope and parties can thus decide to an irreversible

⁷¹ Directorate-General for Trade, ‘The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA)’ June 2018

⁷² Transatlantic Trade and Investment Partnership

⁷³ Trans-Pacific Partnership (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, United States)

⁷⁴ Masahiko Yoshii and Chae-Deug Yi, *An Economic Analysis of Korea-EU FTA and Japan-EU EPA* (2021 Springer) 51

⁷⁵ Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part L329/45

termination of CETA in case of a human rights violation.⁷⁶ This harsh language is surprising seeing the good record of Canada on fundamental rights. Additionally, Canada was vehemently opposed to including a CETA, as an economic agreement, to such clear political objectives.

EPA

The EPA between EU and Japan is also accompanied by a Strategic Partnership Agreement⁷⁷ in which in article 2 both parties reaffirm their commitment to upholding and promoting human rights, principles of democracy and the rule of law. The enforcement mechanism in this strategic partnership agreement is included in article 43. In case of a serious and substantial violation of human rights the case may be addressed as a case of special urgency. The article continues with affirming that such a violation causes the Joint Committee to hold a special consultation meeting. In case this meeting does not produce any acceptable solutions, either party may decide to suspend provisions within the agreement. Notably this only concerns the provisions in the Strategic Partnership Agreement, there is no linkage to the EPA through these articles.⁷⁸

Comparison

Strategic Partnership Agreements made in parallel with economic treaties are not known for creating strong obligations for the contracting parties. Strategic Partnership Agreements are rather a political understanding regarding several areas in which the parties want to enhance their cooperation. Additionally, even these enhanced cooperation statements are often not accompanied with very concrete steps or agreements. They are more general statements that aim to show the goodwill of both parties. It is often the Economic Agreement where the strong provisions are laid down. In the EU-Japan Strategic Partnership Agreement there is no mention

⁷⁶ Bartels (n 37)

⁷⁷ Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part. L216/4

⁷⁸ In fact article 43(8) states that: 'This Agreement shall not affect or prejudice the interpretation or application of other agreements between the Parties. In particular, the dispute settlement provisions of this Agreement shall not replace or affect in any way the dispute settlement provisions of other agreements between the Parties.'

of the EPA nor is there a link made between the two agreements, in contrast to what was done in the EU-Canada Strategic Agreement.

When comparing the two strategic agreements a different stance and overall tone of the language used emerges. This difference in stance regarding CETA is interesting seeing as how it has been said that in terms of values Canada has sometimes been 'closer to [the EU] than some of our members.'⁷⁹

Another example of this surprisingly though stance on Canada when compared with Japan is the difference in the data protection provisions. In the EU-Canada Strategic Partnership Agreement there is a comprehensive provision with clear obligations for both parties.⁸⁰ In the EU-Japan Agreement the Personal data protection provision consists of one sentence: 'The Parties shall enhance cooperation with a view to ensuring a high level of protection of personal data'.⁸¹ This is interesting seeing as how both Canada and Japan have received an Adequacy decision, a decision of the EU Commission that a countries has sufficient data protection laws which makes the transfer of personal data without any safeguards possible between a third country and the EU. Canada had received this decision in 2002⁸², Japan in 2019⁸³, an yet the EU saw it as necessary to lay down a much firmer provision in the Strategic Agreement accompanying CETA than in the agreement with Japan.

6.2. Labour

The sustainable development provisions consist of various chapters in the CETA. Chapter twenty-two is the general provision establishing that 'this regard, through the implementation of Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment), the Parties aim to: (a) promote sustainable development through the enhanced

⁷⁹ N.B. This was said in jest by Rapporteur Artis Pabriks in EU Parliament debate https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004_EN.html

⁸⁰ CETA Art. 25

⁸¹ EPA Art. 39

⁸² Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539) (2002/2/EC)

⁸³ Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information OJ L 76, 19.3.2019, p. 1–58

coordination and integration of their respective labour, environmental and trade policies and measures[.]

CETA

The standard set for the labour provisions is the 1998 International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-up.⁸⁴ Because of these standards, both parties will have to respect core labour standards as laid down in article 23.3.1.⁸⁵ Moreover, CETA contains provisions that are based on the already existing laws of both parties. In the treaty, the parties are required not to 'waive or otherwise derogate from, or offer to waive or otherwise derogate from its labour [or environmental] law and standards to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.'⁸⁶

In terms of cooperation on the labour chapter, in article 23.7 the parties 'Commit to cooperate to promote the objectives of this Chapter[.]' This explicit commitment to cooperate shows that both parties are willing to adapt and align their labour rights and circumstances. The obligations concerning these concepts can be divided in three types⁸⁷: 1. Obligations to implement certain multilateral obligations. 2. Obligations requiring the parties not to reduce their existing levels of protection. 3. Best endeavours obligations encouraging the parties to raise their levels of protection of labour and environmental standards.

EPA

Labour rights in the EPA are mentioned in various separate articles in the trade and sustainable development chapter.⁸⁸

The Parties reaffirm their obligations (mention of ILO obligations, including ILO Declaration on Fundamental Principles and Rights at Work, plus the Follow-Up in 86th Session) Accordingly, the Parties shall respect, promote and realise in their laws, regulations and practices the

⁸⁴ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998

⁸⁵ Freedom of association and collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour, elimination of discrimination in respect to employment and occupation.

⁸⁶ CETA Art. 23.4.2

⁸⁷ Lorand Bartles, 'Human Rights, Labour Standards and Environmental Standards in CETA' 2017

⁸⁸ EPA Chapter 16

internationally recognised principles concerning the fundamental rights at work. It is interesting to note the addition of the word *practices* in the sentence which gives the wording a stronger meaning and is an addition to the wording used in previous trade agreements.

Comparison

In EPA and CETA the labour rights provisions included are very similar: Both reinforce the international obligations of the ILO. Interestingly in EPA article 16.3 is stated that ‘the Parties shall exchange views and information on trade related labour issues of mutual interest in the meetings of the Committee on Trade and Sustainable Development’. Interesting difference with CETA here is that the parties in EPA are only signalling a commitment to exchanging views, not to cooperate on labour issues as in CETA. This difference in wording might seem small but can have different legal connotations. The EP had some severe doubt regarding both agreements because of the lack of the ILO commitment of both Japan and Canada.

The added value of these labour provisions between developed nations is questionable. It seems that this inclusion of labour standards is more appropriate for trade agreements with countries that have a history of systemic and severe violations of the rights of workers.⁸⁹ Interestingly, in CETA and EPA it did serve a purpose. At the time of negotiation both Canada and Japan had not ratified all Fundamental ILO Conventions. The negotiations on CETA caused Canada to fully ratify all Conventions, an example of the effectiveness of NTPOs.⁹⁰

The inclusion of the ILO conventions was extremely controversial during the negotiations of Japan. As a result, the labour provisions, explicitly mentioning the ILO conventions show the capabilities of EU trade agreements. Interestingly, the EU rejected the Canadian proposal of having sanctions in relation to the trade and sustainable development chapter.⁹¹ The fact that the labour provisions as a result do not have a clear sanction mechanism attached to them could be an indication for the concern that the EU has about its own labour standards. This is

⁸⁹ Isabella Mancini, ‘Fundamental Rights in the EUs External Trade Relations: From Promotion “Through” Trade Agreements to Protection ‘In’ Trade Agreements in: Eva Kassoti and Ramses Wessel (eds.), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER Paper 2020/1)

⁹⁰ Government of Canada, ‘Canada ratifies international convention, supports workers’ rights to organize and collective bargaining’ News Release June 14, 2017

⁹¹ Billy Melo Araujo, ‘Labour Provisions in EU and US Mega-regional Trade Agreements: Rhetoric and Reality’ (2018) *International and Comparative Law Quarterly* 242

speculation and it would be interesting for other research to come to a conclusion in this regard.

When looking at these arguments it is safe to say that the inclusion of them is to achieve a goal other than just preventing accusations of protectionism. In the cases of CETA and EPA they fulfilled a genuine purpose.

6.3. Environment

6.3.1. Biodiversity

CETA

CETA does not include a proper article regarding biodiversity although there is some wording in the General chapter. There is some general commitment to effectively implement Multilateral Environmental Agreements that are not trade-related. The two parties did recognise that cooperating is key to achieve objectives regarding biological diversity. But the addition here is that these objectives are mostly related to the trade-related aspects of the conservation and sustainable use of biological diversity⁹²

EPA

In EPA there is specifically article 16.6 regarding biodiversity which has a strong enough wording to impose obligations on both parties to improve this concept. Parties commit to consult and cooperate on trade related environmental matters. Compared to CETA there are no large steps being made.

EPA does strangely enough not include mandatory cooperation on biodiversity elsewhere in the agreement.

6.3.2. Climate Change

CETA

In CETA there is no dedicated section or article regarding climate change, nor is there a mention of the UNFCCC or the Paris Agreement.⁹³ The rationale behind the latter is that the

⁹² CETA Art. 24.12 (g)

⁹³ 'From CETA to JEEPA – the variations in the 'trade & sustainable development' provisions in EU free trade agreements' Eurogroup for Animals, Transport & Environment

Paris Agreement was not concluded yet when the negotiation mandates were granted. Additionally, the political climate of the time in Canada was not right for having these strong obligations implemented in the trade agreement. With the conservative Harper government, the room for strong environmental restrictions would have been hard to agree upon.

However, when looking at Article 24.12 (cooperation on environment issues) one can see that environmental cooperation and combatting pollution was important to both parties.

The Parties recognise that enhanced cooperation is an important element to advance the objectives of the TSD Chapter. The Parties further commit to cooperate on trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation.

Even though strong environmental provisions were not included in the trade agreement, CETA is one of the few trade agreements where the cooperation on the objectives in environmental issues can be read as mandatory. This because of the use of the wording in the first sentence: '[The Parties] *commit* to cooperate on trade-related environmental issues.' Commit to is stronger than 'may' or 'undertake to' used in other trade agreements and thus can be seen as mandatory.⁹⁴

EPA

In the EPA there is article 16.4 in which both parties affirm their commitment to effectively implement the United Nations Framework Convention on Climate Change and the Paris Agreement. As a result, the multilateral agreements are strongly represented in the trade agreement. Notably, the parties only commit to 'work together and take actions'. Something that is more of a declaratory nature than truly obligating the parties to do something

What is interesting to note is that where CETA had a separate article on cooperation on environmental matters. EPA only includes a general article on cooperation 16.2. The two parties merely 'recognize the importance of working together and cooperation is not

⁹⁴ Eurogroup for Animals, Transport & environment, Fern and CONCORD, 'CETA to JEEPA – the variations in the "Trade & sustainable development"' in EU Free Trade Agreements 2018

mandatory. Parties may cooperate on trade-related aspects of the current and future international climate change regime[.]’

6.3.3. Forests

CETA

Forests are separately mentioned in CETA in the article on Trade in forest products (art. 24.10) in which an important choice of words should be highlighted the ‘market access for forest products’. Although the subject ‘forest conservation’ is often classified in literature as a non-trade objective, one should not forget the economic side. Timber and the market access thereof has been fiercely protected by the EU. In fact, when Ukraine restricted its export of timber products to the EU in order to conserve its forests, the EU took Ukraine before the arbitration court.⁹⁵ In that case the EU claimed that export ban was against the newly signed association agreement in 2014. This shows that the lines between true non-trade objectives and just ‘normal’ economic considerations are blurred and often can overlap.

EPA

Japan is known for importing significant volumes of timber products from Malaysia and Indonesia. Regulations to ensure that these products are being sourced through legal trade in timber and legal logging are lacking. Therefore, it is interesting to see how the wording in the Article on Sustainable management of forests and trade in timber and timber products (art. 16.7) is not far more aspirational compared to CETA.

6.3.4. Fisheries and Aquaculture

CETA

In art. 24.11 trade in fisheries and aquaculture is laid down. Although CETA states that the EU and Canada are required to take affirmative steps to protect the maritime life, there is no reference to the Food and Agriculture Organization of the UN and other relevant UN instruments. The omission of this is interesting, especially when compared to the EPA where

⁹⁵ Final Report of the Arbitration Panel established pursuant Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union, of the other part, ‘Restrictions applied by Ukraine on exports on certain wood products to the European Union’, 11 December 2020.

explicit mention is made to these UN instruments.⁹⁶ As is the case in the EU trade agreements with Singapore⁹⁷, Vietnam⁹⁸ and Mexico⁹⁹

EPA

Article 8 in the Trade and Sustainable Development Chapter references illegal fishing, highlighting the issue and explicitly mentions different multilateral agreements that should be observed by both parties. Additionally, there is a separate article on cooperation on this issue.¹⁰⁰ This shows that unlike with CETA, fishery has been a vital issue to both parties.

However, although fishery is an important subject, whale hunting (Whaling) is not being mentioned at all in the EPA. Whaling is a large staple of the Japanese culture and economy. In the EU whaling has been prohibited and the EU is a vocal opponent of it.¹⁰¹ It is therefore interesting, and highly noticeable that there is no mention of international whaling protection instruments in the agreement.

When two parties both have time constraints to work under, this can have a strong influence on the NTPOs included in the trade agreement. Controversial topics, which tend to delay or even jeopardise the negotiations, are often not made a 'red-lining' in the negotiations process. This was evident in the EPA where some well-known controversial issues were left out of the agreement. For example, whaling is not mentioned in the formal trade agreement, even though it has been prohibited in the EU for over 35 years.¹⁰² Moreover, the EU parliament adopted a resolution during the negotiations in 2012 in which it noted that: 'serious divergences remain between the EU and Japan on issues related to the management of fisheries and whaling, notably Japan's whaling under the guise of scientific whaling, and

⁹⁶ EPA Art. 16.8

⁹⁷ Art. 12.8 EU-Singapore agreement

⁹⁸ Art. 8 EU-Vietnam agreement

⁹⁹ Art. 8 EU-Mexico agreement

¹⁰⁰ EPA Art. 12

¹⁰¹ Proposal of 19 December 2007 for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the Schedule of the International Convention on the Regulation of Whaling. <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=LEGISSUM:l28198>

¹⁰² European Commission, 'International Whaling' https://ec.europa.eu/environment/biodiversity/animal_welfare/whaling.htm

calls for broader discussions on the matter of the abolition of whale hunting and of trade in whale products¹⁰³

In 2019 this paradox was also noted in parliamentary questions^{104 105}. Moreover, the EP adopted resolution B8-0853/2016 in 2016 that condemned the Japanese decisions to resume whaling. Something that was mentioned in the Parliamentary questions as well. To both issues the Commission answered along the same lines: Whaling and import of whale meat is prohibited in the EU and the agreement does not bring about any changes to the EU's position in this area. Because of this, trade in whale products is excluded from the EU-Japan Economic Partnership Agreement and therefore there is no mention of it. What is interesting here is that just because the EU does not trade in whale meat does not mean that the trade agreement could not have been used to export these rules. In fact, with the withdrawal of Japan from the International Convention for the regulation of Whaling (ICRW) and the International Whaling Commission, the trade agreement would perhaps be the primary way to do so.

Comparison

When looking at the environmental provisions of both agreements there are several conclusions to draw. Firstly, it is clear that both agreements have similar provisions that impose few obligations on the contracting parties. The EPA is understandably more concerned with climate change seeing as how the negotiations were started in a time where these concerns were more prominent. The negotiations regarding CETA were concluded in 2014. Those of the EPA in 2017. During those three years the Paris Agreement regarding climate change had been signed. Something that had obvious influence on the environmental provisions. Secondly, a some very controversial subjects in the EU-Japan agreement have very light provisions without strong obligations dedicated to them or have been completely left out: most notably, illegal Logging and Whaling. Although this makes the EPA not less complete

¹⁰³ EU trade negotiations with Japan European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan (2012/2711(RSP)) OJ C 72E , 2014, 16–20

¹⁰⁴ Member of the European Parliament from 2009 to 2019, Parliamentary question of 3 January 2019, E-000002-19

¹⁰⁵ Member of the European Parliament from 2014 onwards, Parliamentary question of 16 July 2019, E-002295-19

or ambitious in environmental protection as CETA, the omission of these controversial subjects is interesting nonetheless.

6.4. Enforcement mechanisms

CETA

CETA establishes that the Trade and sustainable Development (TSD) chapter can be enforced by use of a Committee on the TSD.

An important note to be made about the enforcement mechanisms included in CETA is the fact that reports made by the TSD committee are to be made public within 30 days without exception. The panellists 'must be independent, serve in individual capacity, not take instructions, not be affiliated with government, comply with the code of conduct'¹⁰⁶

EPA

The provisions in the EPA are special because of the obligation for the TSD committee to interact with civil society.¹⁰⁷ As a result, the committee will have to follow societies' developments and changing views. The panellists 'shall be independent of, and not be affiliated with or take instructions from government, serve in individual capacity, not take instructions from any organisation or government; no involvement in the matter in question'¹⁰⁸ Moreover, results from the Committee can be kept secret if the parties decide to do so, a clear break with most other free trade agreements and a 'step backward' from CETA.

Comparison

The enforcement mechanisms laid down in both trade agreements are not strong dispute settlement procedures. Instead, they are mechanisms to overcome differences and to charge a panel with compiling a report. Overall the difference are modest. A difference is that the parties can have a decision in the EPA to make reports public whereas public access is guaranteed in the CETA but this omission does hamper transparency but will most likely not have great effect overall.

¹⁰⁶ CETA Art. 23.10(7)

¹⁰⁷ EPA Art. 16.16

¹⁰⁸ EPA Art. 16.18 4(a)

7. Reasons for differences

In the comparison above we see that there are interesting differences in the form and content of the NTPOs in both CETA and EPA. The drivers for these differences will be discussed in the following chapter.

7.1. Public Interest

One of the core reasons that contributed to the form of the NTPOs in both trade agreements seems to be the degree of public interest in the negotiations.

The EPA has received remarkably little criticism from civil society groups, something that is exceptional in EU trade agreements.¹⁰⁹ The main reason for this lack of public interest or critique is the focus in the EPA on traditional subjects such as the reduction of tariffs for motor vehicles, electronics and agricultural products, and the abolishment on non-tariff barriers. The EPA did not have the ambitious proposals that were included in the TTIP or CETA.¹¹⁰ As a result, there was not much controversy regarding the agreement, and this may have led to less media coverage and public involvement. Although specific sectorial interests were represented by specific Japanese interest groups they were nowhere near the level seen during CETA.¹¹¹

In contrast, CETA and its negotiations was one of great salience and controversy.¹¹² Mostly because it was one of the widest and deepest trade negotiations undertaken by the EU at the time.¹¹³ This led to public mobilisation, in contrast to EPA that in part was negotiated at the same time but led to no public salience or mobilisation.¹¹⁴ The difference in public interest led to different attitudes of the EP that is much more active when there is high public interest, as we will see below.

¹⁰⁹ Hitoshi Suzuki, 'The new politics of trade: EU-Japan' *Journal of European Integration* 39(7) 875-889

¹¹⁰ *Ibid*

¹¹¹ Suzuki (n 114)

¹¹² Sophie Meunier and Rozalie Czesana, 'From Back Rooms to the Street? A Research Agenda for Explaining Variation in the Public Salience of Trade Policy-Making in Europe' *2019 Journal of European Public Policy* 26(12)

¹¹³ Meissner (n 14)

¹¹⁴ Meunier and Czesana (n 116)

7.2. Extend of Trade agreements

CETA was the biggest and most ambitious treaty up until that point with far more policy areas, among which investment, than EPA. EPA in fact was more of a traditional kind of trade agreement touching less domains. Logically, a wider scope brings more opportunities to include NTPOs in the negotiations.

7.3. EU's comfort zone

As the stronger trading partner the EU has more leverage to determine the content of the NTPOs. Most notably in the case of CETA, sanctions for violation of the labour provisions were rejected by the EU. What this shows is that the EU is not always the frontrunner to lay down the most ambitious NTPOs. Sometimes it will insist on NTPOs being less harsh, and often with success. So, we see here a negative effect: the EU does not actively pursue NTPOs when it might turn against them.

7.4. EP Activism

All trade agreements being signed by the Commission, as a representative of the EU, have to be approved by both the Council and the EP. Because of this, both actors can have a substantial influence on the content of the provisions included in the trade agreement. The attitude of the EP plays a decisive role in the inclusion of NTPOs.

Canada is a country that has consistently ranked high on human rights, labour rights and environmental protection. When looking at the human rights provisions discussed above it is interesting to see that in CETA these are relatively strict with strong commitments. This question has been discussed in other contributions where the role of the European Parliament (EP) has been highlighted as being significant.¹¹⁵

Because the Commission and Council were more concerned with the commercial dimensions of the CETA, the high salience of the treaty gave the EP the opportunity to be seen as the sole proponent of strong human rights. If then the harsher stance was also implemented in the agreement it would be attributed as an accomplishment of the EP alone. This would increase

¹¹⁵ Meissner (n 14)

their 'policy turf'¹¹⁶. Given the increased public interest in CETA throughout the negotiations, the EP was certain that its actions would generate public response (and approval). The position of the other institutions did help the Parliament in an interesting way. The Commission was mostly concerned with the economic gains the CETA would bring and most Member States did not find the link between CETA and the political agreement significant enough to push hard for. These divergent viewpoints were a burden for negotiators but an opportunity for the EP as it could now show its own agenda. This coupled with the high salience of the negotiations gave the 'EP Activism' a large podium to be seen.

7.5. Differing opinions between Commission and Parliament

An important point to add here is the differing attitudes of the Commission and EU Parliament when it comes to NTPOs. The Commission prefers a constructive engagement; meaning that the EU will constructively work with the other party to rectify violations of NTPOs.¹¹⁷ However, the parliament has been advocating for a more restrictive approach, with clear sanctions. Therefore, one could say that the EU parliament succeeded in changing the approach to, at least, the Human rights included in CETA.

In contrast to CETA, the EP did not consider EPA as a possibility to increase its own political power. The EP chose certain topics or issues in trade negotiations to take a firm stance on. It can raise its political profile and power. However, the Parliament must choose its battles wisely. If it would push a subject too harshly and cause the negotiations to fold, it would achieve precisely the opposite of what it wanted to achieve. The reasons for this position in the negotiations in EPA was mainly because of the smaller public interest in the negotiations, resulting in less controversy.¹¹⁸ When there is a lack of overall interest the Parliament has no advantage in a harsh stance. Shouting in an empty room is just as effective as not shouting at all.

¹¹⁶ Ibid

¹¹⁷ EU Parliament, 'Human rights in EU trade agreements'

¹¹⁸ This also had to do with the fact that the EPA is less ambitious and encompassing when compared to CETA

7.6. Low Risk High Reward

EP activism is not without boundaries. The EP is also wary not to jeopardise the trade negotiations.

Because Canada is a country with excellent human right efforts the EP was confident in taking a tough stance, relying on the fact that the Canadians would not make human rights a breaking point of the negotiations. Because of these factors, the EP was involved in the negotiations to an unprecedented degree. For the EP human rights and other NTPOs were not brought about because of an idealistic stance. The Parliament saw pushing for these strong provisions as a low-risk high-reward possibility for improving its own visibility, interests and institutional power. Tough clauses on NTPOs were very likely to be included in the agreement and at the same time, because of the high salience of the CETA negotiations, had a strong effect on the position of the EP.

In contrast, the low-risk high-reward that the Parliament seeks was not as certain in the negotiations with Japan as, they were with Canada. Japan is a more defensive negotiator¹¹⁹ thus the stance that the parliament took in the CETA would carry more risks in the EPA negotiations. This shows that in the end the Parliament (as an institution) is not willing to jeopardise the ultimate goal of these agreements: Trade.

7.7. Partner's position

Another reason given for the nature of the NTPOs in EPA is Japan's lack of ability to export its regulations thus making the attitude defensive.¹²⁰ Suzuki argues that precisely because Japan struggles to export its own rules, it is not likely to accept harsh, conditional NTPOs. An explanation for this is that if a country is not used to exporting its rules, it would not be used to defend, reformulate and compromise on its rules.

Such an analysis points to the suggestion that the EU can export its regulations. This is being substantiated by literature¹²¹ that reinforces the view that the EU is a rule setter and, in this

¹¹⁹ Suzuki

¹²⁰ Suzuki

¹²¹ 'Brussels effect' nog andere bronnen toevoegen

context, would be able to push for including strong environmental and labour protection provisions in the trade agreement. However, as seen before the provisions are not that extensive as one might expect.

In terms of Human Rights, what can be seen here as well is the strong disagreements that the EU and Japan had during the negotiations. Especially the linkage between the Strategic Partnership Agreement and the Economic agreement was missing. This was because of the refusal of Japan to include such an essential elements clause in the Strategic Partnership.¹²² One of the main reasons for this was the existence of capital punishment in Japan, something that has been noted by the EU to be an inhuman form of punishment that should be ended.¹²³ Moreover, the EP called upon the EU to 'enter into a dialogue with the Japanese Government on a moratorium on capital with a view to its eventual abolition'.¹²⁴ Regardless of this resolution, the EP decided to vote in favour of the EPA. What this shows is that even though the EU wants to firmly link trade and fundamental rights, Japan was able to keep the two apart, most likely because of its big economic power and size. Moreover, Public opinion in Japan is in favour of capital punishment.¹²⁵ Additionally, in the EU the civil interest in capital punishment in other countries could be described as indifferent.

The importance of the Trade Partner's position can also be illustrated by the fact that in CETA environmental provisions were without enforcement provisions, something that can be traced back to the Canadian government at time of the negotiations.¹²⁶

¹²² Yuki Moritani, 'The Partnership Agreements with Japan as a part of structural foreign policy' 2020 the Greater European Journal, 2(1)

¹²³ Statement of the Delegation of the EU to Japan, Shogo Takahashi 'What is the perception of the Death Penalty in Japan?' NHK, 13 July 2018; Ionel Zamfir, 'The Death Penalty and the EU's fight against it' European Parliamentary Service, 2019

¹²⁴ European parliament non-legislative resolution of 12 December 2018 on the draft Council decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other Part (08462/2018)

¹²⁵ Takakazu Murakami, 'Over 80% Accept Death Penalty in Japan as 'Inevitable': Government Poll' The Mainichi 18 January 2020

¹²⁶ The Council of Canadians, 'The CETA Deception 2.0: How the Trudeau government is misrepresenting CETA' (2017) Unifor

7.8. Tactical objective

An added reason for the form of NTPOs in the case of CETA was that it was seen as the global blueprint for the true linkage of NTPOs and trade agreements. As a result, expectations were high. Especially because Canada was vehemently opposed to linking the CETA negotiations with the Strategic Partnership Agreement.¹²⁷ The Strategic Partnership Agreement is the political agreement that was being concluded in parallel with CETA. Because of this strong Canadian opposition several European actors, such as the DG Trade and the EEAS were willing to make concessions. However, if concessions were made it would set a precedent for the TTIP negotiations on human rights and NTPOs. How strange this might seem between developed countries; it should not be forgotten that in trade negotiations the size of economies can have a considerable impact. If the EU would make concessions to Canada, it likely would have to make concessions to the USA. Because the United States are a far bigger economic and political power these concessions would most likely have been far greater. This approach also showed that the EU, and especially the EP believed that it had to adopt a consistent approach to any Free Trade Agreement, regardless of the actual human rights situation in the third country.¹²⁸ Especially because of this conviction it is important for the EU to show that even the fact that a country is as developed as the EU has no impact on the provisions in trade agreements.

7.9. Geopolitical situation

During the negotiating of CETA it became a blueprint for further negotiations with the USA. It had thus become a strategic tool. Strong NTPOs were part of this blueprint. Even when the TTIP negotiations halted, strong NTPOs were still welcomed by the EP. In the final debate of the EP to conclude CETA it was highlighted by several MEPs and Rapporteurs how much the signing of the trade agreement was a welcome break from the protectionist and isolationist stance of the USA. As Manfred Weber of the PPE-Fraction of the EP put it: 'Donald Trump has terminated TTIP. He wants to build Walls. We as Europeans will show, with this confirmation,

¹²⁷ After 10 rounds of negotiating it was still a hot-button issue. Duggal, S. (2014) 'EU, Canada differ on political deal rollout', available at <http://www.embassynews.ca/news/2014/04/01/eu-canada-differ-on-political-deal-rollout/45360>

¹²⁸ Christilla Roederer-Rynning, 'Parliamentary Assertion and Deep Integration: The European Parliament in the CETA and TTIP negotiations'

that we do not want to erect walls but that we want to build bridges and cooperate.¹²⁹ What this shows is that the EU wanted to show to the rest of the world that the EU was truly capable of concluding these ambitious trade agreements in a changing world. However, it must be kept in mind that the majority of the negotiations had been done before the change in the American position. It was also noted during the debates of the EP that if the EU could not sign an agreement with Canada, 'the most European Country outside of Europe'¹³⁰ than with whom could it sign another ambitious trade agreement. The conclusion can be drawn here that the EP had different interest in accepting CETA. One was that it was a good podium to show that the free trade possibilities of the EU were far from over and to show that the EU still was able to advance and protect the prosperity of its citizens.

During the Negotiations of EPA the situations looked quite different and this substantially influenced how the agreement was negotiated and signed. At the start of negotiations with Japan the EU was negotiating with the USA to come to an agreement regarding TTIP, Japan was doing the same with the TPP. Therefore, it made sense for both the EU and the Japanese to come to a trade agreement among themselves as not to have the TIPP and the TPP put European firms in Japan and Japanese firms in Europe at a competitive disadvantage.¹³¹ However, in 2016 with the election of Donald Trump the process of negotiations with the USA for both the EU and Japan was halted and with the more protectionist rhetoric coming from the US it was unlikely to be started up again.

As mentioned before this caused the EU and Japan to conclude their negotiations faster.¹³² The increase in speed meant that there was less time or willingness by both parties to take a tougher stance on certain areas. Additionally, at the time of the cancellation of the

¹²⁹ EU Parliament Debate 15 february 2017: 'Und Donald Trump hat TPP gekündigt. Er will Mauern bauen. Und wir als Europäer woll an diesem Tag, mit dieser Abstimmung, heute deutlich machen, dass wir nicht Mauern abbauen wollen, sondern wir wollen Brücken bauen, wir wollen Partnerschaft.'

¹³⁰ Marietje Schaake: 'het meest Europese land buiten de Unie' EU Parliament Debate 15 february 2017

¹³¹ Gabriel Felbermayr, 'The EU-Japan Economic Partnership Agreement and revitalisation of the international economic liberal order' Royal institute elcano found at: http://www.realinstitutoelcano.org/wps/portal/riecano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/asia-pacifico/ari22-2019-felbermayr-eu-japan-economic-partnership-agreement-revitalisation-international-economic-liberal-order

¹³² Michael Frenkel and Benedikt Walter, 'The EU-Japan Economic Partnership Agreement: Relevance, Content and Policy implications', 2017 Intereconomics 52(6) 359

negotiations of the TTIP some speculated that the global construct of bilateralism and multilateralism was over.¹³³ The prediction, and perhaps reality, of the position of the US was that countries would pursue more protectionist stance in world trade. The trade agreement was an opportunity for both Japan and the EU to show that although their negotiations with the largest economy on earth had failed, bilateral trade agreements were still a viable option. Most importantly it showed the other option. Both parties attempted to show that just because the US pursued a more isolationistic and protectionist stance on the world stage, that this did not mean that this example had to be followed by other nations. Bilateral trade agreements still could be concluded and would still benefit both parties. A clear difference here with CETA is that the CETA NTPOs were clearly done with the intention to show the Americans what an ambitious trade agreement with the EU would entail. EPA was negotiated with the last phase being more geared to the rest of the world. The EU and Japan clearly wanted to show that free trade was the way to go, setting a precedent for future large trade agreements was not the objective.

The situation with the USA put additional pressure not only on the Japanese negotiators and the Commission of the EU but also on the other institutions of the EU to cooperate with an expedite conclusion of the EPA. This can be seen when looking at the EU parliament debates regarding EPA.¹³⁴ What emerges from the statements made in the plenary debates in the parliament is not just the enormous economic advantages that were being made by concluding the EPA, which did really open up the markets of Japan and the EU to each other. In the statements the geopolitical aspect of EPA was highlighted again and again. As Alessia Maria Mosca from the S&D group stated: 'First on a geopolitical level, the Union is filling the void left by Trump's United States. We are building a new rules-based global trade order that counteracts the negative effects of globalization'¹³⁵ Only then the statement mentioned the

¹³³ Kemal Dervis, 'Global Power is shifting. Is it the end of multilateralism' World Economic Forum 24 July 2018; 'Having Survived Trump, What's Next for Multilateralism' World Politics Review 22 March 2021; Allen Hicken, Pauline Jones, Anil Menon, 'The International System After Trump and the Pandemic' (2021) Current History 120(822)

¹³⁴ Plenary Debate 11 December 2018, CRE 11/12/2018 - 14

https://www.europarl.europa.eu/doceo/document/CRE-8-2018-12-11-ITM-014_EN.html

¹³⁵ Primo, a livello geopolitico l'Unione sta riempiendo il vuoto lasciato dagli Stati Uniti di Trump. Stiamo costruendo un nuovo ordine commerciale globale basato su regole che contrastano gli effetti negativi della globalizzazione.

economic advantages of the conclusion of the EU-Japan agreement. The Geopolitical importance of the Agreement was further collaborated by Pedro Silva Pereira¹³⁶, the rapporteur to this agreement: 'No matter how relevant it may be from the economic point of view, however, this agreement is, above all, of major strategic importance.'¹³⁷ Furthermore, where with CETA the tendency was for MEPs to state that the advantages outweighed the disadvantages that are tabled, for EPA the majority of the MEPs acknowledged the its shortcomings but instead of discussing the advantages as with CETA the main argument was to look at what great strategic benefits this would bring.

8. Conclusion

With the main reasons explaining why the differences in NTPOs in CETA and EPA exist determined, we can draw some conclusions.

It has become clear that EU trade agreements are active, dynamic and ever changing instruments of EU foreign policy. It shows that they are an effective tool to promote EU interests around the world. Trade agreements are not just an opportunity for greater market access or economic growth. Trade agreements are also vital for the EU, with its limited military and political capabilities, as strategic instruments. This dualistic usage of EU trade agreements is being accepted by the Council, Commission and European Parliament.

NTPOs are an integral part of these trade agreements. So integral that they too are subject to negotiations. NTPOs can contain obligations and mandatory standards, or, in contrast, can call only for the exchanging of view on certain policy areas and voluntary cooperation. They are not set in stone and can change in content, number and form.

NTPOs are not trade provisions. As such their content is influenced by different considerations than trade. Geopolitical factors play a big role. Commotion on the world stage that calls for an expedite conclusion of trade agreements, as was the case with EPA, leads to NTPOs to be watered-down and become more a form of soft law. High public interest and criticism causes NTPOs to toughen up and become more unconditional. In both cases the EP's position and

¹³⁶ He further elaborated on this statement in: Pedro Silva Pereira, 'The EU-Japan Economic Partnership Agreement from the European Parliament's Perspective: A Landmark Agreement beyond trade Core

¹³⁷ EU Parliament Debate 11 December 2018

considerations can be considered vital. Moreover, we can see here that NTPOs in trade agreements evolve depending on the situation. Just as the rest of the provisions included in the treaty. What this also shows is that the EU's intention that NTPOs are not subject to negotiations is not followed in practice. It is to be expected that the more integral NTPOs become, the more they will be subject to negotiations.

What this also shows is that although trade agreements might be an efficient way to promote and enforce these non-trade provisions, NTPOs are secondary to the primary purposes of a trade agreement. It is not idealism that forms them, it is politics and pragmatism. None of the EU institutions is willing to make NTPOs the breaking point of trade negotiations.

With the number of NTPOs expected to grow and the EU showing no signs of slowing down the process of concluding a bilateral agreement with as many countries as possible, it will be interesting to see if NTPOs continue to be pragmatically used as in CETA and EPA or that they will be set in stone and become a consistent and truly 'non-negotiable' presence in the trade agreements of the European Union.

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