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Environmental conditionality in Eu-Latin America trade relations

¹ *Giulia D'Agnone*

ABSTRACT: The purpose of this paper is to verify whether it can be ascertained a policy of "environmental conditionality" in EU trade relations with Latin American countries, aimed to environmental promotion and to improve sustainable development. It analyses both agreements and unilateral acts in order to define the characteristics and the efficacy of such a policy. The paper reaches the conclusion that environmental conditionality, even being a soft form of conditionality, can prove to be an effective formula to induce third countries to improve environmental protection.

KEYWORDS: ENVIRONMENTAL CONDITIONALITY; AGREEMENTS; TRADE RELATIONS.

A condicionalidade ambientais nas relações comerciais entre a União Europeia e os países de América Latina

RESUMO: O objetivo deste artigo é verificar se pode ser constatada uma política de "condicionalidade ambientais" nas relações comerciais da UE com os países latino-americanos, visando a promoção ambiental e a melhoria do desenvolvimento sustentável. O artigo analisa acordos e atos unilaterais para definir as características e a eficácia de tal política, chegando à conclusão de que a condicionalidade ambiental, mesmo sendo uma forma soft de condicionalidade, pode revelar-se uma fórmula eficaz para induzir terceiros países a melhorar a proteção ambiental.

PALAVRAS-CHAVE: CONDICIONALIDADE AMBIENTAIS; ACORDOS; RELAÇÕES COMERCIAIS.

SUMMARY: Introduction; 1. Legal basis of EU environmental policy; 2. Environmental conditionality in free trade agreements concluded by

1. Research Fellow in EU Law at University of Campania "Luigi Vanvitelli", qualified in Italy as Associate Professor of EU Law. Ph.D. in International and EU Law, she is the author of many scientific publications published both in national and international journals.

the EU with Latin American countries; 3. Environmental conditionality in agreements of non-commercial nature; 4. Environmental conditionality in EU unilateral acts: the scheme of generalised tariff preferences; Final considerations; Bibliography.

Introduction

Creditors often subordinate the access to certain advantages or aids to the realization or to the existence of certain conditions in order to influence the beneficiary's conduct. In international relations, both economic and political conditionality have been frequently used since the beginnings of the Nineties.

Economic conditionality has been referred to as the «linking of the disbursement of a loan to understandings concerning the economic policy which the government of the borrower country intends to pursue»,² and represents a common practice of international financial institutions, primarily the International Monetary Fund and the World Bank.³ Even if it is not much studied,

2. P. Mosley, *A Theory of Conditionality*, in P. Mosley (ed.), *Development Finance and Policy Reform*, London: Palgrave Macmillan, 1992, p. 129.

3. In particular, as regards the IMF activity, it has been observed that «[it] was increasingly made conditional on structural reforms [...]. The sectoral and thematic coverage of structural conditionality (SC) expanded over time and covered changes in legislation policies, and the structure of economic incentives, as well as institutional reform» (Independent Evaluation Office of the International Monetary Fund, *Structural Conditionality in IMF- Supported Programs*, in Evaluation Report, 2007, p. 2) so that «[t]he International Monetary Fund, for example, normally asks the governments to which it lends to adhere to specified targets for the growth of bank credit and government expenditure, and it may require changes in other variables such as the exchange rate» (P. Mosley, *Conditionality as Bargaining Process: Structural-Adjustment Lending 1980-1986*, in *Essays in International Finance*, 1997, p. 1). Many are the reasons lying beneath the IMF economic conditionality: see. C. Brown, *Democracy's Friend or Foe? The Effects of Recent IMF Conditional Lending in Latin America*, in *International Political Science Rev.*, 2009, p. 431 et seq.; see in particular p. 433. In general, on the IMF conditionality see, amongst others, D. Axel, *The Development of IMF and World Bank Conditionality*, in L. Yueh (ed.), *The Law and Economics of Globalisation: New Challenges for a World in Flux*, London: Edward Elgar Publishing, 2009, p. 161 et seq.; R.M. Lastra, *IMF Conditionality*, in J.J. Norton, M. Andenas (eds), *International Monetary*

it is not uncommon for the European Union to resort to economic conditionality in its external action.⁴

Widely used by the European Union in its relations with third countries, and object of much academic attention, is its political conditionality: by taking advantage of its commercial and economic strength the EU frequently attempts to influence third countries' internal policies to promote the respect of human rights, of the rule of law and of democratic principles.⁵ Many are the international

and Financial Law upon Entering the New Millennium: A Tribute to Sir Joseph and Ruth Gold, London: British Institute of International and Comparative Law, 2002, p. 551 et seq.; E. Denters, *Law and Policy of IMF Conditionality*, The Hague, Boston: Kluwer Law International, 1996.

4. G. D'Agnone, *La condizionalità economica nell'azione esterna dell'Unione europea*, in *Il Diritto dell'Unione europea*, 2016, p. 653 et seq.

5. The very first conditionality clause was contained in Art. 1 of the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, of 2 April 1990. Amongst the many authors that have discussed this subject, see J. Rideau, *Le rôle de l'Union européenne en matière de protection des droits de l'homme*, in *Recueil Des Cours*, 1997, p. 9 et seq.; H.E. Smith, *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?*, Florence: European University Institute, 1997; B. Brandtner, A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, in *European Journal of International Law*, 1998, p. 468 et seq.; P. Alston (ed.), *The EU and Human Rights*, New York: Oxford University Press, 1999; S. Angioi, *Genesi ed evoluzione del "principio di condizionalità" nella politica commerciale e nella politica di cooperazione allo sviluppo della Comunità europea*, in *Rivista internazionale dei diritti dell'uomo*, 1999, p. 458 et seq.; A. Tizzano, *L'azione dell'Unione europea per la promozione e la protezione dei diritti umani*, in *Il Diritto dell'Unione Europea*, 1999, p. 149 et seq.; M. Bulterman, *Human Rights in the Treaty Relations of the European Community. Real Virtues or Virtual Reality?*, Antwerpen: Intersentia, 2001; E. Lannon, M. K. Inglis, T. Haenebalcke, *The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations*, in M. Maresceau, E. Lannon (eds), *The EU's Enlargement and Mediterranean Strategies: a Comparative Analysis*, New York, Basingstoke: Palgrave, 2001, p. 97 et seq.; M. Giorello, *The Clauses of Democratic Conditionality in the European Union's External Relations*, in C. Cosgrove-Saks (ed.), *Europe, Diplomacy and Development. New Issues in EU Relations with Developing Countries*, London: Palgrave Macmillan, 2001, p. 79 et seq.; E. Cannizzaro, *The Scope of the EU Foreign Power Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?*, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer Law International, 2002, p. 297 et seq.; E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague: Martinus Nijhoff Publishers, 2003; A. Williams, *EU Human Rights Policies. A Study in Irony*, Oxford: Oxford University Press, 2004; L. Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford:

agreements concluded by the European Union, as well as the unilateral acts directed primarily to developing countries, attaching conditions which aim to promote political reforms and guarantee the observance of democratic principles and human rights.⁶ Two are the techniques used by the European Union to apply conditionality: the so called "stick method" corresponds to a negative conditionality and makes use of (implies) clauses which enable the suspension of an agreement with a third country in case of non-execution; the "carrot method" is a form of positive conditionality which consists in a system of progressive increase of EU funds in favour of third countries as a reward for compliance with human rights and political standards.⁷

While economic and political conditionality are thus well settled techniques frequently adopted by international organizations, "environmental conditionality" – i.e. a form of conditionality aimed to spur third countries to comply with environmental standards – is certainly more recent and above all less studied.⁸

Oxford University Press, 2005; P. Leino, *European Universalism?: the EU and Human Rights Conditionality*, in *Yearbook of European Law*, 2006, p. 329 et seq.; S. Gstöhl, *The Common Commercial Policy and Political Conditionality: "Normative Power Europe" through Trade?*, in *Studia diplomatica*, 2010, p. 23 et seq. See also, more recently, S. Poli, *The Principle of Conditionality in the EU's Relations with its Neighbours: its Evolution and Reconciliation with the Principle of Consistency*, in *Il Diritto dell'Unione europea*, 2018, p. 525 et seq.

6. This form of conditionality was formalized in the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final, of 23 May 1995.

7. See in particular G. Crawford, *Foreign Aid and Political Reform: A Comparative Analysis of Political Conditionality and Democracy Assistance*, London: Palgrave Macmillan, 2001, p. 1; E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, cit., p. 100.

8. This is shall not surprise, since in the Nineties – when the other forms of conditionality developed in EU external relations – sustainable development and, more generally, environmental protection was not a primary concern, in contrast

The present article will focus on the European Union (EU) international relations with Latin America, especially trade agreements, which have deeply intensified since the beginning of the last Millennium and in particular in the last decade when, just to make some examples, the EU-Central America association agreement was signed and the negotiations for a EU-Mercosur free trade agreement (FTA) were relaunched.⁹ As it has been observed, the reason seems to lie in the fact that "[t]he European Union [...] is aware of the great importance that th[e] region has gained as a destination for its exports and investments. Furthermore, the European Union wishes to reaffirm its ties with countries in the region because it hopes to consolidate its political and economic position".¹⁰

In this light, this article will try to verify whether, to what extent and the techniques eventually used by the EU to spur Latin American partners to increase their environmental protection standards.

with the need to secure that relations with future candidate countries would be informed by economic and democratic policies compatible with EU values. Sometimes environmental issues were contemplated, but they were clearly not essential elements of the agreements concluded by the EU. To the contrary, the notion of "environmental conditionality" was mainly connected with the internal Common Agricultural Policy, which provided for aid and incentives to production of quality food: see European Commission, *The development and future of the common agricultural policy. Follow-up to the reflections paper (COM (91) 100 of 1 February 1991) - Proposals of the Commission. Communication of the Commission to the Council and to the European Parliament*, COM (91) 258 final/3, of 22 July 1991.

9. See European Commission, press release of 4 May 2010, *European Commission proposes relaunch of trade negotiations with Mercosur countries*, available at www.europa.eu/rapid/press-release_IP-10-496_en.htm. For an early comment see L. Pantaleo, *Towards an EU-Mercosur Investment Agreement*, in *Studia Diplomatica*, 2014, p. 47 et seq.

10. A. Manrique de Luna Barrios, *The Free Trade Agreements between the European Union and Latin America. The Peruvian and Mexican Case*, in *Challenges of the Knowledge Society. Political Sciences, European Studies and International Relations*, 2015, p. 817.

To this end, after a glance at the legal basis of the European environmental policy (section 2), both bilateral and multilateral agreements concluded with the region's countries, together with specific unilateral acts of the EU, will be analysed (sections 3-5). A final paragraph will be dedicated to some concluding remarks on the characteristics of EU environmental conditionality as emerged in the previous paragraphs and on the actual effects of the EU environmental policy with Latin American countries States, i.e. its concrete efficacy when put to the test of the latest environmental challenges in the region.

1. Legal basis of eu environmental policy

Environmental protection has become one of the objectives of the European Union (then Community) with the 1986 Single European Act which, to this end, added a new Title to the EEC Treaty specifically dedicated to the environment (Title VII).¹¹ With the Maastricht Treaty the environment became the object of a specific policy of the Community, and later the Amsterdam Treaty made some minor modifications to the policy, mainly of procedural character, introducing the co-decision procedure as the rule instead of the cooperation procedure.

The Lisbon Treaty has (re)affirmed the EU commitment to environmental protection and sustainable development and has expressly emphasised the internal and external dimension of the

11. The ECJ actually recognized environmental protection to be an essential objective of the European Community before the adoption of the Single European Act: see for example European Court of Justice, judgment of 7 February 1985, case 240/83, *Procureur de la République v ADBHU*, para. 13.

EU action in this field. Notwithstanding Art. 3, para. 3, TEU makes reference to the need to “work for the sustainable development in Europe”, alluding to the internal dimension of environmental policies, paragraph 5 states that the EU shall contribute to the “sustainable development of the Earth”, thus conferring a global perspective to the EU environmental policy.¹² The Lisbon Treaty has thus strengthened the policy and extended its scope which is no more limited to economic activities but which is now intended to be a cross-cutting principle, in the sense of a sustainable economic, social and environmental development informing both the internal and external action of the EU.¹³

Moreover Art. 21 TEU, as amended by the Lisbon Treaty, states that in its external action the Union shall “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development” (Art. 21, para. 2, let. f), TEU). It shall be recalled that Art. 21 does not attribute to the EU new competences¹⁴ and that therefore the legal basis of European

12. On EU environmental policy before the Lisbon Treaty see in particular, within the Italian literature, P. Fois, *Il diritto ambientale nell'ordinamento dell'Unione Europea*, in G. Cordini, P. Fois, S. Marchisio, *Diritto ambientale, Profili internazionali europei e comparati*, Torino: Giappichelli, 2005, p. 51 et seq.; O. Porchia, *Tutela dell'ambiente e competenze dell'Unione europea*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2006, p. 17 et seq.

13. M. Alberton, M. Montini, *Le novità introdotte dal Trattato di Lisbona per la tutela dell'ambiente*, in *Rivista giuridica dell'ambiente*, 2008, p. 505 et seq., especially p. 507.

14. See E. Cannizzaro, M.E. Bartoloni, *Art. 21 TUE*, in A. Tizzano (a cura di), *Trattati dell'Unione Europea*, Milano: Giuffrè, 2014, p. 227. Some authors retain that Art. 21, para. 2, TEU has the power to widen the objectives of each policy having external relevance as defined by the legal basis (see. M. Cremona, *The Two (or Three) Treaty Solution: The New Treaty Structure of the EU*, in A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law After Lisbon*, Oxford: Oxford University Press, 2012, p. 40 et seq., especially p. 46 and 47).

environmental (external) policy shall be found elsewhere in the Treaties; but this constitutes an hurdle easy to leap, since the three articles dedicated to environmental policy (Arts 191-193 TFEU) do have an international dimension. Indeed, under Art. 191, para. 1, TFEU “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change” is one of the objectives of EU environmental policy.

2. Environmental conditionality in free trade agreements concluded by the EU with Latin American countries

Free trade agreements represent one of the main instruments of the EU common commercial policy. Until the middle of the years 2000 the choice of commercial partner countries was mainly due to political reasons.¹⁵ Many factors – such as the failure of the initiatives to promote a new round of multilateral negotiations within the World Trade Organisation (WTO) between 1999 and 2004 and, in particular, the failure of the Doha Development Round; the rise of new commercial powers like India; and the United States commercial policy favouring the multiplication of

15. The conclusion of agreements with the African Caribbean and Pacific (ACP) countries has been initially motivated by the fact that most of them were former colonies of EU Member States. Similarly, agreements with Eastern European States have found their origin in the will to orient the policies of transition economies after the Cold War and those with North Africa in the need to create a stability area in the EU neighbourhood. For an analysis of the evolution of EU trade policy see S. Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims*, in *European Law Journal*, 2014, p. 719, emphasizing that “none of the regions concerned were regions of economic growth. It was the EU that provided the growth pole and not the other way around”. See also F. De Ville, J. Orbie, *The European Union’s Trade Policy Response to the Crisis: Paradigm Lost or Reinforced?*, in *European International Online Papers*, 2011, Article 2.

free trade agreements (especially with emerging economies) – led the EU to relaunch its own commercial policy through the conclusion of a number of purely commercial agreements with third States.¹⁶ The proliferation of trade relations with third States has thus represented a means to strengthen the role of the EU in international relations.

It is in that light that, with reference to Latin America, the Association Agreement (including a free trade area) between the EU and Central American States (Costarica, Honduras, El Salvador, Guatemala, Nicaragua and Panama) was signed on 29 June 2012,¹⁷ and that the EU signed a comprehensive trade agreement with the Andean Community, which has been provisionally applied with Peru since 1 March 2013, with Colombia since 1 August 2013 and which has been later joined by Ecuador.¹⁸ Moreover, in 2010 the European Commission relaunched the negotiations for the EU-Mercosur FTA, which is still under negotiation.¹⁹

16. In the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions COM(2006) 567 final, of 4 October 2006, *Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy*, the Commission emphasized the need "to influence the forces driving change, to seize the opportunities of globalisation and to manage the risks" which, in its external dimension, meant to reinforce the WTO multilateral trading system and to expand the role of trade policy in EU external relations into bilateral trade developments.

17. Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, of 29 June 2012 (EU-Central America Agreement).

18. Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, of 26 June 2012 (EU-Andean Community Agreement).

19. See the press release of the European Commission of 4 May 2010, *European Commission proposes relaunch of trade negotiations with Mercosur countries*, available at www.europa.eu/rapid/press-release_IP-10-496_en.htm.

The analysis of both older and newer agreements concluded by the EU with Latin American countries does not conduct to a constant and univocal approach over time as regards environmental conditionality.²⁰

For example, in the 2002 association agreement concluded with Chile, including a comprehensive free trade area, the promotion of sustainable economic and social development is considered to be a guiding principle of the agreement²¹ (differently from the respect for democratic principles and fundamental human rights that, together with the principle of the rule of law, constitute essential elements of the agreement, so that their violation can led a party to take appropriate measures, in derogation to the procedure set forth in Art. 200, para. 2, of the agreement), while previous agreements, such as the framework agreement for trade and economic cooperation concluded with Argentina in 1990, substantially make no reference to environmental issues, being focused essentially on economic objectives.²² In order to reinforce such a conclusion, it can be mentioned also the global agreement concluded with Mexico in

20. On EU environmental policy in trade relations see in particular E. Morgera, *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012 and in particular the contribution of R. Žvelc, *Environmental Integration in EU Trade Policy: the Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements*, p. 174 *et seq.* See also E. Postnikov, *Environmental Instruments in Trade Agreements: Pushing the Limits of the Dialogue Approach*, in C. Adelle, K. Biedenkopf, D. Torney (eds), *European Union External Environmental Policy. The European Union in International Affairs*, Houndmills: Palgrave MacMillan, 2018, p. 59 *et seq.*

21. See Art. 2 of the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, of 18 November 2002.

22. The agreement contains only a "soft" democratic conditionality clause: see Art. 1 of the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, of 2 April 1990.

the year 2000, where the Parties declared to be “mindful of the importance that both Parties attach to the proper implementation of the principle of sustainable development”, without, however, taking any measure to improve it.²³

At the same time, in some coeval agreements there can be found some traces of economic cooperation with a look also to environmental considerations: it is so as regards, for example, the framework agreement for cooperation concluded between the European Economic Community and Uruguay in 1992,²⁴ or the framework agreement for cooperation concluded with Brazil in 1995,²⁵ which include the protection of the environment within the cooperation’s objectives and dedicate a specific article to the cooperation in the field of the environment.²⁶

The tendency towards a more incisive environmental conditionality in FTAs has then been definitively increased in new agreements concluded since 2010 and in those currently under negotiation. For example, in the 2012 association agreement concluded by the European Union with Central America States the parties have “confirm[ed] their commitment to the promotion of sustainable development, which is a guiding principle for the implementation of this Agreement, taking notably into account

23. Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, of 8 December 1997.

24. Framework Agreement for cooperation between the European Economic Community and the Eastern Republic of Uruguay, of 4 November 1991.

25. Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil, of 30 June 1992.

26. Respectively arts 6 and 18.

the Millennium Development Goals”,²⁷ so that an entire title of the agreement has been dedicated to trade and sustainable development.²⁸ And, in the same vein, the 2012 EU-Andean Community agreement can be cited. Previous agreements, like the one concluded in 2008 with CARIFORUM States,²⁹ contain less pervasive dispositions on sustainable development, to which a single article of the agreement is dedicated, containing a generic commitment to “work cooperatively towards the realisation of a sustainable development”.³⁰

As regards the agreements under negotiation, it is worth to cite the already mentioned FTA between the European Union and Mercosur. What emerges from the text of the trade part of the agreement – which contains an entire chapter dedicated to trade and sustainable development – is that to “enhance the integration of sustainable development in the Parties’ trade and investment relationship, notably by establishing principles and actions concerning labour and environmental aspects of sustainable development of specific relevance in a trade and investment context” represents one of its objectives.³¹

The premise that increased trade should not come at the expense of the environment or labour conditions, and that it should

27. Art. 1, para. 2, of the EU-Central America Agreement.

28. See Title VIII of the Agreement.

29. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, of 15 July 2008.

30. See Art. 3 of the Agreement.

31. The text of the agreement has been provisionally published and can certainly undergo further modifications. It can be consulted on the website <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.

promote sustainable development, lies at the roots of other trade agreements currently under negotiation with Chile and Mexico.

As regards Chile, in November 2017 the EU launched negotiations on a modernised trade pillar of the 2002 EU-Chile association agreement. In that occasion the Council clearly indicated that “the recognition that sustainable development is an overarching objective of the Parties and that they will aim at ensuring the respect, promotion and effective implementation of international environmental and labour agreements and standards consistent with the EU *acquis*”, reflecting “the commitment of the Parties not to encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation and standards, core labour standards or policies and legislation, as well as the commitment to improve laws, policies and underlying levels of environmental and labour protection”.³²

As regards Mexico, what emerges from the agreement in principle published on 23 April 2018 is that, similarly to the EU-Cariforum agreement, there will be a trade and sustainable development chapter, with a set of binding commitments to protect workers’ rights, environmental and climate protection, provisions on the fight against climate change and the transition to a sustainable low-carbon economy, referencing to the Paris Agreement.³³

32. Council of the European Union, *Directives for the negotiation of a Modernised Association Agreement with Chile, 13553/17 ADD 1*, available at http://www.sice.oas.org/TPD/CHL_EU/Modernization/Directives_e.pdf. See also the Sustainability Impact Assessment in Support of the Negotiations for the Modernisation of the Trade Part of the Association Agreement with Chile, Final Report of 07 May 2019, available at https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158829.pdf.

33. See the published version of the text of the agreement updated in May 2020, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

3. Environmental conditionality in agreements of non-commercial nature

Elements of environmental conditionality can also be drawn from EU agreements concluded with third States not having a purely commercial nature. The reference is to the agreements in the field of cooperation with third States, under Title III of Part V TFEU, and precisely agreements with developing countries (Arts 208-211 TFEU) and agreements with third countries other than developing countries (Arts. 212 e 213 TFEU).

Here, as regards Latin American States, the Cotonou Agreement can be cited.³⁴ In addition to the Preamble, where in 2010 a new recital dedicated to the global environmental challenge posed by climate change has been added,³⁵ the text of Art. 1 has been modified. The Article, dedicated to the objectives of the partnership, now contains a clear reference to the Millennium Development Goals within the international commitments of the parties that shall inform all development strategies, together with the specification that “[t]he principles of sustainable management of natural resources and the environment, including climate change, shall be applied and integrated at every level of the partnership”. Moreover,

34. See the text of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, of 22 June 2010.

35. The new recital states that the Parties are “aware of the serious global environmental challenge posed by climate change, and deeply concerned that the most vulnerable populations live in developing countries, in particular in Least Developed Countries and Small Island ACP States, where climate-related phenomena such as sea level rise, coastal erosion, flooding, droughts and desertification are threatening their livelihoods and sustainable development”.

the text of the agreement has been modified with an additional Article specifically dedicated to climate change (Art. 32A).

However, as already noted with regard to some of the previously cited trade and commercial agreements, the protection of the environment, although included within the objectives of the agreement and being the object of specific obligations, is not considered to be an essential element which can give rise to the consequences that will be analysed further below (section 6).

4. Environmental conditionality in eu unilateral acts: the scheme of generalised tariff preferences

The EU environmental conditionality policy can also be drawn from the so-called scheme of generalised tariff preferences (GSP), a unilateral measure of commercial policy adopted under Art. 207, para. 2, TFEU, thus having no reciprocity. It lowers or removes import duties from products coming into the EU market from vulnerable developing countries and is characterized by a general regime³⁶ and two special schemes: one aimed at incentivising sustainable development and good governance (GSP+), and the so-called *Everything But Arms* regime (the EBA regime) for the least developed countries as identified by the United Nations (Article 17 of the GSP Regulation).

36. The Scheme was adopted for the first time in 1971, in order to implement the system of generalised tariff preferences whose creation was recommended by the United Nations Conference on Trade and Development (UNCTAD) and then regularly updated and modified. To date, the scheme is governed by Regulation (EU) no. 978/2012 of the European Parliament and of the Council, of 25 October 2012, applying an Everything But Arms and repealing Council Regulation (EC) no. 732/2008.

The GSP+ is oriented by a logic of rewards³⁷ in favour of those countries assuming the special burdens and responsibilities resulting from the ratification of 27 core international conventions on human and labour rights, environmental protection and good governance as well as from the effective implementation thereof.³⁸ The preferential arrangements for sustainable development and good governance may be temporarily withdrawn if the beneficiary country does not respect its binding undertaking to maintain the ratification and effective implementation of those conventions or to comply with the reporting requirements imposed by the respective conventions, or if the beneficiary country does not cooperate with the EU's monitoring procedures set out in the Regulation.³⁹

Suspension of GSP preferences has been applied to Belarus (from GSP) for the violation of the ILO Conventions on freedom of association and on collective bargaining,⁴⁰ to Myanmar/Burma

37. On political conditionality in the GSP, see L. Bartels, *The WTO Ruling on EC-Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programs*, in *Human Rights and International Trade*, 2005, p. 463 *et seq.*; M. Irish, *GSP Tariffs and Conditionality: a Comment on EC-Preferences*, in *Journal of World Trade*, 2007, p. 683 *et seq.*; M. Healy, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries: the Use of Positive Conditionality in the European Generalised System of Preferences*, in *International Trade Law and Regulation*, 2009, p. 79 *et seq.*; K.C. Kennedy, *The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference*, in *Journal of International Law and Practice*, 2012, p. 521 *et seq.* On environmental conditionality see O. De Schutter, *Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards*, Bloomsbury: Hart Publishing, 2015, chapter 4.

38. The list of conventions is contained in Annex VIII of Regulation no. 978/2012.

39. See Art. 19 of Regulation no. 978/2012.

40. Council Regulation (EC) no. 1933/2006, of 21 December 2006, temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus.

(from GSP) for Forced labour⁴¹ and to Sri Lanka (from GSP+)⁴². More recently, on 12 February 2020, the European Commission decided to withdraw part of the tariff preferences granted to Cambodia under the EBA trade scheme due to the serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights.⁴³

As regards Latin American countries, in 2008 the Commission launched an investigation regarding El Salvador, then a GSP+ beneficiary, with respect to its compliance with ILO Convention 87 on freedom of association, but decided not to withdraw preferences; in 2012, an investigation was launched against another GSP+ country, Bolivia, for failure to implement the UN Single Convention on Narcotic Drugs, but GSP+ status was maintained. To date there have been no cases of suspension of the GSP for violations of conventions on environmental protection.

Final considerations

The analysis conducted in the previous sections has demonstrated that the European Union frequently resorts to environmental conditionality in both bilateral and unilateral acts

41. Council Regulation (EC) no. 552/97, of 24 March 1997, temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar.

42. Implementing Regulation (EU) no. 143/2010 of the Council, of 15 February 2010, temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) no. 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka.

43. Commission Delegated Regulation (EU) 2020/550, of 12 February 2020, amending Annexes II and IV to Regulation (EU) no. 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) no. 978/2012 in respect of certain products originating in the Kingdom of Cambodia C/2020/673.

with Latin American countries, in accordance with the objective to promote and contribute to the sustainable development in its external relations enshrined Art. 3, para. 5, TEU.

Environmental conditionality contained in the SPG is a typical example of positive conditionality, since the influence exercised by the EU is based on the promise to provide certain incentives, whenever the recipient country succeeds in meeting environmental conditions. Even if to date the European Union has never suspended the SPG for violations of environmental character, unilateral conditionality can prove to be a valid alternative to environmental clauses included in EU agreements with third countries.

To the contrary, defining the nature and the efficacy of environmental conditionality contained in the agreements concluded by the EU with Latin American countries is more complex, since it can hardly be compared to human rights and political conditionality.

As it is well known, human rights or democratic clauses are usually of two kinds. Once it has been inserted in the agreement an "essential elements clause", stating that the principles of human rights and democracy "constitute an essential element of the [...] agreement", the so-called baltic clause consists in a suspension clause usually stating that "[t]he parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present agreement"; the Bulgarian non-execution clause, instead, provides greater flexibility than a mere suspension clause, providing a procedure of consultations prior to the adoption of

any appropriate measures so that only for extremely urgent cases the suspension can be a valid option. Suspension, though being considered an “appropriate measure”, is thus to be intended as a last resort. In both cases conditionality has a negative nature, a sanctioning character operating *ex post*, i.e. after a violation has occurred.

What emerges from the clauses of environmental protection included in the EU-Latin American countries agreements is that they don't share with typical examples of positive conditionality the rewarding rationale and the *ex ante* nature. At the same time, they lack the sanctioning character that is implicit in negative forms of conditionality.

In fact, environmental protection is not the object of essential elements clauses contained in EU-Latin American countries' agreements, being more frequently cited – as already noted – within their objectives. Even the most recent agreements concluded or under negotiation, which certainly demonstrate a more penetrating environmental conditionality policy of the European Union through the inclusion of trade and sustainable development (TSD) chapters (or titles),⁴⁴ do not consider sustainable development to be an essential element, including it within the “guiding principles”⁴⁵ or the objectives⁴⁶ of the agreements. As a consequence, neither the suspension of the agreement nor the adoption of appropriate measures are allowed in case of violation of clauses safeguarding sustainable development. The new generation of

44. See above, section 3.

45. Art. 1, para. 2, of EU-Central America Agreement.

46. See Art. 4, let. j), of the EU-Andean Community Agreement.

agreements (concluded in the last decade or still under negotiation) usually establish a monitoring committee to facilitate and verify the effective implementation of TSD chapters, together with a consultative domestic advisory group. If either party suspects the other of breaking its commitments, government-to-government consultations can be initiated and, in case of failure of governmental consultations, a panel of experts can be convened to determine whether a party is in breach of its obligations and to suggest possible ways to resolve the issue. What is more telling is that TSD chapters are not subject to the dispute settlement procedure established by the different EU-Latin American countries' agreements,⁴⁷ so that environmental conditionality clauses can be considered to be toothless in practice.

However, it shall be taken into that, as it is well known, during the last twenty years the conclusion of multilateral (if not global) sound environmental agreements has become progressively difficult since "everywhere the process of standard-setting is blocked. Some of the main reasons for this appear to be the reluctance of the United States to become bound by international agreements. This tendency existed already in the past, but increased over time. [...] The second big obstacle to global environmental agreements is the attitude of numerous countries which prioritize economic development and

47. See for example Art. 285, para. 5, of the EU-Andean Community Agreement, stating that "This Title is not subject to Title XII (Dispute Settlement)"; see also Art. 284, para. 4, of the EU-Central America Agreement, under which "The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title".

growth over the 'luxury problem' of environmental protection".⁴⁸ In this context, environmental issues are rarely subject to forced constraints, being more favourably reached through voluntary efforts,⁴⁹ and thus cannot be expected to be subject to sanctions similar to those envisaged in case of political conditionality.

After all, recently the EU has not hesitated to make use of its economic and commercial leading position as spur to induce Brazil to implement its environmental commitments. As it is well known, Brazil has recently embraced a policy aimed at dismantling environmental protections, backtracking on previous commitments and goals,⁵⁰ through an increasing deforestation in the last years,⁵¹ which has made the whole world worry for "the Earth's lungs", the Amazon rain forest.⁵² In response, "the European Parliament is pressing for the EU to withdraw trade privileges if partners breach environmental and climate change standards", and "Commission President Ursula von der Leyen has

48. See L. Krämer, *Exporting EU Environmental Product Standards to Third Countries*, in *Cleer Working Papers*, 2013/5, p. 20.

49. For example, the Paris agreement recognizes that none of the major powers can be forced into drastic emissions cuts.

50. For a fresh overview of the region's environmental news, see A. Maxwell, C. Herrera, J. Carey-Webb, *Latin America's 2020 Climate Leaders and Laggards*, available at <https://www.nrdc.org/experts/amanda-maxwell/latin-americas-2020-climate-leaders-and-laggards>.

51. D. Menegassi, *Desmatamento na Amazônia atinge nível recorde no primeiro trimestre de 2020*, available at <https://www.oeco.org.br/noticias/desmatamento-na-amazonia-atinge-nivel-recorde-no-primeiro-trimestre-de-2020/>. The process that has brought to such a large scale deforestation is well described in the European Parliament In-Depth Analysis Requested by the ENVI Committee, *Brazil and the Amazon Rainforest*, Luxembourg, 2020, p. 17, available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL_IDA\(2020\)648792_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648792/IPOL_IDA(2020)648792_EN.pdf). See also R. D'Amore, *Amazon Rainforest Fires: What Caused Them & Why Activists are Blaming Brazil's President*, in *Global News*, available at <https://globalnews.ca/news/5794191/amazon-rainforest-fire-explained/>.

52. See for example Emmanuel Macron's Tweet of 22 August 2019, available at <https://twitter.com/EmmanuelMacron/status/1164617008962527232?s=20>.

tasked [...] the trade commissioner-designate with using existing trade tools to “support sustainable development” and “closely monitor the implementation of climate, environmental and labour protections” in the EU’s free trade agreements”.⁵³ Moreover, in June 2019 the French President Emmanuel Macron threatened Brazil to block the free trade agreement between the European Union and Mercosur⁵⁴, and many other EU Member States stand strongly for an end to Amazon deforestation before ratifying the free trade agreement with Mercosur.⁵⁵ The results of this approach did not delay to appear, since the Brazilian President Bolsonaro has then taken positive steps to fight the fires and, on August 23, 2019, Operation Green Brazil was initiated,⁵⁶ and Mercosur countries have expressed their willingness to establish a joint legal instrument additional to the agreement on extra TSD commitments in order to break the current deadlock of the agreement.⁵⁷

Even if the EU-Mercosur agreement is still under negotiation, and thus in this case environmental conditionality has not been activated, the linking of environmental considerations to

53. S. Lowe, *The EU should reconsider its approach to trade and sustainable development*, available at <https://www.cer.eu/insights/eu-should-reconsider-its-approach-trade-and-sustainable-development>.

54. See B. Garza, *President Jair Bolsonaro’s Role in the Increased Deforestation of the Amazon Rainforest*, available at <https://djilp.org/president-jair-bolsonaros-role-in-the-increased-deforestation-of-the-amazon-rainforest/#post-9667-footnote-16>.

55. The Guardian, *EU seeks Amazon protections pledge from Bolsonaro in push to ratify trade deal*, available at <https://www.theguardian.com/world/2020/oct/20/eu-seeks-amazon-rainforest-protections-pledge-from-bolsonaro-in-push-to-ratify-trade-deal>.

56. *Ibidem*.

57. See recently on the legal alternatives at stake G. Van der Loo, *‘Mixed’ Feelings about the EU–Mercosur Deal: How to Leverage it for Sustainable Development*, available at <https://epc.eu/en/Publications/Mixed-feelings-about-the-EU-Mercosur-deal-How-to-leverage-it-for-su~3dad10>.

economic advantages seems to be an effective formula to promote environmental protection.

Concluding, the will of the European Union to rise up to a global legal actor actively engaged not only to protect and improve the quality of the environment within its boundaries, but also in its external action through the promotion of environmental-friendly agreements or trade policies should be certainly welcomed, even if to date only a soft environmental conditionality has been developed. Yet a number of important challenges remain to be addressed if the EU is to play a meaningful role in the protection of the environment and to affirm itself as a leader in global environmental governance processes.⁵⁸

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