

To Bite Off More than One Can Chew? Climate-led Conditionality in the EU's Generalised Scheme of Preferences Through the Lens of the Paris Agreement on Climate Change

*Virginia Remondino**

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ABSTRACT: Since its launch in 1971, the EU generalised scheme of preferences (GSP) has represented a landmark tool of the Union's common commercial policy, aiming at heightening market access for developing and least developed countries through preferential tariff treatment conceded voluntarily, non-reciprocally and on a non-discriminatory basis. Over the decades, the EU GSP has evolved, from a measure apt at sustaining industrialisation in vulnerable third countries to an instrument fostering sustainable development beyond the Union's borders. As such, the present GSP Regulation, through its GSP+ arrangement, subordinates both the granting and temporary withdrawal of tariff preferences upon, *inter alia*, implementation of twenty-seven international conventions, also related to the environment. The Regulation, however, is to be put to the test by the most pressing ecological issue of the present millennium, notably climate change. Accordingly, does the EU GSP regime provide for a form of climate-led conditionality, connected to the respect of the landmark Paris Agreement on climate change (PA)? The article first reconstructs the origins and structure of the EU GSP regime, with the aim of exploring to what extent both a positive and a negative climate-led conditionality can be envisaged thereof. Secondly, the analysis dwells on the 2021 Commission's proposal for the revision of the GSP Regulation, putting ahead the leeway of granting and temporarily withdrawing trade preferences upon respect of the Paris Agreement on climate change. Against this backdrop, the investigation ponders the systemic limitations of the proposal, whose operationalisation through the lens of the PA remains nebulous.

* PhD candidate and research fellow in European Union law, *Alma Mater Studiorum* - University of Bologna, virginia.remondino2@unibo.it.

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1. Introduction

All economic activities engender an impact on the environment and climate. Trade does not represent an exception.¹ With climate change denoting the most severe ecological challenge of the present millennium², policies and normative measures aiming at tackling it, also of a trade nature³, have been rapidly proliferating at the global level.⁴

It thus denotes no coincidence that the debate dwelling over the use (and misuse) of commercial tools to contribute to addressing and combating climate change has intriguingly tickled legal doctrine and practitioners worldwide.⁵ Whilst the trade regime

¹ Cf. World Trade Organization, *World Trade Report 2022: Climate Change and International Trade* at www.wto.org 11. It is worth highlighting that the 2023 summary report of the UN Intergovernmental Panel on Climate Change (IPCC) emphasizes that global net anthropogenic greenhouse gas (GHG) emissions, one of the leading causes of anthropogenic climate change, continue to increase, accounting to about 12 per cent more in 2019 compared to 2010 levels, 54 per cent higher than in 1990. See Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC sixth assessment report (AR6) – Summary for Policymakers*, at www.ipcc.ch 4.

² In this regard, the 2024 United Nations report on sustainable development clearly emphasizes that: '[c]limate records were shattered in 2023 as the climate crisis accelerated in real time. Rising temperatures have not abated and global greenhouse gas emissions continue to climb'. See United Nations, *The Sustainable Development Goals Report 2024* at unstats.un.org.

³ Cf. K Kulovesi, 'Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes' (2014) 6 *Trade, Law & Development* 55, 57.

⁴ See Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the world* at climate-laws.org.

⁵ For general comments on the trade and environment *nexus* in international and EU law, see *ex multis* RA Brand, 'Sustaining the Development of International Trade and Environmental Law' (1997) 21 *Vermont Law Review* 823; G Sacerdoti, 'La disciplina del commercio internazionale e la protezione dell'ambiente' in P Fois (ed), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente* (Editoriale Scientifica 2007) 63; E Brown Weiss, JH Jackson and N Bernasconi-Osterwalder, *Reconciling Environment and Trade* (Brill 2008); G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford University Press 2012); G Marceau and C Marquet, 'La jurisprudence de l'OMC et la recherche d'un équilibre entre développement économique et considérations non-commerciales: le cas de l'environnement' (2017) 30 *Revue Québécoise de droit international* 119; G Adinolfi, 'Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea' (Eurojus, 14 May 2017) at rivista.eurojus.it; E Cima, *From Exception to Promotion: Re-Thinking the Relationship between International Trade and Environmental Law* (Brill 2021). For illustrations concentrating on the interlink entwining climate change and international trade instruments, see *inter alia* E Morgera and K Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change' (2013) University of Edinburgh School of Law Research Paper Series 22–2013, at www.pure.ed.ac.uk; DS Olawuyi, 'Harmonizing International Trade and Climate Change Institutions: Legal and Theoretical Basis for Systemic Integration' (2014) 7 *Law and Development Review* 107; D Park, *Legal issues on climate change and international trade law* (Springer 2016); R Leal-Arcas, *Solutions for Sustainability: How the International Trade, Energy and Climate Change Can Help* (Springer 2019).

does represent a 'critical node to mobilize'⁶ in the solution to climate change, scholars have long warned against the deployment of discriminatory international trade measures for the attainment of given environmental protection objectives, reflecting a tension which, if overstretched, may subvert international trade rules.⁷

This represents no innovation. As early as 1992, with the drafting of the first international convention specifically devoted to climate change, *viz.* the United Nations Framework Convention on Climate Change (UNFCCC)⁸, the urgency to promote an open international trading system capable of better addressing the problem of environmental degradation was underscored, yet accenting the stipulation for climate change measures, including unilateral ones, not to constitute a means of arbitrary or unjustifiable discrimination to, nor a disguised restriction on, international trade.⁹

In light of the foregoing, the European Union (EU or Union) has, in the past decades, been actively elaborating commercial tools – comprising both bilateral¹⁰ and unilateral instruments – seeking to sustain the international climate change regime, hence

⁶ P Brenton and V Chemutai, 'The Trade and Climate Change Nexus: The Urgency and Opportunities for Developing Countries' (World Bank Group 2021) ix.

⁷ Cf. M McKenzie, 'Climate Change and the Generalized System of Preferences' (2008) 11 *Journal of International Economic Law* 679, 680.

⁸ United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994) (UNFCCC).

⁹ Ibid Art 3(5). Differently, the Paris Agreement on climate change (opened for signature 22 April 2016, entered into force 4 November 2016) (PA) mentions trade measures neither in its preamble nor in its operative clauses. Nevertheless, some legal commentators have interpreted the seventh recital of its preamble, according to which its '[p]arties may be affected not only by climate change, but also by the impacts of the measures taken in response to it' as an implicit allusion to unilateral trade instruments. See in this sense D Bodansky, J Brunnée and L Rajamani, *International Climate Change Law* (Oxford University Press 2012) 348.

¹⁰ Starting with the free trade agreement concluded between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (signed 6 October 2010, entered into force 13 December 2015), the EU has systemically enshrined, within its so-called 'new generation free trade agreements', provisions concerning sustainable development, in general, and climate change, in particular. For an overview in legal literature concentrating on the integration of clauses pertaining to climate change within the EU's preferential trade agreements, see specifically C Bertram and H Van Coppenolle, 'Strengthening the Paris Agreement through trade? The Potential and Limitations of EU Preferential Trade Agreements for Climate Governance' (2024) 24 *International Environmental Agreements: Politics, Law and Economics* 589. For general accounts on the integration of sustainability considerations in the Union's preferential trade agreements, cf. G Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57 *Common Market Law Review* 1031; G Adinolfi, 'A Cross-Cutting Legal Analysis of the European Union Preferential Trade Agreements' Chapters on Sustainable Development, Further Steps Towards the Attainment of the Sustainable Development Goals?' in C Beverelli, J Kurtz and D Raess (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum* (Cambridge University Press 2020) 15; A Muccione, 'Il rapporto dei capitoli su 'commercio e sviluppo sostenibile' con la disciplina in materia commerciale' in G Adinolfi (a cura di), *Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea* (G Giappichelli 2021); S Villani, 'I Capitoli in Materia di Sviluppo Sostenibile negli Accordi Commerciali dell'Unione Europea: Prove di Rilevanza Sistemica' (2022) 3 *Diritto del commercio internazionale* 707.

responding to given primary law requirements.¹¹ Notably, the EU is called on by its founding treaties¹² to define and pursue its external policies and action as to attain given foreign policy objectives.¹³ Article 207 TFEU, legal basis of the common commercial policy (CCP), explicitly mandates that the CCP ‘shall be conducted in the context of the principles and objectives of the Union’s external action’, enshrined in Articles 3(5) and 21 TEU.¹⁴ Whilst the former Article stipulates that the EU ‘shall contribute to [...] the sustainable development of the Earth’¹⁵, along with fostering ‘free and fair trade’¹⁶, Article 21 TEU mandates that the Union is to ‘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’.¹⁷ Moreover, from a more general perspective, the mentioned provisions call on

¹¹ For general accounts see *inter alia* P Leino, ‘The Journey Towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law’ in M Cremona and B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 259; R Mastroianni, ‘Le garanzie dei valori dell’azione esterna e il ruolo della Corte di giustizia’ in R Baratta, C Morviducci and E Sciso (eds), *I valori dell’Unione europea e l’azione esterna* (G Giappichelli 2016) 215; M Cremona, ‘Human Rights as a Value of EU Trade Policy’ in M Balboni and C Danisi (eds), *Human Rights as a Horizontal Issue in EU External Policy* (Editoriale Scientifica 2021); E Kassoti and RA Wessel, ‘The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union’ in P García Andrade (ed), *Interacciones entre el derecho de la Unión Europea y el derecho internacional público* (Tirant lo Blanch 2023) 19.

¹² See Treaty on the Functioning of the European Union (TFEU) [2012] and Treaty on European Union (TEU) [2012].

¹³ From this perspective, Art 205 TFEU specifies that: ‘the Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.’ Generally, see J Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016); E Neframi, ‘The Dynamic of the EU Objectives in the Analysis of the External Competence’ in E Neframi and M Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018) 63.

¹⁴ For a comment cf. A Dimopoulos, ‘The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy’ (2010) 15 *European Foreign Affairs Review* 153. See also C Kaddous, ‘The Transformation of the EU Common Commercial Policy’ in P Eeckhout and M López Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart 2019) 429.

¹⁵ Art 3(5) TEU.

¹⁶ *Ibid*

¹⁷ Art 21(2)(f) TEU. Also relevant for present purposes is Art 21(2)(d) TEU, according to which the Union, in its external relations, shall ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’. Along with the objectives guiding the Union’s action on the international scene, Art 11 TFEU further postulates that ‘environmental protection requirements must be integrated in the definition and implementation of the Union’s policies and activities’, also comprehending the CCP. See Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore*, EU:C:2017:376, paras 146–147. For a comment cf. C Beaucillon ‘Opinion 2/15: Sustainable is the New Trade. Rethinking Coherence for the New Common Commercial Policy’ (2017) 2 *European Papers* 819. Also A Aseeva, ‘Retour vers le futur: la politique étrangère de l’Union européenne, le commerce international et le développement durable dans l’avis 2/15’ (2017) 42 *Revue Juridique de l’Environnement* 785.

the Union to contribute to the 'strict observance and development of international law'.¹⁸

Against this backdrop, the generalised scheme of preferences (GSP)¹⁹, as a Union's trade measure²⁰, offers an intriguing case study to analyse and assess the potential for EU unilateral commercial instruments to foster climate protection worldwide, in particular in order to promote the attainment of the objectives enshrined in the Paris Agreement on climate change (PA).²¹ As the investigation will argue and despite some inherent deficiencies, the instrument represents in fact a significant expression of the interaction entwining international and EU law, with the GSP regime providing a significant tool for the enforcement of the former.

The present article is structured as follows. Section 2 traces the origins and structure of the EU GSP regime, depicting how ecological variables have been progressively inserted and affirmed therein. In section 3 the article discloses to what extent environmental conditionality operates within the current EU GSP Regulation²², specifically by illustrating whether both a positive (sub-section 3.1.) and a negative (sub-section 3.2.) climate-led conditionality may be envisioned. Building on previous considerations, section 4 gathers attention on the 2021 Commission's proposal²³ for the revision of the scheme, putting ahead the leeway of granting and temporarily

¹⁸ Art 3(5) TEU. With a different wording, Art 21(2)(b) TEU stipulates that, in its international relations, the Union shall aim at 'consolidat[ing] and support[ing] [...] the principles of international law'.

¹⁹ Regulation (EU) 978/2012 of the European Parliament and of the Council Regulation of 25 October 2012 applying a scheme of generalised tariff preferences. For sake of clarity, throughout the present article the generic acronym 'GSP' is to be deployed as to identify all the special arrangements covered by the GSP Regulation.

²⁰ The GSP Regulation has been adopted on the legal basis proper of the EU common commercial policy, *i.e.* Art 207 TFEU. The choice of the correct legal basis for the GSP Regulation has, interestingly, also been subject to the scrutiny of the European Court of Justice. See Case 45/86 *Commission of the European Communities v Council of the European Communities*, EU:C:1987:163.

²¹ For an overview on the intersection between the Paris Agreement on climate change and international trade law, see OE Fitzgerald, 'Introduction to the Paris Agreement and the World Trade Organization' in P Delimatsis and L Reins (eds), *Trade and Environmental Law* (Edward Elgar 2021).

²² Regulation (EU) 978/2012 (n 19). Throughout the present article, the expression 'climate conditionality' will be deployed to address both the granting of trade preferences upon respect of international conventions specifically dealing with climate change (positive climate conditionality) and the related withdrawal of preferences for failures to comply with given climate conventions (negative climate conditionality). For a general comment on the deployment of political conditionality, under both a positive and a negative perspective, see E Fierro, 'Approaching Conditionality' in E Fierro (ed), *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff 2003).

²³ Commission 'Proposal for a regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing regulation (EU) 978/2012 of the European Parliament and of the Council' COM (2021) 579 final. At time of writing, negotiations on the Proposal are still pending in first reading. Since the European Parliament and Council were not able to find an agreement prior to the expiry date of the current EU GSP Regulation, this latter one has been extended for the period 2024-2027. Cfr. Regulation (EU) 2023/2663 of the European Parliament and of the Council of 22 November 2023 amending Regulation (EU) No 978/2012 applying a scheme of generalised tariff preferences.

withdrawing trade preferences upon respect of the Paris Agreement on climate change. Section 5 is thus to concentrate on the systemic limitations of the proposal, whose effective operationalisation through the lens of the PA remains ambiguous. In this regard, the analysis elaborates on the Commission's intent of mainstreaming negative climate conditionality, as detailed by Articles 15 and 19 of the proposal (sub-sections 5.1. and 5.2.). Section 6 concludes by providing some final remarks, putting the spotlight on the potential for the agreed extension²⁴ of the current GSP Regulation in bringing the Council and European Parliament back to the negotiating table, possibly giving teeth to the 2021 Commission's proposal.

2. Origins and structure of the EU GSP regime

The current EU GSP Regulation was finalised in 2012, entering into force in 2014. As an international construct, the GSP epitomises a system aiming at heightening market access for developing and least-developed countries (LDCs), by means of preferential tariff treatment conceded voluntarily and non-reciprocally by developed countries on a non-discriminatory basis.²⁵ Its roots are to be found in the first and second sessions of the United Nations Conference on Trade and Development (UNCTAD), held in the 1960s.

As a matter of fact, it shall be kept in mind that, in the bosom of the framework instituted by the General Agreement on Tariffs and Trade (GATT)²⁶, granting tariff

²⁴ Regulation 2023/2663 (n 23). Particularly, negotiations for a novel GSP regulation stalled on the contentious issue of introducing, within the piece of legislation, a specific form of negative conditionality. In accordance with Art 19(1)(c) of the Commission's proposal (n 23), all the preferential arrangements covered by the GSP regime, as specified in the mentioned Commission's proposal, could be temporarily withdrawn on the ground of '*serious shortcomings* in customs controls on the export or transit of drugs (illicit substances or precursors), or *related to the obligation to readmit the beneficiary country's own nationals* or serious failure to comply with international conventions on antiterrorism or anti-money laundering', emphasis added. This peculiar type of negative conditionality has been harshly contested by the European Parliament, accusing the Council to 'hijack this trade and development tool [*i.e.* the GSP Regulation] and put it to the service of its migration objectives'. See European Parliament, *MEPs pause GSP negotiations as Council hijacks scheme for migration agenda* at www.europarl.europa.eu. Along with opposition from the European Parliament, the proposition of rendering the withdrawal of trade benefits conditional upon readmission of third countries' nationals was firmly opposed by several non-governmental organisations, in an open letter addressed to the Council of the EU. See International Federation for Human Rights, *Joint NGO letter: Delete all reference to readmission as a conditionality in draft EU GSP reform* at www.fidh.org. From a purely legal perspective, Vigidal has argued that the inclusion of a form of migration-led conditionality within the proposal for a novel GSP regulation could also contravene the obligations contracted by the EU under WTO law. See G Vigidal, 'Passing Political Pressure for a Development Agenda? WTO Law Limits to the Trade-Migration Linkage in the Proposed EU GSP Regulation' (EU Immigration and Asylum Law and Policy, 28 April 2023) at eumigrationlawblog.eu.

²⁵ See generally GM Grossman and AO Sykes, 'A Preference for Development: The Law and Economics of GSP' (2005) 4 *World Trade Review* 41; G Marín Durán and E Morgera (n 5) 145.

²⁶ General Agreement on Tariffs and Trade (signed 30 October 1947, provisionally entered into force 1 January 1948) (GATT).

preferences limitedly to some of its contracting parties would, ordinarily, account for a breach of the most-favoured-nation (MFN) principle, embedded in Article I GATT.²⁷ Accordingly, the establishment of GSP schemes necessitated an 'explicit authorization'²⁸, *i.e.* a precise legal basis, under the GATT framework, to be ultimately found in the enabling clause.²⁹

The European Community (EC) launched its first GSP program in 1971³⁰, which yet did not entail any ecological or climate components.³¹ The scope of the arrangement was, assertively, that of sustaining industrialisation and an export-oriented economic growth in developing and least-developed countries, with a specific emphasis on manufacturing products.³² Nevertheless, over time, the environmental conditionality character of the measure has been progressively strengthened, in particular due to the enhanced political and normative *momentum* generated at both international and EU level around environmental matters.³³ The first GSP scheme to integrate ecological requirements was the so-called 'GSP environment'³⁴, a component of a

²⁷ For an in-depth historical reconstruction of the GSP system in the bosom of the GATT/WTO see JC Sánchez Arnau, *The Generalised System of Preferences and the World Trade Organisation* (Cameron May 2004); N Breda dos Santos, R Farias and R Cunha, 'Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 *Journal of World Trade* 637; L Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715.

²⁸ Cf. G Marín Durán and E Morgera (n 5) 146.

²⁹ As well claimed by Switzer, in contrast to the MFN predicate demanding most-favoured-nation treatment to be extended *unconditionally* to all other GATT contracting parties, there would be no provision in the enabling clause stipulating that the granting of GSP benefits shall be 'unconditional', thus foreseeing the eventuality to provide for both positive and negative conditionalities within GSP systems. Cf. S Switzer, 'Environmental Protection and the Generalized System of Preferences: A Legal and Appropriate Linkage?' (2008) 57 *International and Comparative Law Quarterly* 113, 115. Of this view see also L Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507; J Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform' (2005) 42 *Common Market Law Review* 1663.

³⁰ Regulation (EEC) of the Council 1309/71 of 21 June 1971.

³¹ Cf. S Switzer (n 29) 117.

³² G Marín Durán and E Morgera (n 5) 147.

³³ For a general comment, see V Nanda and G Pring, *International Environmental Law and Policy of the 21st Century* (Brill 2012) 97–158. From an EU law perspective, it should be recalled that, in 1994, the European Commission adopted a communication concerning the novel role that the EU GSP should play in the international arena, acknowledging how special trade incentives could represent critical components for fostering sustainable development worldwide. Cf. European Commission, 'Communication of 1 June 1994 on Integration of developing countries in the international trading system - role of the GSP 1995-2004' COM (1994) 212 final. For an in-depth outlook see R Zvelc, 'Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press 2012) 178.

³⁴ The GSP environment was first introduced by Regulation (EC) 3281/94 of the Council of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect

broader category of regulatorily provided special incentive arrangements.³⁵ The GSP environment chiefly embraced an ‘incentive-based approach’³⁶, conditioning the granting of additional, non-reciprocal, trade preferences to beneficiary countries upon respect of internationally recognized standards apropos the sustainable management of tropical forests.³⁷ Some years later, Regulation (EC) 2501/2001 foresaw, for the first time, the eventuality for commercial benefits to be provisionally and unilaterally withdrawn on specified environmental grounds.³⁸

The above-mentioned special incentive schemes were hence the predecessors of what, in the aftermath of the *EC-Tariff Preferences* WTO dispute³⁹ – and with the coming into force of the reformed GSP Regulation of 2005⁴⁰ – became known as the

of certain industrial products originating in developing countries. Subsequently, amendments were integrated into Regulation (EC) 2501/2001 of the Council of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004.

³⁵ In accordance with Regulation 2501/2001(n 34), besides the GSP environment, four other special incentive arrangements were conceived. Notably, the special arrangement for least developed countries; the special arrangement to combat drug production and trafficking; the special incentive arrangement for the protection of labour rights; and the general GSP.

³⁶ Cf. S Gstöhl, ‘No Strings Attached? The EU’s Emergency Trade Preferences for Pakistan’ in I Govaere and S Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises Account* (Brill 2014) 55.

³⁷ Art 8(1) Regulation 3281/94 (n 34).

³⁸ In relation to all the arrangements provided for by Regulation 2501/2001 (n 34), the possibility of unilaterally and temporarily withdrawing trade concessions was circumscribed, according to Art 26(1)(g), to infringements of the objectives of the listed international conventions on the conservation and management of fisheries resources. Alongside, Art 26(3) of Regulation 2501/2001 foresaw the possibility of withdrawing the trade preferences provided by the special incentive arrangements specified in title III, including the GSP environment scheme, when the national legislation of the beneficiary country no longer incorporated, *inter alia*, the environmental standards referred to in Art 21(2) of Regulation 2501/2001, or if the domestic legislation was not effectively complied with; or in cases in which the undertakings specified in Art 22(1) of Regulation 2501/2001 were not respected.

³⁹ In the year 2001 the inclusion of Pakistan in the special incentive arrangement for drugs (*i.e.* the drugs arrangement) triggered a legal reaction by India against the then European Community in the bosom of the WTO, on the asserted discriminatory nature of the measure at stake. In particular, India regarded the preferences accorded under the arrangement to run counter to Art I(1) of GATT, along with several provisions proper of the enabling clause. Ultimately, the Appellate Body (AB), called on to adjudicate on the dispute, ruled for the WTO-inconsistency of certain aspects of the special arrangement. In response to the AB report, the EC decided to modify its special incentive arrangements into what became known as the ‘special incentive arrangement for sustainable development and good governance’, or GSP+. A comprehensive assessment of the *EC-Tariff Preferences* dispute goes beyond the scope of the present article. For comments in legal literature, see *ex multis* S Charnovitz and others ‘The Appellate Body’s GSP decision’ (2004) 3 *World Trade Review* 239; J Harrison (n 29); M Irish, ‘GSP Tariffs and Conditionality: A Comment on EC-Preferences’ (2007) 41 *Journal of World Trade* 683; L Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’ (2007) 10 *Journal of International Economic Law* 869; A Tomazos, ‘The GSP Fallacy: A Critique of the Appellate Body’s Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds’ in GA Bermann and PC Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2010) 306.

⁴⁰ Regulation (EC) 980/2005 of the Council of 27 June 2005 applying a scheme of generalized tariff preferences. Regulation 980/2005 was reviewed on several occasions, in particular by Regulation

GSP+ arrangement. The 2005 GSP Regulation was thus composed of three distinct schemes: (i) a general arrangement (general GSP) granting duty-free access for non-sensitive products and tariff reductions for sensitive products to all beneficiary countries;⁴¹ (ii) the special incentive arrangement for sustainable development and good governance (GSP+), offering duty-free access to vulnerable developing countries for approximately all goods covered by the general GSP, on the condition of ratification and effective implementation of specified international conventions, also correlated to environmental protection;⁴² and (iii) the everything but arms (EBA) scheme, according duty-free access to the EU market to all goods coming from LDCs, with the exception of arms and ammunitions.⁴³

In particular, under the former GSP+ scheme, vulnerable developing countries were entitled to request additional trade preferences – *vis-à-vis* those granted under the general GSP – on specified products as far as they could demonstrate to have ratified and effectively implemented the international conventions listed in the Regulation.⁴⁴ Additionally, from a negative conditionality perspective, GSP+ benefits could be temporarily withdrawn if the national legislation of the beneficiary country could no longer incorporate the conventions, including environmental ones, indicated in the GSP Regulation itself, or effective implementation of the former could not be granted.⁴⁵ The overall structure predisposed by the 2005 GSP Regulation remained unaltered when the system was revised in 2012, continuing to present three distinct arrangements each granting a diverse level of access to the Union's market.⁴⁶

(EC) 732/2008 of the Council of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011. Yet, no major changes were introduced regarding the GSP+ arrangement.

⁴¹ Regulation 732/2008 (n 40) Art 6.

⁴² Ibid, Arts 7-10. In this vein, Lebzelter and Marx argue that the additional tariff concessions granted under the GSP+ scheme would represent 'a form of compensation, or reward, for having signed up to, and for implementing the relevant international law', thus 'offering the 'carrot' of preferences'. Cf. T Lebzelter and A Marx, 'Is EU GSP+ Fostering Good Governance? Results from a New GSP+ Compliance Index' (2020) 54 *Journal of World Trade* 1, 4.

⁴³ Ibid, Arts 11-12.

⁴⁴ See Regulation 980/2005 (n 40) Annex III.

⁴⁵ Regulation 732/2008 (n 40) Art 15(2), reading: '[...] the special incentive arrangement referred to in Section 2 of Chapter II [*i.e.* the special incentive arrangement for sustainable development and good governance] may be withdrawn temporarily, in respect of all or of certain products included in this arrangement and originating in a beneficiary country, in particular if the national legislation no longer incorporates those conventions referred to in Annex III which have been ratified in fulfilment of the requirements of Article 8(1) and (2) or if that legislation is not effectively implemented'. Alongside and with a view to environmental integration, according to Art 15(1)(e) of Regulation 732/2008 (n 40), the temporary withdrawal of trade preferences could occur in cases of 'serious and systematic infringement of the objectives of regional fishery organisations or arrangements of which the Community is a member concerning the conservation and management of fishery resources'.

⁴⁶ Under the current GSP Regulation, beneficiary countries in the general GSP scheme benefit from lower than MFN treatment or zero import duties on approximately 66 per cent of their tariff lines applied by the Union. Under the GSP+ program, instead, the EU grants duty free import on all products covered

Against this background, the following section is to investigate if, and to what extent, the current GSP+ arrangement, to date the only scheme to provide for environmental-led conditionality within the GSP Regulation presently in force,⁴⁷ makes both the granting of additional trade preferences (sub-section 3.1.) and the withdrawal of those benefits (sub-section 3.2.) subject to respect of the international conventions pertaining to climate change.

3. Climate-led conditionality in the present GSP Regulation

As noted, the current GSP Regulation maintains a tripartite structure, including as a specific arrangement for the enhancement of sustainable development and good governance the GSP+ scheme. The latter grants to vulnerable developing countries non-reciprocal and duty-free access for specified products, conditional on ratification and effective implementation of the mandated twenty-seven international conventions (*i.e.* the relevant conventions) relating to labour and human rights, environmental and climate protection, as well as good governance.⁴⁸ Currently, the GSP+ arrangement counts eight beneficiaries.⁴⁹ Annex VIII of the current GSP Regulation entails, among the indicated relevant conventions, two climate-related agreements, *viz.* the United Nations Framework Convention on Climate Change and the Kyoto Protocol.⁵⁰ Since the present GSP Regulation was finalised in 2012, it logically does not include amongst the listed environmental conventions the Paris Agreement on climate change, as the latter was signed by the EU only in 2016.⁵¹

It is nonetheless worth emphasizing that the enclosure of the UNFCCC amongst the environmental deals whose ratification and implementation are explicitly mandated by the current GSP Regulation represents a significant improvement when compared to previous *praxis*, as the former GSP Regulation merely comprised, within the conventions related to climate change, the Kyoto Protocol to the

by the general GSP. Finally, under the EBA arrangement, duty-free and quota-free access is applied to all products exported by the concerned LDCs, with the only exception of arms and ammunitions.

⁴⁷ According to legal scholars, the GSP+ scheme would represent the ‘current and most complete instrument through which the EU applies [conditionality]’. Cf. I Borchert and others ‘The Pursuit of Non-Trade Policy Objectives in EU Trade Policy’ (2020), EUI Working Papers 26–2020, at cadmus.eui.eu. Of this view see also C Portela, *Enforcing Respect for Labour Standards with Targeted Sanctions* (Friedrich Ebert Stiftung 2018).

⁴⁸ For a general overview of the requirements for eligible countries to enter into the GSP+ arrangement, see European Commission, *GSP Insights* at drive.google.com (last accessed 5 May 2025).

⁴⁹ These are: Bolivia, Cabo Verde, Kyrgyzstan, Mongolia, Pakistan, Philippines, Sri Lanka and Uzbekistan. See European Commission, *Generalised Scheme of Preferences Plus (GSP+)* at trade.ec.europa.eu.

⁵⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change (opened for signature 16 March 1998, entered into force 16 February 2015).

⁵¹ Decision (EU) 2016/590 of the Council of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.

UNFCCC.⁵² As rightly argued by Marín Durán and Morgera, whereas the GSP+ has traditionally endorsed a far-reaching approach to environmental integration, some 'degree of selectivity'⁵³ could hence be observed as to the choice of the Multilateral Environmental Agreements (MEAs) appointed as criteria for eligibility under the special arrangement for sustainable development and good governance.⁵⁴

3.1. Positive conditionality in the GSP+ scheme: granting additional trade preferences upon ratification and effective implementation of climate-related conventions

In accordance with Article 10, read in conjunction with Article 9, of the current GSP Regulation, a GSP beneficiary country shall be granted the additional tariff preferences⁵⁵ provided under the GSP+ scheme if several conditions are met.⁵⁶ Besides submitting an explicit request to that effect⁵⁷ and qualifying as 'vulnerable' due to a lack of trade diversification and insufficient integration within the international trading system⁵⁸, the concerned country necessitates, from a climate change perspective, to have ratified both the UNFCCC and the Kyoto Protocol.⁵⁹ Alongside, the *ad hoc* monitoring bodies constituted under those conventions shall not have acknowledged any serious failure in the effective implementation of any of the aforesaid arrangements.⁶⁰ Further requirements to benefit from the trade preferences granted under the GSP+ scheme include: lack of formulation of a reservation prohibited under the relevant conventions, or which is considered forbidden for the purpose of those conventions;⁶¹ devising of a binding undertaking to maintain ratification of the relevant

⁵² Regulation 732/2008 (n 40) Annex III. The limited enclosure of the Kyoto Protocol among the climate conventions whose ratification and implementation were necessary as to benefit from the additional trade preferences granted under the GSP+ scheme has been criticised in legal doctrine. See M McKenzie (n 7) 689.

⁵³ G Marín Durán and E Morgera (n 5)160.

⁵⁴ The Authors underlined that it 'may appear odd' that the European Union excluded the necessary ratification and implementation of the UNFCCC as a positive condition for receiving GSP+ tariff benefits, given that 'this agreement, rather than the Kyoto Protocol, sets out the key commitments of developing countries under the international climate change regime and the two instruments are usually read together'. See Ibid 161.

⁵⁵ These are spelt out by Art 12(1) of Regulation 978/2012 (n 19), specifying that the common customs tariff *ad valorem* duties on all products listed in annex IX, originating in a GSP+ beneficiary country, shall be suspended. Additionally, in accordance with Art 12(2), common customs tariff specific duties on the aforesaid products shall be suspended entirely, with the only exception of goods for which the common customs tariff duties include *ad valorem* duties.

⁵⁶ Products included in the GSP+ arrangement are specified in Annex IX of Regulation 978/2012 (n 19).

⁵⁷ Regulation 978/2012 (n 19) Art 10(1)(a).

⁵⁸ Ibid Art 9(1)(a).

⁵⁹ Ibid Art 9(1)(b), read in conjunction with Annex VIII.

⁶⁰ Ibid Art 9(1)(b).

⁶¹ Ibid Art 9(1)(c).

conventions and ensure their effective implementation;⁶² acceptance of the reporting, monitoring and review obligations defined by the provisions of the relevant conventions;⁶³ and participation and cooperation in the monitoring procedure specified by Article 13 of the present GSP Regulation.⁶⁴

Against the normative backdrop prescribed by the current GSP Regulation, the latest biennial Commission's report on the GSP determined that the GSP+ arrangement positively contributed to fostering the implementation of the covered international agreements, in particular in the environmental and climate change domains.⁶⁵ The findings would hence be coherent with traditional legal literature concentrating on the role played by positive trade conditionality in engendering human rights through, in particular, ratification of related international arrangements.⁶⁶

Nevertheless, it is important to bear in mind that challenges associated, in particular, with effective compliance with the requirements mandated by the GSP+ scheme continue to persist. It has thus been maintained that the GSP regime has, so far, produced a limited (albeit positive) impact on sustainable development, particularly due to the inherent difficulties in evaluating the causal relationship between ratification of the aforesaid international agreements and domestic reforms carried out in beneficiary countries.⁶⁷

⁶² Ibid Art 9(1)(d).

⁶³ Ibid Art 9(1)(e).

⁶⁴ Ibid Art 9(1)(f).

⁶⁵ Of utmost importance for the present examination, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR) underline that all GSP+ beneficiary countries have signed the Paris Agreement on climate change, sometimes responding to specific requests of the GSP+ monitoring missions, as in the specific case of the Philippines. Cf. European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Report: Report on the Generalised Scheme of Preferences covering the period 2018-2019' JOIN (2020) 3 final. The latest biannual report on the implementation of the GSP highlights that 'overall, beneficiary countries [*i.e.*, GSP, GSP+ and EBA beneficiaries] are making progress in addressing key environmental and climate change challenges', with higher 'ambition in the nationally determined contributions and co-operation in multilateral fora regarding climate change'. See European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Report to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2020-2022' JOIN (2023) 34 final 12. The findings would be consistent with the conclusions of the 2020 sustainability impact assessment predisposed for the novel GSP regulation. This underlines that, with regard to environmental conventions, the ratification rate of GSP beneficiary countries is 'relatively high'. See Commission, *Study in Support of an Impact Assessment to prepare the Review of GSP Regulation No. 978/2012 - Volume 1: Main Report* at op.europa.eu 105.

⁶⁶ In this sense cf. L Bartels, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries' (Study for the European Parliament Directorate General External Policies of the Union 2008) at europarl.europa.eu 13. On the positive implications of trade conditionality in the specific domain of labour rights, see J Orbie and L Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 *European Foreign Affairs Review* 663.

⁶⁷ See Commission, *Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP) - Final Report* at op.europa.eu, hereinafter 'Mid-Term Review', 118

Alongside, whereas the ratification share of relevant MEAs, including climate change conventions, has been deemed 'relatively high', their level of implementation remains mixed across the different beneficiary countries.⁶⁸ It has thus been underlined that: '[i]n the area of environment and climate, GSP+ countries have a good track-record on ratification of the listed conventions, albeit the level of implementation often remains problematic'.⁶⁹ Accordingly, the European Commission, in its impact assessment accompanying the proposal for a novel GSP regulation, has put the spotlight on 'the need to put further measures in place in order to ensure that the GSP supports positive environmental development'⁷⁰, specifically by fostering monitoring of compliance with the relevant international conventions.⁷¹

3.2. Negative conditionality in the GSP+: withdrawing trade benefits for failures to comply with specified international climate standards

The temporary withdrawal of the additional trade preferences mandated by the special incentive arrangement for sustainable development and good governance is to be envisioned in two scenarios: (i) the GSP+ beneficiary country fails to respect its binding commitments concerning the maintenance of ratification of the relevant conventions and their effective implementation, or it fails to fulfil its reporting and monitoring obligations as specified by the present GSP Regulation;⁷² or (ii) the GSP+ beneficiary country has formulated a reservation which is prohibited by any of the relevant conventions or which is considered to be incompatible with the object and

⁶⁸ Cf. Commission, *Study in support of an impact assessment to prepare the review of GSP Regulation No. 978/2012 - Volume 1: Main Report* (n 65) 106.

⁶⁹ G Van der Loo, 'The Commission Proposal on Reforming the Generalised Scheme of Tariff Preferences: Analysis of Human Rights Incentives and Conditionalities' (European Parliament in-depth analysis requested by the DROI Subcommittee 2022) 9. See also L Beke and N Hachez, 'The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar' (KU Leuven Working Papers 155-2012) 11, emphasizing that the 'progress in ratification does not seem to be matched with progress in implementation on the ground'.

⁷⁰ Commission Staff Working Document of 22 September 2021, 'Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council' SWD(2021) 266 final 16. The impact assessment suggested including the Paris Agreement in the international conventions that GSP+ beneficiaries need to comply with, as well as extending negative climate conditionality as also to include environmental and good governance conventions.

⁷¹ In this vein, the Mid-Term Review brought to the surface that the GSP+ beneficiaries were 'lagging behind' with the reporting obligations mandated by the environmental conventions listed in Annex VIII, requirements which were prodromic to the effective implementation of the Conventions. From the perspective of the international climate change regime, the Review showed, by way of illustration, that Bolivia failed to comply with the reporting obligations proper the UNFCCC, while Paraguay had not notified and adopted measures in order to implement its intended nationally determined contributions (INDCs) under the aforesaid Convention. Cf. Mid-Term Review (n 67) 117-18.

⁷² Regulation 978/2012 (n 19) Art 15(1) read in conjunction with Art 9(1)(e-f).

purpose of those conventions.⁷³ Shall the Commission have a reasonable doubt about the occurrence of the mentioned breaches, it can adopt an implementing act to initiate the procedure for temporarily withdrawing the tariff preferences provided under the GSP+ arrangement.⁷⁴

Granted that, as previously indicated, both the UNFCCC and the Kyoto Protocol are included among the international conventions whose ratification and effective implementation are required in order to qualify for the preferential treatment specified by the GSP+ scheme, the non-respect of their binding commitments shall legitimise the Commission to initiate – and eventually carry out – the procedure for temporarily withdrawing the tariff preferences granted under the special incentive arrangement.⁷⁵ In this vein, positive and negative conditionality stand as the two sides of the same coin, the latter being typified by the GSP+ intrinsic *ratio* of promoting compliance with internationally recognised sustainability and good governance standards through the deployment of commercial means.⁷⁶ A *ratio* which, being substantiated through the possible deployment of assertive means, renders the GSP Regulation substantially different from other instruments proper of the Union's common commercial policy, in particular its preferential trade agreements of a new generation. In fact, these latter ones have long disregarded the possibility of imposing trade 'sanctions' in cases of non-compliance with their provisions pertaining to sustainability, instead relying on cooperative means for settling the eventual disputes arising under so-called 'trade and sustainable development' (TSD) chapters.⁷⁷

⁷³ Ibid Art 15(1) read in conjunction with Art 9(1)(c).

⁷⁴ Ibid Art 15(3).

⁷⁵ Notice however that the process for withdrawing trade preferences is gradual in nature, aiming at allowing the concerned country to remedy the alleged breach. See Art 15(9) Ibid

⁷⁶ Cf. S Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32 *Utrecht Journal of International and European Law* 41.

⁷⁷ The 'toothless' enforcement mechanism envisaged under the majority of the TSD chapters proper of the Union's new generation free trade agreements has given rise to a vivid debate in legal literature. On the one hand, several commentators, in line with the traditional view expressed by the European Commission, have disregarded the possibility of imposing countermeasures in cases of non-compliance with the obligations stemming from the provisions enshrined in TSD chapters, considered unwarranted also from an effectiveness standpoint. In this sense, see G Marín Durán (n 10); D Prévost and I Alexovicova, 'Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements' (2019) 6 *International Journal of Public Law and Policy* 236. On the other hand, some commentators – in line with some EU Members States and civil society representatives – have advocated for the possibility of imposing economic 'sanctions' in cases of violations of the obligations enshrined in TSD chapters. Cf. in particular M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 *Journal of International Economic Law* 25. This debate has led the European Commission to rethink from the inside its approach to the enforcement of the TSD chapters proper of the Union's new generation free trade agreements, leading to a change of paradigm crystallized in the European Commission, 'Communication: The power of trade partnerships: together for green and just economic growth' COM(2022) 409 final. See further note 98.

Along with the described *specialis* withdrawal procedure applicable to the GSP+ arrangement only, the current GSP Regulation also entails a *generalis* withdrawal mechanism⁷⁸, which shall pertain to 'provisions common to all arrangements'.⁷⁹ In accordance with this procedure, the preferential arrangements can be temporarily revoked at the occurrence of 'serious and systemic violations of principles laid down in the conventions listed in Part A of Annex VIII of the Current GSP Regulation [i.e. core human and labour rights UN/ILO Conventions]',⁸⁰ yet not extending to the international agreements related to environmental and good governance principles embedded in part B of Annex VIII of the present GSP Regulation, possibly posing queries under a coherence perspective.⁸¹

In light of the foregoing, it can be argued that a twin-track approach to negative climate conditionality is established by the current GSP Regulation: while qualified breaches of MEAs do not permit the temporary withdrawal of the GSP benefits under the *generalis* withdrawal mechanism, a GSP+ beneficiary country may lose its preferential status when, in particular, failing to maintain ratification and effectively implement the concerned climate conventions.⁸²

In addition, it shall be highlighted that legal doctrine has long concentrated on the effectiveness of negative conditionality in concretely fostering compliance with internationally recognized environmental and climate standards.⁸³ In particular, the sporadic and inconsistent utilisation of the withdrawal mechanism for trade preferences under the GSP Regulation has been harshly condemned.⁸⁴ As rightly noted by

⁷⁸ Regulation 978/2012 (n 19) Art 19.

⁷⁹ Ibid Chapter V.

⁸⁰ Ibid Art 19(1).

⁸¹ On the relevance of the principle of coherence in EU external environmental law, see M Cremona, 'Coherence and EU External Environmental Policy' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press 2012) 33.

⁸² Note, in addition, that the *specialis* withdrawal mechanism under Art 15 of Regulation 978/2012 (n 19) obliges the Commission to temporarily withdraw the special incentive arrangement for sustainable development and good governance in case the beneficiary country no longer respects its binding undertakings as formulated in Art 9 of the said Regulation. Differently, Art 19 of the current GSP Regulation on the *generalis* withdrawal procedure merely specifies that the preferential arrangements provided for by Art 1(2) of Regulation 978/2012 'may' be withdrawn in the specified cases. Accordingly, the Commission would not be under a legal obligation to trigger Art 19 of the present GSP Regulation.

⁸³ Cf. for overviews C Portela (n 47); JD Janer Torres, 'The Generalized Scheme of Preferences as a Carrot-and-Stick Mechanism of EU Trade Policy in Pursuit of Non-Trade Policy Objectives' in LM Hinojosa-Martínez and C Pérez-Bernárdez (eds), *Enhancing the Rule of Law in the European Union's External Action* (Edward Elgar 2023) 244, 256-260. From the specific perspective of the engagement of the European Parliament in the withdrawal of trade preferences, see KL Meissner, 'Requesting Trade Sanctions? The European Parliament and the Generalized Scheme of Preferences' (2021) 59 *Journal of Common Market Studies* 91.

⁸⁴ See L Beke and N Hachez (n 69) 13; K Yaraslau, 'Why European Union Trade Sanctions Do Not Work' 17 (2008) *Minnesota Journal of International Law* 209. For a contrary opinion see Wardhaugh, arguing that the Commission's ongoing monitoring of beneficiary countries' compliance with the international conventions listed by the GSP Regulation is no 'idle threat', as the withdrawal of

Van der Loo, the European Commission has, so far, decided to rely on the withdrawal procedure provided by the GSP Regulation only in a very limited number of cases, instead attempting to engage with beneficiary countries through the deployment of ‘more constructive instruments’⁸⁵, such as structured dialogues.⁸⁶ Also, it is worthy of note that none of the infrequent cases involving the temporary retraction of preferences under the GSP Regulation has, to date, concerned violations of international environmental or climate change conventions.⁸⁷

4. The 2021 Commission’s proposal for a novel GSP regulation: climate conditionality at a crossroads

The present GSP Regulation was set to expire on 31 December 2023, thus concluding its ten-year cycle. To prevent both the general GSP and GSP+ schemes from ceasing to apply,⁸⁸ the European Commission has, in September 2021, tabled its proposal for a new GSP regulation, aiming at renewing the arrangements for another decade.⁸⁹ The proposal maintains the essential structure and features of its predecessor, yet with some significant innovations.

Sri Lanka’s designation in 2010 and the subsequent review of Bolivia’s status in 2012 indicate. Accordingly, the author claims that a stick-based approach is likely to be a more effective means for promoting human rights through trade instruments. See B Wardhaugh, ‘GSP+ and Human Rights: Is the EU’s Approach the Right One?’ (2013) 16 *Journal of International Economic Law* 827, 832. It is worth emphasizing that also the mid-term review for the GSP Regulation has highlighted that negative conditionality does not constitute an effective deterrent for the prevention of human rights violations, for which see *supra* (n 67). On the point see G Van der Loo (n 69) 10.

⁸⁵ G Van der Loo (n 69) 9.

⁸⁶ Notice that the European Commission’s margin of discretion over its choice to trigger the withdrawal procedures specified by the GSP Regulation has also been at the centre of a 2015 case brought before the General Court (GC) by the Italian tanning industry association. See Case T-338/14 *Unione Nazionale Industria Conciaria (UNIC) v European Commission*, EU:T:2015:59. Yet, the case was considered inadmissible by the GC, as the contested measure could not be considered a reviewable act *ex Art 263 TFEU*.

⁸⁷ To date, the European Commission has decided to resort to negative conditionality against beneficiary countries in limited cases. By way of illustration, worth mentioning are the 2010 cases concerning Venezuela and Sri Lanka, which were downgraded from the GSP+ scheme to the general GSP arrangement. Whereas Venezuela had failed to ratify the United Nations Convention against corruption (opened for signature 9–11 December 2003, entered into force 14 December 2005), thus losing its GSP+ status permanently, the violations charged to Sri Lanka regarded the country’s failure to effectively implement several international agreements, entailing the International covenant on civil and political rights (opened for signature 16 December 1966, entered into force 23 March 1976); the Convention against torture and other cruel, inhuman or degrading treatment or punishment (opened for signature 10 December 1984, entered into force 26 June 1987); and the Convention on the rights of the child (opened for signature 20 November 1989, entered into force 2 September 1990). Consequently, Sri Lanka’s preferences were suspended from 2010 to 2017. See for an analysis I Borchert and others, (n 47) 26.

⁸⁸ Notice that imports from least-developed countries, *ex Art 43* of the Commission’s proposal of the Commission’s proposal for a novel GSP Regulation, would continue to be covered by the EBA scheme, as the arrangement does not have an expiry date.

⁸⁹ Proposal COM (2021) 579 final (n 23) Art 43.

Relevantly, the necessity for the novel piece of legislation to mirror the environmental and climate priorities of the EU, as specified by the 2019 European Green Deal,⁹⁰ is underlined. In this vein, the proposal also appears in line with the perspective embraced by the Commission in its 2021 trade policy review⁹¹, predicating the tripartite necessity to support an open, assertive and *sustainable* commercial policy. As a consequence, climate conditionality is reinforced along a two-pronged guideline.

In primis, the list of international conventions whose ratification and effective implementation are indispensable to benefit from the additional commercial preferences granted under the GSP+ scheme results updated. Annex VI to the proposal includes, among the relevant conventions, the Paris Agreement on climate change, substituting the Kyoto Protocol. Accordingly, in order to be bound by the newly introduced international agreements, third countries which were already beneficiaries under the GSP+ scheme as of 31 January 2023 are to (re)apply in accordance with the procedure provided by the proposal.⁹²

Secondly, the proposal brands negative conditionality as a vital component for contributing to the fight against climate change.⁹³ Thus, while the *specialis* mechanism for the temporary withdrawal of preferences applicable to the GSP+ arrangement is maintained without major modifications,⁹⁴ negative climate conditionality is streamlined as also to embrace the general GSP and EBA schemes. Specifically, the *generalis* temporary withdrawal procedure, already spelt out in Article 19 of the current GSP Regulation, now extends the possibility of temporarily revoking all the arrangements presently covered by the Regulation in instances of ‘serious and systemic violation of the principles laid down in the conventions listed in Annex VI’⁹⁵, the latter also entailing environmental, climate and good governance conventions. In the words of the Commission, the mainstreaming of negative conditionality would find its *raison d’être*

⁹⁰ European Commission, ‘Communication: The European Green Deal’ COM (2019) 640 final. For general overviews, see L Krämer, ‘Planning for Climate and the Environment: The EU Green Deal’ (2020) 17 *Journal for European Environmental and Planning Law* 267; M Falcone, ‘Il Green Deal europeo per un continente a impatto climatico zero: la nuova strategia europea per la crescita tra sfide, responsabilità e opportunità’ (2020) 15 *Studi sull’integrazione europea* 379; M Onida, ‘Il Green Deal Europeo’ in P Manzini and M Vellano (a cura di), *Unione Europea 2020: I dodici mesi che hanno segnato l’integrazione europea* 257.

⁹¹ European Commission, ‘Communication: Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’ COM (2021) 66 final.

⁹² Proposal COM (2021) 579 final (n 23) Art 10(8) .

⁹³ *Ibid* 9.

⁹⁴ *Ibid* Art 15.

⁹⁵ *Ibid* Art 19(1)(a). It shall be specified that if the Commission considers that findings justify the temporary withdrawal for the reasons specified in Art 19(1), it shall be empowered to adopt delegated acts to temporarily revoke the preferential arrangements covered by the GSP Regulation. Interestingly, in the adoption of the delegated acts, the Commission may consider the socio-economic effects of the temporary withdrawal of tariff preferences in the beneficiary country. On this point see extensively C Portela, ‘Are EU GSP Withdrawals and CFSP Sanctions Becoming More Alike?’ (2023) 28 *European Foreign Affairs Review* 35, 43.

in the prospect of ‘engag[ing] on such issues [*i.e.* environmental protection and good governance] in support of the UN Sustainable Development Goals (SDGs) and the contribution of the EU’s green agenda to GSP beneficiary countries’.⁹⁶

It has hence been suggested that whereas the extension of the *generalis* withdrawal procedure to environmental and climate-related international agreements would not engender a major impact on GSP+ beneficiary countries, already required to maintain ratification and to effectively implement all the listed international agreements, for general GSP and EBA beneficiaries such a leeway might prove particularly challenging, as the latter ones would now, *de jure*, be mandated not to undermine the asserted ‘principles’ of the specified international deals.⁹⁷ Yet, the proposal appears coherent with the novel policy guidelines put forward by the European Commission in its 2021 trade policy review, stressing the necessity of rendering the Union’s CCP tools – entailing both its unilateral and bilateral instruments – more assertive on the international plane.⁹⁸

Anyhow, it can be argued that the proposal stops short to effectively supersede the twin-track approach to the retraction of the GSP preferential arrangements on climate grounds. Proceeding with order, it can be inferred that the *generalis* and *specialis* withdrawal procedures attribute to GSP beneficiaries a different set of obligations to be complied with as not to incur in the temporary withdrawal of the preferential arrangements.

Particularly, it can be claimed that the *specialis* withdrawal procedure applicable to GSP+ countries only, spelt out in Article 15 of the Commission’s proposal, displays an all-embracing character, subjecting GSP+ beneficiary countries to comprehensive substantive obligations. These latter ones can be divided in three core cate-

⁹⁶ Proposal COM (2021) 579 final (n 23) 7.

⁹⁷ Cf. G Van der Loo (n 69)12.

⁹⁸ Besides the proposal for a novel GSP regulation, it shall be kept in mind that the Commission’s intention of rendering more assertive its common commercial policy, and the normative instruments related to it, also surfaces from the mentioned change of paradigm which has characterized the enforcement mechanism proper of the EU new generation free trade agreements’ TSD chapters. In fact, the Commission had traditionally favoured a ‘cooperative’ approach to the enforcement of the said chapters, disregarding the leeway of imposing economic ‘sanctions’ in cases of non-compliance with the obligations stemming from them. Nonetheless, with the advent of the 2022 Communication on ‘the power of trade partnerships’, the Commission has put forward the possibility of imposing countermeasures ‘as a matter of last resort’, notably in cases of ‘serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change’. Cf. Communication COM(2022) 409 final (n 77) 11. For comments in legal literature, see A Mensi, ‘Sviluppo sostenibile e meccanismi di risoluzione delle controversie negli accordi commerciali conclusi dall’unione europea: criticità e nuove prospettive’ (2023) 78 *La comunità internazionale* 271; V Remondino, ‘New Generation Free Trade Agreements at a Crossroads. Assessing Environmental Enforcement of the E.U.’s Trade and Sustainable Development Chapters from Global Europe to the Power of Trade Partnerships Communication’ (2023) 8 *University of Bologna Law Review* 149; G Marín Durán, ‘The EU’s Evolving Approach to Environmental Provisions in Free Trade Agreements’ in RA Wessel and others, (eds), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations* (Brill 2024) 257.

gories: (i) maintenance of ratification and effective implementation of the international conventions included in Annex VI; (ii) acceptance of regular monitoring and review of implementation records in accordance with the *ad hoc* provisions of the relevant conventions, along with cooperation with the Union's reporting and monitoring procedure as provided by Article 13 of the Commission's proposal; and (iii) lack of formulation of a reservation in relation to any of the relevant conventions, which is prohibited under those conventions or which is considered by Article 9 of the Commission's proposal to be incompatible with the object and purpose of the relevant conventions.⁹⁹

Contrariwise, under the *generalis* withdrawal procedure proper of Article 19(1)(a) of the Commission's proposal, the GSP-covered preferential arrangements may be temporarily withdrawn only at the occurrence of qualified violations of the principles laid down by the concerned international conventions. Violations which, assertively, shall be both serious and systemic.¹⁰⁰

Against this backdrop, the following section elaborates on the normative implications which might stem from extending negative climate conditionality upon respect of obligations deriving from the Paris Agreement on climate change.

5. On a slippery slope: assessing the existence and extent of substantive and procedural obligations under the Paris agreement on climate change

As it has been exposed in the previous section, the recent Commission's proposal for a novel GSP regulation streamlines negative climate conditionality behind the GSP+ arrangement, subjecting all GSP beneficiaries to the respect of the Paris Agreement on climate change. Yet, the envisaged twin-track approach to negative conditionality triggers a reflection on the concrete obligations which shall be effectively fulfilled by GSP beneficiaries under the normative framework of the Paris Agreement on climate change, as not to incur in the temporary withdrawal mechanism mandated by, one the one hand, Article 15 and, on the other hand, Article 19(1)(a) of the Commission's proposal.

5.1. Legal obligations for GSP+ beneficiary countries ex Article 15 of the Commission's proposal

In section 4 it has been argued that, under the *specialis* withdrawal procedure spelt out in Article 15 of the Commission's proposal, the special incentive arrangement for sustainable development and good governance can be temporarily withdrawn in case of a failure by a GSP+ beneficiary country to respect the three core binding undertakings enshrined in Article 9 of the proposal. The latter, hence, deserves to be

⁹⁹ Proposal COM (2021) 579 final (n 23) Art 15.

¹⁰⁰ See C Portela (n 95) 42.

singularly investigated against the backdrop of the obligations established by the Paris Agreement on climate change.

5.1.1. Maintenance of ratification and effective implementation of the Paris Agreement on climate change

As to keep benefitting from the tariff preferences provided under the GSP+ arrangement, the beneficiary shall give ‘a binding undertaking to maintain ratification of the relevant conventions [i.e. the Paris Agreement on climate change] and to ensure the effective implementation thereof’.¹⁰¹ Two points thus deserve a specific scrutiny: the notion of ‘maintenance of ratification’ and the concept of ‘effective implementation’.

In connection with the former, some preliminary considerations prove necessary. *In primis*, the obligation for GSP+ beneficiary countries to ‘maintain ratification’ of the Paris Agreement on climate change appears to give expression to a principle which is starting to emerge in the domain of international environmental law. Notably, the principle of non-regression.¹⁰² Whereas the latter has been predominantly conceived as an obligation for States not to derogate to, nor regressing from, domestic environmental measures and laws,¹⁰³ the ratio underpinning it – i.e. preventing the so-called ‘environmental backsliding, in the face of major challenges like climate change’¹⁰⁴ – could well support its application also in relation to international conventions and standards, such as the PA.¹⁰⁵

Secondly, it should be pointed out that it is not the first time that the expression ‘maintenance of ratification’ is deployed within the remit of the EU GSP regime, having been originally enshrined in both Article 9(1)(d) of Regulation 980/2005 and

¹⁰¹ Proposal COM (2021) 579 final (n 23) Art 9(1)(d).

¹⁰² According to Mitchell and Munro, the principle of non-regression from environmental standards, which finds its roots in the international human rights regime, still accounts to ‘an unrealised concept that appears in theoretical and advocacy literature but is not readily observable in the primary sources of international environmental law’. Yet, the Authors claim that, recently, ‘there have been signs that this principle could transform from a theoretical concept to a legal reality’, having been expressly codified in Art 3(c) of the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (opened for signature 9 April 2018, entered into force 22 April 2021). See AD Mitchell and J Munro, ‘An International Law Principle of Non-Regression from Environmental Protections’ (2023) 72 *International and Comparative Law Quarterly* 35, 61 ff. For general insights on the principle of non-regression in international environmental law, see *inter alia* M Prieur, ‘Une vraie fausse création juridique: le principe de non-régression’ (2016) 41 *Revue juridique de l'Environnement* 319; M Prieur, ‘The Principle of Non-Regression’ in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 251; M Vordermayer-Riemer, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2021).

¹⁰³ AD Mitchell and J Munro (n 102).

¹⁰⁴ *Ibid* 62.

¹⁰⁵ Cf. M Prieur, ‘Une vraie fausse création juridique’ (n 102) 323, comparing denunciation from an international environmental treaty to a form of regression from given levels of protections.

Article 8(1)(b) of Regulation 732/2008,¹⁰⁶ and later embedded within the EU GSP Regulation currently in force.¹⁰⁷ Yet, as its predecessors, the proposal for a novel GSP regulation does not elucidate on the meaning of the notion. Nevertheless, by relying on the definition of the term 'ratification' provided by the Vienna Convention on the law of treaties (VCLT),¹⁰⁸ the obligation to maintain ratification might still be conceptualised as the preservation of the State's consent to be bound by a treaty.¹⁰⁹ In this vein, a GSP+ beneficiary country ought to refrain from any act which could undermine its original consent to be legally bound by the relevant conventions listed in Annex VI of the Commission's proposal, in particular by denouncing them.

From the specific perspective of the Paris Agreement on climate change, it could hence be claimed that the obligation to maintain ratification is to be substantiated in a general duty to abstain from triggering the *ad hoc* withdrawal procedure spelt out in Article 28 PA, consenting each party to the agreement to withdraw from it by giving written notification to the depositary.¹¹⁰ Accordingly, whereas from an international law standpoint the GSP+ beneficiary's choice to withdraw from the Paris Agreement on climate change represents the exercise of a sovereign choice,¹¹¹ under

¹⁰⁶ Interestingly, the provisions extended the obligation to maintain ratification not only to the listed relevant conventions, but also to 'their implementing legislation and measures', hence presenting a broader scope of application *vis-à-vis* the current GSP Regulation and Commission's proposal for a novel GSP Regulation.

¹⁰⁷ Regulation 978/2012 (n 19) Art 9(1)(d) .

¹⁰⁸ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) (VCLT). According to Art 2(1)(b) VCLT, ratification is defined as an 'international act so named whereby a *State establishes on the international plane its consent to be bound by a treaty*', emphasis added.

¹⁰⁹ For general comments in legal doctrine, see *inter alia* A Bolintineau, 'Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68 *American Journal of International Law* 672; M Fitzmaurice, 'Consent to Be Bound – Anything New under the sun?' (2005) 74 *Nordic Journal of International Law* 483; A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013) 87-113; M Fitzmaurice and P Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge University Press 2020) 96-120; J Brunnée, 'Consent', *Max Planck Encyclopedia of Public International Law* (online version 2022).

¹¹⁰ By providing an express provision on withdrawal, Art 28 PA (n 9) is thus to fall within the field of operation of Art 54(a) VCLT, mandating that '[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty'. Accordingly, any Party to the PA which desires to withdraw from it must comply with the procedural requirements set out in Art 28(1) of the Paris Agreements on climate change, reading: '[a]t any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.' For a comprehensive analysis concerning the substantial and procedural requirements of the withdrawal procedure of the Paris Agreement on climate change, see R Cantley-Smith, 'Article 28: Withdrawal' in G Van Calster and L Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar 2021) 422.

¹¹¹ In this sense see H Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *European Journal of International Law* 73, 104, noting that: 'treaty withdrawal decisions are equally as central to the expression of national sovereignty as the joining of treaties'. The recognition of the right to withdraw from a treaty as the exercise of a

the EU GSP regime the withdrawal would further consist in a failure to respect one of the conditions laid down in the Commission's proposal. Still, it can be argued that, by making a formal request as to benefit from the additional tariff preferences granted under the GSP+ scheme, the beneficiary country would willingly agree to restrain the exercise of its sovereign right concerning the possibility of withdrawing from the listed relevant conventions, having to comply with the obligations spelt out by the Commission's proposal in order to benefit from the conferred trade benefits.

Coming to the concept of 'effective implementation', the Commission's proposal, following suit with the current GSP Regulation,¹¹² provides a definition of the expression, signifying 'the *integral* implementation of the undertakings and obligations undertaken under the international conventions listed in Annex VI, thus ensuring fulfilment of the principles, objectives and rights guaranteed in these conventions in the beneficiary country's entire territory'.¹¹³ As GSP+ beneficiary countries would consequently be bound to implement *in toto* the Paris Agreement on climate change, identifying what undertakings and obligations would subsist on its parties reveals vital. To begin with, it shall be noted that the PA, whilst certainly binding in its form¹¹⁴, imposes few substantive obligations on its individual signatories.¹¹⁵ The incapability of the arrangement to singularly¹¹⁶ address obligations on its parties would remarkably transpire from Article 2 PA, laying down the core objective of the agreement. The clause, calling on its signatories to strengthen a '*global* response to the threat of climate change'¹¹⁷ fails to mandate any national-level emissions' reduction target, instead relying on three variables proper of the collective long-term climate

State's national sovereignty has also been recognized by some multilateral conventions. Specifically, see Art XVI(2), first line, of the Chemical Weapons Convention (opened for signature 13 January 1993, entered into force 29 April 1997), reading: '[e]ach State Party shall, *in exercising its national sovereignty*, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country', emphasis added.

¹¹² Regulation 978/2012 (n 19) Art 2(1). On the point in legal literature, see R Zvelc (n 33)182.

¹¹³ Proposal COM (2021) 579 final (n 23) Art 2(11), emphasis added.

¹¹⁴ Legal literature has interestingly thrown the attention on the difference existing between the legal form of the Paris Agreement on climate change, *viz.* an international agreement under Art 2(1)(a) VCLT, and the level of bindingness of its provisions. According to Bodle and Oberthür 'while formally speaking the whole of the Paris Agreement is binding on its parties under international law, whether and to what extent its individual provisions establish legal rights and obligations (...) depends on their wording'. See R Bodle and S Oberthür, 'Legal Form of the Paris Agreement and Nature of Its Obligations' in D Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 97.

¹¹⁵ Cf. D Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 142.

¹¹⁶ Within the Paris Agreement on climate change (n 9), only limited provisions refer to the individual signatories to the Agreement, by deploying the expression 'each party'. These clauses are Arts 4(2), 4(3), 4(9), 4(16), 4(17), 7(9), 7(10), 13(7), 13(8), 13(11) and 25(1) Paris Agreement on climate change.

¹¹⁷ *Ibid* Art 2(1), emphasis added.

pathway.¹¹⁸ In Ghaleigh's terms, the provision would hence constitute the roots of the 'general toothlessness of the Agreement',¹¹⁹ posing 'no legal disincentive to those parties whose commitment to the PA objective is weak or wavering'.¹²⁰

This notwithstanding, the normative content of the Paris Agreement on climate change is not completely deprived of legal significance. A closer scrutiny of its provisions discloses, *inter alia*, the subsistence of several obligations and undertakings individually incumbent on each Party¹²¹, which can be categorized into three focal categories: (i) mitigation;¹²² (ii) adaptation;¹²³ and (iii) finance.¹²⁴ Since GSP+ beneficiaries would be bound to implement integrally the international agreement at stake, it is believed that a failure to comply with any of the aforesaid categories of obligations may, abstractly, legitimise the EU to trigger the *specialis* withdrawal mechanism mandated by the proposal. This represents an important innovation *vis-à-vis* the international climate change regime, in which no assertive enforcement mechanism is, to date, available.¹²⁵

Still, three variables are worth minding. First, the Paris Agreement on climate change mainly envisages substantive obligations of conduct rather than of result.¹²⁶ Significant in this regard are the mandatory undertakings incumbent on the signatories under Article 4(2) PA¹²⁷, calling on each party to 'prepare, communicate and maintain' domestic emissions reduction targets, termed nationally determined contributions (NDCs), with a view to reaching the agreement's objective as enshrined in Article 2 PA.¹²⁸ Alongside, parties to the agreement are mandated to 'pursue domestic mitigation measures, *with the aim of achieving* the objectives of such contributions'.¹²⁹ Thus, the arrangement would generate a good faith expectation that each

¹¹⁸ Ibid Art 2(1)(a-c).

¹¹⁹ N Singh Ghaleigh, 'Article 2: Aims, Objectives and Principles' in G Van Calster and L Reins (eds) (n 110) 89.

¹²⁰ Ibid

¹²¹ Cf. L Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 337.

¹²² Paris Agreement on climate change (n 9) Arts 3–6.

¹²³ Ibid Art 7.

¹²⁴ Ibid Art 9. Yet, it shall be reminded that, as stressed by Bondansky et al., obligations on climate finance are 'rather modest' and mostly binding on developed country parties to the Paris Agreement on climate change. Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 240.

¹²⁵ See extensively C Reichenbach, 'The Missing Dispute Resolution Mechanisms in International Climate Change Agreements' (2022) 3 *Global Energy Law and Sustainability* 129.

¹²⁶ For a general account, see S Oberthür and R Bodle, 'Legal Form and Nature of the Paris Outcome' (2016) 6 *Climate Law* 40.

¹²⁷ Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 231, emphasizing that the 'most significant legal obligations of the Paris Agreement are to be found in its mitigation article [*i.e.* Art 4]'. See extensively B Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford University Press 2022).

¹²⁸ Paris Agreement on climate change (n 9) Art 3.

¹²⁹ Ibid Art 4(2), emphasis added.

signatory would effectively endeavour to achieve its NDC, yet falling short of requiring its objectives to be concretely fulfilled.¹³⁰

Secondly, it must be noted that some clauses of the Paris Agreement on climate change, while presumably creating individual obligations for each state party, yet include semantic constructs which decrease their legal enforceability. Paradigmatic in this sense is the provision embedded in Article 7(9) PA, compelling¹³¹ each party to ‘as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions’.¹³² In Bodle and Oberthür’s terms, the PA would thus entail ‘soft’ language that ‘nudges but does not prescribe’.¹³³

Thirdly, it shall be stressed that developing countries, the specific addressees of the GSP+ arrangement, boast a differential position in the normative framework of the Paris Agreement on climate change, under the environmental law principle of common but differentiated responsibilities and respective capabilities (CBDRRC or, for sake of simplicity, principle of differentiation).¹³⁴ As a consequence, within the

¹³⁰ In this sense cf. D Bodansky, J Brunnée and L Rajamani (n 9) 231. See also R Bodle, L Donat and M Duwe, ‘The Paris Agreement: Analysis, Assessment and Outlook’ (2016) 10 *Carbon and Climate Law Review* 5, 7, highlighting that: ‘the PA does not oblige parties to actually fulfil these NDCs, hence their content is not as such legally binding. Parties are only required to pursue measures ‘with the aim of achieving’ the objectives of such contributions’. Contrarily see Mayer, arguing that ‘the Parties to the Paris Agreement have an obligation of conduct to pursue measures expected to implement the mitigation target contained in their NDC’. Cf. B Mayer, ‘International Law Obligations Arising in Relation to Nationally Determined Contributions’ (2018) 7 *Transnational Environmental Law* 251, 256.

¹³¹ Paris Agreement on climate change (n 9) Art 7(9), reading: ‘each Party *shall*, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions’, emphasis added.

¹³² Ibid emphasis added.

¹³³ R Bodle and S Oberthür (n 114) 98.

¹³⁴ On the historical affirmation and content of the principle, see generally CD Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *American Journal of International Law* 276; P Cullet, ‘Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Step’ (2016) 5 *Transnational Environmental Law* 305; F Pellizzari, ‘Responsabilità comune e differenziata nel riscaldamento globale’ (2020) Università Cattolica Working Papers 03-2020, at ideas.repec.org. It is worth emphasizing that the normative nature of the principle of common but differentiated responsibilities and respective capabilities remains contested among commentators. Majoritarian legal literature yet excludes that the principle can, to date, represent a norm of customary international law, binding *erga omnes*. In this sense see T Deleuil, ‘The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties’ (2012) 21 *Review of European, Community and International Environmental Law* 271; L Rajamani, ‘Common but Differentiated Responsibilities’ in L Krämer and E Orlando (eds) (n 102) 291. Nevertheless, in the bosom of the international climate change regime, the CBDRRC principle finds codification both in Art 3 of the UNFCCC and in Art 2(2) of the PA, international agreements binding *inter partes*. Accordingly, the Principle applies between their contracting parties, to date the majority of the states of the international community. From this angle of perspective cf. J Scott and L Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469, 477; J Brunnée and C Streck, ‘The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities’ (2013) 13 *Climate Policy* 589; C Voigt and F Ferreira, ‘Differentiation in the Paris Agreement’

normative scaffold of the international agreement under scrutiny, obligations binding on developing-country parties to the PA would be less stringent in comparison to those ones incumbent on developed-country signatories.¹³⁵ This would occur with regard to both substantive and procedural obligations. In connection to the former and by way of example, whereas all parties to the Paris Agreement on climate change are mandated to undertake and communicate NDCs *ex Article 4(2) PA*, also by duly considering the requirement of progression,¹³⁶ it is inferred that developed country parties should 'take the lead',¹³⁷ in undertaking absolute emission reduction targets.¹³⁸ On the contrary, developing country Parties are simply encouraged to 'continue enhancing their mitigation efforts',¹³⁹ moving over time towards 'economy-wide emission reduction or limitation targets in the light of different national circumstances'.¹⁴⁰

In relation to the latter, an important element to take into consideration concerns the modalities and mechanisms through which compliance with the obligations deriving from the Paris Agreement is to be assessed. As the next sub-paragraph will

(2016) 6 *Climate Law* 58; G Marín Durán, 'Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes' (2023) 72 *International and Comparative Law Quarterly* 73, 83.

¹³⁵ It must be clarified that the Paris Agreement does not elucidate on the concrete meaning of the terms 'developed' and 'developing' country parties, a deficiency which has been addressed in legal doctrine. In this regard, Rajamani underlines that '*Needless to say the terms "developed" and "developing" countries have not been defined in the Paris Agreement. In Paris, countries with "economies in transition" as well as those whose "special circumstances are recognized" by the COP, viz. Turkey, sought to ensure that they would be included in the category of developing countries and thus entitled to any benefits that might flow thereon. This proved contentious until the end, but the term "developing countries" was eventually left open and undefined*'. Cf. L Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *International and Comparative Law Quarterly* 493, 513, emphasis added. From a similar perspective, yet within the remit of the UNFCCC, see R Boyte, 'Common but Differentiated Responsibilities: Adjusting the "Developing"/"Developed" Dichotomy in International Environmental Law' (2010) 14 *New Zealand Journal of Environmental Law* 63, 83-84.

¹³⁶ The requirement of progression, as enshrined in Art 3 of the Paris Agreement on climate change (n 9), mandates that efforts made by all parties 'will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement'. Progression is also referred to in other landmark clauses of the Paris Agreement on climate change, first and foremost Art 4 on mitigation. For a general account see C Voigt and F Ferreira, "'Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285.

¹³⁷ Paris Agreement on climate change (n 9) Art 4(4).

¹³⁸ Ibid Art 4(5). further requires support to be provided to developing country parties for the implementation of Art 4, recognizing that 'enhanced support for developing Country Parties will allow for higher ambition in their actions'.

¹³⁹ Ibid Art 4(4).

¹⁴⁰ Ibid.

illustrate, differentiation is also reflected within the provisions of the PA concerning monitoring and review, constructed around the concept of ‘built-in flexibility’.¹⁴¹

5.1.2. Acceptance of reporting requirements, regular monitoring and review of implementation records ex Articles 13-15 of the Paris Agreement on climate change

In accordance with Article 9(e) of the Commission’s proposal, GSP+ beneficiaries shall accept ‘without reservation the reporting requirements imposed by any of the relevant conventions’, along with giving ‘a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions’.

The Paris Agreement on climate change envisages a three-pronged oversight system, composed of an enhanced transparency framework (ETF)¹⁴², an implementation and compliance mechanism (ICM)¹⁴³ and the global stocktake.¹⁴⁴ Since the latter is essentially¹⁴⁵ to assess collective, rather than country-level, progress towards the attainment of ‘the purpose of [the PA] and its long term goals’¹⁴⁶, worth investigating for present purposes are, in particular, the first two facets of the oversight system.

Without demanding completeness¹⁴⁷, it shall be remarked that the ETF addresses both individual reporting and review requirements in the light of transparency, regarded as ‘an indispensable backbone of the international climate change regime’.¹⁴⁸ In relation to reporting, each party to the PA is mandated to regularly provide two compulsory¹⁴⁹ sets of information: a national inventory report of ‘anthropogenic emissions by sources

¹⁴¹ Ibid Art 13(1).

¹⁴² Ibid Art 13.

¹⁴³ Ibid Art 15.

¹⁴⁴ Ibid Art 14.

¹⁴⁵ Whereas the global stocktake is primarily to assess collective, rather than individual, efforts towards the attainment of the Paris Agreement’s long term goals, legal scholars have read the third paragraph of the provision, according to which ‘the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support [...]’, as generating a strong and individual expectation for individual parties to the Paris Agreement on climate change to enhance the ambition of their climate action. Cf. D Bodansky, J Brunnée and L Rajamani (n 9) 245.

¹⁴⁶ Art 14(1) Paris Agreement on climate change (n 9). According to Bodansky et al. the global stocktake performs a ‘crucial function in the context of ‘nationally determined’ contributions. It allows a *collective assessment* of whether national efforts add up to what is necessary to limit temperature increase to well below 2° C’. See D Bodansky, J Brunnée and L Rajamani (n 9) 244, emphasis added.

¹⁴⁷ For illustrations in legal literature concentrating on transparency within the framework of the Paris Agreement on climate change, see *inter alia* A Kohli, ‘Making Sense of Transparency and Review in the Paris Agreement’ (2015) 26 *Yearbook of International Environmental Law* 46.

¹⁴⁸ H van Asselt and K Kulovesi, ‘Article 13: Enhanced Transparency Framework for Action and Support’ in G Van Calster and L Reins (eds) (n 110) 302.

¹⁴⁹ Besides the mandatory reporting requirements proper of Art 13(7) of the Paris Agreement on climate change (n 9), each party ‘should’, ex Art 13(8), additionally provide, *as appropriate*, information concerning ‘climate change impacts and adaptation under Article 7’.

and removals by sinks of greenhouse gases'¹⁵⁰, prepared according to good practice and the methodologies therein provided;¹⁵¹ and information essential to track progress made towards the implementation and achievement of its NDC *ex* Article 4 PA.¹⁵² Information provided is, secondly, to undergo a review process in two steps, comprising both a technical expert¹⁵³ and a party-to-party review.¹⁵⁴

In the light of the foregoing, it could be claimed that a GSP+ country's failure to accept the reporting requirements proper of Article 13(7) PA, as well as its refusal to accept review under Article 13(11-12) PA, may account to a failure to effectively fulfil its monitoring undertakings as specified by Article 9(e) of the Commission's proposal. Nevertheless, as anticipated, it is vital to consider that GSP+ beneficiaries, as developing country parties to the PA, continue to be assigned, yet to a more limited extent in comparison to previous praxis¹⁵⁵, a differential status under the ETF.¹⁵⁶ The latter, being constructed in the aforementioned context of built-in flexibility, inevitably allows 'developing countries to report in less detail'¹⁵⁷, merely requiring them to account for 'basic information'.¹⁵⁸ Similarly to reporting, also the review mechanism *ex* Article 13(11-12) PA allows for flexibility, offering a significant margin of manoeuvre to developing countries in terms of timing of the process.¹⁵⁹ It may be hence argued that the Paris Agreement on climate change,

¹⁵⁰ Paris Agreement on climate change (n 9) Art 13(7)(a).

¹⁵¹ *Ibid*, including: 'methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement'.

¹⁵² *Ibid* Art 13(7)(b) reading: 'information necessary to track progress in implementing and achieving its nationally determined contribution under Article 4'.

¹⁵³ *Ibid* Art 13(11).

¹⁵⁴ *Ibid* Art 13(12).

¹⁵⁵ The PA generally supersedes the bifurcated system of reporting and review proper of both the UNFCCC and the Kyoto Protocol, envisaging *ad hoc* obligations mainly on developed-country parties. To the opposite, the Paris Agreement's monitoring mechanism is, in principle, equally applicable to both developed and developing countries which are Parties to it. For a general illustration see C Falduto, J Ellis and K Simeonova, 'Understanding reporting and review under Articles 6 and 13 of the Paris Agreement' (2021) OECD/IEA Climate Change Expert Group Papers 2021-04, at www.oecd.org.

¹⁵⁶ In this vein, Art 13(2) of the Paris Agreement on climate change (n 9) specifies that: 'the transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities'. Legal scholars have brought to the surface the systemic shortcomings of this provision, which may *de facto* lead to the continuation of the two-pronged system previously in force. See from a critical perspective A Tabau, 'Evaluation of the Paris Climate Agreement According to a Global Standard of Transparency' (2016) 10 *Carbon and Climate Law Review* 23; L Rajamani (n 135) 502-503.

¹⁵⁷ H van Asselt and K Kulovesi (n 148) 306.

¹⁵⁸ *Ibid* Basic information may regard, for instance, the typology of sectors and gases covered by the reporting activity and the time series for the reporting. See United Nations Framework Convention on Climate Change, Decision 18/CMA.1, Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, UN Doc FCCC/PA/CMA/2018/3/Add.2 (2019).

¹⁵⁹ (n 9) Art 13(11) provides that 'for those developing country Parties that need it in the light of their capacities, the review process shall include assistance in identifying capacity-building needs',

whilst positively considering the diverse capabilities of its developing country parties, inevitably lowers the threshold for compliance under Article 15(1) of the Commission's proposal.

Eventually, coming to the implementation and compliance mechanism of Article 15 PA, suffice to notice that the instrument might entail a specific significance for GSP+ beneficiaries merely in light of the binding undertaking to accept regular monitoring of implementation records¹⁶⁰, as the provision stops short to envisage reporting and review obligations directly incumbent on individual parties to the agreement.¹⁶¹

5.1.3. Lack of formulation of reservations prohibited under the Paris Agreement on climate change

Conclusively, the Commission's proposal foresees the possibility for GSP+ tariff preferences to be temporarily withdrawn at the occurrence of a beneficiary country's formulation of a reservation¹⁶² which is prohibited under the relevant conventions, or which is incompatible with the object and purpose of those conventions, as detailed by Article 9(c) of the Commission's proposal.¹⁶³

whereas Art 13(12) underlines that the 'technical expert review [...] shall pay particular attention to the respective national capabilities and circumstances of developing country Parties'.

¹⁶⁰ Proposal COM (2021) 579 final (n 23) Art 9(c).

¹⁶¹ Paris Agreement on climate change Art 15(1) (n 9) merely stipulates that 'a mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established'. For a general account see Y Dagnet and E Northrop, 'Facilitating Implementation and Promoting Compliance (Article 15)' in D Klein and others (eds) (n 144).

¹⁶² According to Art 2(1)(d) VCLT, the term 'reservation' means a: 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

¹⁶³ Proposal COM (2021) 579 final (n 23) Art 15(1), read in conjunction with Art 9(c). In this regard, the Commission's proposal clarifies under which circumstances a reservation is to be considered incompatible with the object and purpose of the relevant conventions. Notably, this occurs when '(i) a process explicitly set out for that purpose under the convention has so determined'; or '(ii) in the absence of such a process, the Union where it is a party to the convention, and/or a qualified majority of Member States parties to the convention, in accordance with their respective competences as established in the Treaties, objected to the reservation on the grounds that it is incompatible with the object and purpose of the convention and opposed the entry into force of the convention as between them and the reserving state in accordance with the provisions of the Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1969'. In this vein, the Commission's proposal manages to clarify the boundaries of the application of Art 19(c) VCLT, merely stipulating that a reservation can be formulated by a State unless it is 'incompatible with the object and purpose of the treaty'.

In fact, due to its open-ended terms, the operationalization of Art 19(c) VCLT has proved particularly difficult. As well underscored by Aust: '[m]any differing views have been expressed as to how [the compatibility test ex Art 19(c) VCLT] should be applied, especially to human rights treaties, but the practice of states is patchy and uncertain'. See A Aust (n 109) 123. Legal literature has long concentrated on reservations incompatible with the object and purpose of treaties, in particular with regard to human rights conventions. Cf. *ex multis* P Imbert, *Les réserves aux traités multilatéraux: évolution de droit et de la pratique depuis l'avis consultatif donné par la Cour Internationale de Justice le 28 mai 1951* (Pedone 1978); E Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995);

The Paris Agreement on climate change, akin to the UNFCCC¹⁶⁴ and the Kyoto Protocol¹⁶⁵, expressly disallows reservations *ex* Article 27 PA, stating that ‘no reservations may be made to this Agreement’.¹⁶⁶ It thus follows, as a logical consequence, that the formulation of any reservation advanced by GSP+ beneficiaries in the bosom of the Paris Agreement on climate change can legitimise the Union to trigger the *specialis* withdrawal procedure for a failure to comply with Article 9(c) of the Commission’s proposal.

Accordingly, the proposed GSP regulation manages to institute a hard enforcement mechanism flowing, as a direct legal consequence, from the formulation of the illegitimate reservation. This marks a striking point of divergence from the ordinary public international law regime, in which the legal effects of prohibited reservations have long given rise to debate.¹⁶⁷ In fact, in the silence of the Vienna Convention on the law of treaties on this point¹⁶⁸, two predominant positions have emerged. On the one hand, supported by the ruling of the International Court of Justice (ICJ) in its 1951 advisory opinion on reservations to the Convention of genocide¹⁶⁹, the ‘total

R Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002) 96 *American Journal of International Law* 531; U Linderfalk, ‘On the Meaning of the ‘Object and Purpose’ Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19’ (2003) 72 *Nordic Journal of International Law* 429; U Villani ‘Tendenze della giurisprudenza internazionale in materia di riserve ai trattati sui diritti umani’ in G Venturini and S Bariatti (eds), *Liber Fausto Pocar - Diritti individuali e giustizia internazionale* (Giuffrè 2009) 969; B Simma and G I Hernández, ‘Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 60.

¹⁶⁴ Art 24 UNFCCC.

¹⁶⁵ Art 26 Kyoto Protocol.

¹⁶⁶ In this vein, Art 27 PA falls within the category of prohibited reservations provided by Art 19(a) VCLT, according to which ‘a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty’.

¹⁶⁷ For a general account see *ex multis* R Baratta, *Gli effetti delle riserve ai trattati* (Giuffrè 1999) 83 ff.; G Gaja, ‘Il regime della Convenzione di Vienna concernente le riserve inammissibili’ in *Studi in onore di Vincenzo Starace* (Editoriale Scientifica 2008) 349, 358-361; A Pellet, ‘The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’ (2013) 24 *European Journal of International Law* 1061, 1090-1094. According to the latter Author, while formally Art 21 VCLT concerns the ‘[l]egal effects of reservations and objections to reservations’, in reality ‘it says little on these effects, on which it sheds little light, and *nothing on the effects of an invalid reservation*’. Cf. *ibid* 1090, emphasis added.

¹⁶⁸ See in this sense B Simma and G I Hernández (n 163) 64, arguing that the VCLT presents ‘major gaps’ concerning the discipline of the consequences of impermissible reservations.

¹⁶⁹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports 1951, 15, paras 26-27, observing that: ‘[a]s no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention’. Accordingly, in replying to the first submitted question, the Court straightforwardly ruled that: ‘a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible

invalidity',¹⁷⁰ solution was put forward, postulating that, when an illegitimate reservation is formulated, the reserving state could not be considered as a party to the specific agreement. In the words of Giegerich, '[t]he Court thus assumed that an impermissible reservation would render this State's ratification or accession ineffective *in toto*'.¹⁷¹ On the other hand, the so-called 'severance',¹⁷² doctrine was endorsed. The latter, whilst being codified neither in the VCLT nor finding support in international customary law¹⁷³, was developed by international adjudicators, in particular by the European Court of Human Rights in the famous *Belilos* case.¹⁷⁴ Later, it was embraced, with some variations, by the International Law Commission (ILC) in its 2011 Guide to Practice on Reservations to Treaties.¹⁷⁵ So, according to the severa-

with the object and purpose of the Convention; *otherwise, that State cannot be regarded as being a party to the Convention*', emphasis added.

¹⁷⁰ T Giegerich, *Treaties*, 'Multilateral, Reservations to', *Max Planck Encyclopedia of Public International Law* (online version 2020).

¹⁷¹ Ibid the Author is yet critical about the position embraced by the ICJ in its Advisory Opinion, arguing that: 'from a policy standpoint, the ICJ's strict solution is unsatisfactory because it eliminates any serious legal risk for the reserving party which is tempted to safeguard its individual interests by extensive reservations and expect nothing worse than ending up not being a party to the treaty'.

¹⁷² For a comprehensive analysis cf. KL McCall-Smith, 'Severing reservations' (2014) 63 *International and Comparative Law Quarterly* 599; B Simma and GI Hernández (n 163). For a critical position see LR Helfer, 'Not Fully Committed? Reservations, Risk, and Treaty Design' (2006) 31 *Yale Journal of International Law* 367, 380, arguing that the remedy of severance of illegitimate reservations ought to be analyzed in conjunction with the discipline of denunciation proper of a treaty. From this perspective, the Author highlights that: 'if a treaty body's decision to sever is erroneous – that is, if the reservation was in fact a condition of the state's consent to be bound – holding the state to the entire treaty without the benefit of the reservation binds the state to obligations to which it expressly declined to consent and from which it may not lawfully withdraw'.

¹⁷³ Cf. KL McCall-Smith, 'Severing reservations' (n 172) 611.

¹⁷⁴ *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) para. 60, in which the Court held that: 'the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration'. For insights in legal literature see I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: the *Belilos* Case' (1990) 33 *German Yearbook of International Law* 69; S Marks, 'Reservations Unhinged: The *Belilos* case before the European Court of Human Rights' (1990) 39 *International and Comparative Law Quarterly* 300.

¹⁷⁵ ILC, 'Guide to Practice on Reservations to Treaties' (2011) (hereinafter ILC Guide to Practice). According to guideline 4.5.1. '[a] reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect'. Still, as underlined by Pellet (n 167) 1092, declaring a reservation null and void, independently of the reactions of the other contracting parties, 'only partially solves the question of the status of the author of an invalid reservation in relation to the treaty'. From this perspective, the ILC Guide to Practice provides an answer to the latter question in guideline 4.5.3., representing the final, compromise solution following confrontation between the ILC and human rights bodies in the aftermath of the adoption of General Comment No. 24 by the Human Rights Committee (11 November 1994, CCPR/C/21/Rev.1/Add.6 (1994)) and of the Preliminary

bility principle, the State or international organisation that has formulated the illegitimate reservation would remain bound to the treaty without benefitting from the reservation¹⁷⁶, considered devoid of any legal effect.¹⁷⁷ Furthermore and importantly, the ILC Guide to Practice has made it clear that the formulation of an impermissible reservation ‘produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it’.¹⁷⁸

Against this background, the Commission's proposal, by foreseeing an alternative effect directly stemming from the devising of the impermissible reservation – *i.e.* the temporary withdrawal of the additional trade preference provided by the GSP+ scheme – radically reinvents the wheel *vis-à-vis* the international law regime concerning the legal effects of illegitimate reservations. As a matter of fact, whereas the Commission's proposal does embrace neither the total invalidity nor the severance doctrine formulated in the bosom of public international law, it envisages as the sole consequence stemming from the formulation of the illegitimate reservation the possible withdrawal of the additional tariff preferences granted under the GSP+ scheme, in order to induce the wrongdoing beneficiary State to compliance.¹⁷⁹ From this latter perspective, the *ratio* underpinning the triggering of the temporary withdrawal mechanism would thus be similar to the one grounding the application of countermeasures under international law¹⁸⁰, whose adoption in relation to impermissible reservations –

Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties as included in the Report of the International Law Commission on the work of its forty-ninth session, 12 May-18 July 1998, UN Doc A/52/10 (1998). For an extensive analysis see Pellet (n 167) 1092-1093.

¹⁷⁶ Cfr. ILC Guide to Practice guideline 4.5.3(2), reading: ‘[u]nless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation’.

¹⁷⁷ Ibid, in accordance with guideline 4.5.2, the objection to the invalid reservation is not considered necessary to declare its nullity. Nonetheless, it is specified that the State or international organisation ‘which considers that a reservation is invalid should formulate a reasoned objection as soon as possible’.

¹⁷⁸ Ibid Guideline 3.3.2. In this respect B Simma and GI Hernández (n 163) 74, argue that the wording of the guideline ‘clarifies the nature of the act of formulating a reservation, confining it strictly to the law of treaties, and in this sense settles in the negative the question of whether formulating a reservation could entail a breach of an international obligation’.

¹⁷⁹ Accordingly, the *ratio* underpinning the withdrawal mechanism proper of the EU GSP regime would be that of ‘rectify[ing] the shortcoming giving rise to the suspension’ of the trade benefits. From this perspective see critically C Portela (n 95) 44.

¹⁸⁰ Under Art 49(1) of the ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (hereinafter ILC Draft Articles), ‘[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act *in order to induce that State to comply with its obligations* under part two’, emphasis added. In this vein, the commentary accompanying the ILC Draft Articles underlines that countermeasures are ‘taken to achieve a specified end, whose justification terminates once the end is achieved’. See ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) 129. In legal doctrine see on the point FI Paddeu, ‘Countermeasures’, *Max Planck Encyclopedia of Public international Law* (online version 2015), 16, emphasizing that: ‘the countermeasure is not an end in itself, but only a means to an

given the absence of international responsibility – would appear to be excluded at the root.¹⁸¹

5.2. Legal obligations for GSP beneficiary countries *ex* Article 19 of the Commission's proposal

As anticipated, the Commission's proposal entails, in Article 19, a *generalis* withdrawal mechanism applicable to all the covered arrangements, which can be triggered at the occurrence of 'serious and systemic violations of principles laid down in the conventions listed in Annex VI'.¹⁸² Compared to the above-examined *specialis* withdrawal procedure, Article 19 displays a qualified character, restraining the Commission's margin of manoeuvre in the assessment of breaches occurred under the framework of the Paris Agreement on climate change. In fact, the Commission shall be entitled to act only for violations which, on the one hand, display the characteristic of being both systemic and serious and that, on the other, affect the principles inherently established by the PA. These two distinct facets are thus worth analysing.

At the outset, the Commission's proposal specifies that violations *ex* Article 19(1)(a) shall be both 'serious' and 'systemic', yet without providing further elucidation as to the effective meaning of these terms within the context of the GSP Regulation. This normative lacuna might pose some queries of utmost practical relevance since, as rightly noted by Karimova, the deployed terms have, thus far, resisted authoritative definition also in the bosom of public international law.¹⁸³ With specific

end. *If the countermeasure is not taken for the purpose of inducing the target State to comply with its obligations, it will be unlawful*', emphasis added. On the point see also DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 822, arguing that following the publication of the ILC Draft Articles '[t]he use of countermeasures for purely punitive reasons – without any hope or expectation that the malefactor state will actually back down from its offensive conduct – appears to be now precluded [by Art 49 of the ILC Draft Articles]'. Generally on the topic, cf. C Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994); L Sicilianos 'La codification des contre-mesures par la Commission du droit international' (2005) 38 *Revue Belge de Droit International* 447; EK Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010).

¹⁸¹ See guideline 3.3.2 of the ILC Guide to Practice (n 175) and Art 49 ILC Draft Articles (n 180), according to which countermeasures can be adopted only against a State which is 'responsible' for an internationally wrongful act.

¹⁸² Proposal COM (2021) 579 final (n 23) Art 19(1)(a).

¹⁸³ Cf. T Karimova, 'What Amounts to a "Serious Violation of International Human Rights Law"? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty' (2014) Geneva Academy Briefing Paper 6-2014, at www.geneva-academy.ch. Whilst an extensive examination of the concept of 'serious and systemic violation' goes beyond the scope of the present investigation, legal scholars have long debated on the concrete meaning of the expression, often paralleled with similar semantic constructs such as the well-known formula of 'gross and systemic violations'. Cf. *ex multis* P D'Argent, 'Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations fla-

regard to the word 'systemic', clarification could still be provided by the guidelines adopted by the Council of Europe¹⁸⁴, conceptualising the term as 'something that is spread throughout, wide and extensive, affecting a group or a structure as a whole'¹⁸⁵ and not concretising in a 'single occurrence'.¹⁸⁶

Yet, more complex reveals the task of giving shape and colour to the expression 'serious violation', with both quantitative¹⁸⁷ and qualitative¹⁸⁸ assessments having been advanced. Nonetheless, the concept of 'serious violation', for the purposes of the Commission's proposal, might, at a first reading, be assimilated to that of 'material breach' of a treaty, *ex* Article 60(3) VCLT.¹⁸⁹ In particular, the serious violation of the principles of the relevant conventions could be abstractly connected to the hypothesis foreseen by let. (b) of Article 60(3) VCLT, according to which a material breach consists of 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. This reading would result partially supported by a recent Commission's communication¹⁹⁰, which conceptualises the 'serious violations (...) of the Paris Agreement' as any 'failure to comply with obligations that *materially defeats the object and purpose of the agreement*'.¹⁹¹

Still, at a more careful analysis some relevant differences between the two formulations come to the surface. Firstly, it shall be noted that the definition of 'serious violation' put forward by the Commission introduces an express qualification of the

grantes du droit international des droits de l'homme et de violations graves du droit international humanitaire' (2005) 51 *Annuaire Français de Droit International* 27; D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2006).

¹⁸⁴ Council of Europe, 'Methodology for assessment of systemic human rights violations' (February 2020) at rm.coe.int.

¹⁸⁵ *Ibid* 9.

¹⁸⁶ *Ibid*.

¹⁸⁷ E.g. see Council of Europe, 'Eradicating impunity for serious human rights violations: Guidelines and reference texts' (2011) H/Inf (2011) 7 <<https://rm.coe.int/1680695d6e>>.

¹⁸⁸ Cf. D Shelton (n 183) 390, defining 'gross' violations as violations which are 'particularly serious in nature because of their cruelty or depravity'.

¹⁸⁹ The parallelism between the concept of 'material breach', *ex* Art 60 VCLT, and the notion of 'serious and persistent breach', proper of EU law, in particular *ex* Art 7 TEU, has also been noted in legal literature. See in this regard B Blagoev, 'Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality' (2011) 16 *Tilburg Law Review* 191, 230.

¹⁹⁰ Communication COM(2022) 409 final (n 77). The interpretative value of EU non-binding acts, including Commission's communications, has long been recognized by the European Court of Justice in the Union's legal order. See *inter alia* case C-322/88 *Grimaldi v Fonds des maladies professionnelles*, EU:C:1989:646, paras 18-19.

¹⁹¹ Communication COM(2022) 409 final (n 77), p. 11, emphasis added. It must still be pointed out that, as anticipated, the mentioned Commission's communication does not refer to the concept of 'serious violation of the Paris Agreement' in relation of the EU GSP regime, instead elaborating on it in the similar context of the trade and sustainable development chapters included in the Union's new generation free trade agreements.

breach, which shall notably defeat the object and purpose of the treaty ‘materially’.¹⁹² The latter term presumably relates to the gravity of the violation, as hinted at by the explanatory memorandum accompanying the Commission’s proposal, highlighting that the withdrawal procedure proper of the EU GSP regime shall be ‘activated in cases of exceptionally grave violations’.¹⁹³ To the opposite, the wording of Article 60(3)(b) VCLT does not qualify, in qualitative terms, the breach of the essential provision, thus appearing to ‘permit reactive termination or suspension of a treaty already in the event of what amounts to no more than a minor or trivial violation of an essential provision’.¹⁹⁴

Accordingly, and secondly, the definition of ‘serious violation’ elaborated by the Commission omits to specify that the breached provisions – *rectius*, the principles of the relevant conventions – shall present the requirement of essentiality, contrary to the conceptualisation of the material breach *ex* Article 60(3)(b) VCLT.¹⁹⁵ From this side of the spectrum, the European Commission, in evaluating whether to trigger the withdrawal mechanism *ex* Article 19(1)(a) of the proposal, would not need to

¹⁹² In other linguistic versions, the Communication relies on the terms ‘substantiellement’ or ‘sostanzialmente’ to qualify the gravity of the violation.

¹⁹³ Proposal COM (2021) 579 final (n 23), explanatory memorandum 3 and 7.

¹⁹⁴ O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 1106. The Authors yet also underline that Art 60(3)(b) VCLT ‘was obviously meant to cover only cases in which the violation seriously jeopardized the accomplishment of the treaty’s object and purpose’. See also M Xiouri, ‘Material Breach of a Treaty: Some Remarks on the Partial Award of 30 June 2016 in the Matter of an Arbitration between Croatia and Slovenia’ (2019) 8 *Cambridge International Law Journal* 131, 142, differently arguing that even a minor breach of an essential provision would constitute a breach under Art 60(3)(b) VCLT. From a similar perspective, Simma and Tams argue that ‘contrary to what might be expected, there is [in Art 60(3)(b) VCLT] no reference to the intensity or gravity of the breach; instead, the provision’s focus is on the character of the treaty obligation that is being breached’. Accordingly, the Authors come to the conclusion that ‘grave breaches of treaty provisions that are not essential’ would not account to a breach for the purposes of Art 60 VCLT Cf. B Simma and CJ Tams, ‘Reacting against Treaty Breaches’ in D B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2020) 569, 575.

Against this backdrop, legal doctrine has thus brought to the surface how Art 60(3)(b) VCLT would fail to straightforwardly address the issue of minor breaches of essential provisions, merely demanding ‘whether a (major or minor) breach affects the accomplishment of the object and purpose of the treaty.’ Cf. ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 743. For a different position see FL Kirgis, ‘Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties’ (1989) 22 *Cornell International Law Journal* 549, 552, arguing that, whereas the literal formulation of Art 60(3)(b) might suggest that any violation essential to the accomplishment of the object and purpose of a treaty could represent a material breach, ‘common sense suggests that the answer should be otherwise’. The Author hence emphasizes that a minor violation of an essential provision would not constitute a material breach of a treaty.

¹⁹⁵ By relying on the International Law Commission’s commentary to the draft on now Art 60 VCLT, Kirgis clarifies that essential provisions of an international treaty are not restrained to those ‘directly touching the central purposes of the treaty’. Instead, ‘other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all’, also if presenting an ancillary character. See FL Kirgis (n 194) 552. In this sense also ME Villiger (n 194) 743; A Aust (n 109) 260.

assess whether the specific provision of the relevant conventions shall be deemed essential for the attainment of the object and purpose of a given treaty.

Therefore, the concepts of 'material breach', *ex* Article 60(3)(b) VCLT, and of 'serious violation', *ex* Article 19(1)(a) of the Commission's proposal, whilst similar at a first glance, can, at a more careful analysis, be depicted as a photograph accompanied by its negative film. In fact, on the one hand, the VCLT foresees a violation (abstractly not further qualified) of a provision which shall be essential for the accomplishment of the object and purpose of a treaty.¹⁹⁶ On the other hand, the conceptualisation of 'serious violation' put forward by the Commission demands a grave violation of any (and not essential) principle proper of the relevant conventions, which might engender the attainment of their object and purpose.

Building on these considerations, it remains to be evaluated what can be deemed a 'principle' within the specific framework of the Paris Agreement on climate change. As anticipated, the latter entails a guiding principle, enshrined in Article 2(2) PA. Notably, the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.¹⁹⁷ Yet, as rightly noted in legal literature, whereas the clause has the 'potential to create legally binding obligations',¹⁹⁸ it is still 'framed carefully as to dilute its legal effect'.¹⁹⁹ According to Rajamani, this would specifically concretise in three major shortcomings, likely to render the provision's enforcement highly unfeasible. *In primis*, Article 2(2) PA fails to expressly identify the subjects tasked with implementation, passively referring to 'this Agreement'.²⁰⁰ Secondly, and concordantly, Article 2(2) PA does not deploy prescriptive language, but rather predictive, merely providing that the Paris Agreement on climate change 'will be [instead of shall be] implemented to reflect' the principle of differentiation. Yet, these shortcomings would not constitute major

¹⁹⁶ From this side of the spectrum, as underlined by Villiger, 'a typical example of [a violation *ex* Art 60(3)(b) VCLT], would be the non-performance, or the incorrect performance, of certain treaty provisions'. Accordingly, the requirement of essentiality would be connected to the function performed by specific provisions within a given treaty's regime. *Cf.* ME Villiger (n 194)742, emphasis added.

¹⁹⁷ Art 2(2) Paris Agreement on climate change (n 9) reads: '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'. It shall be noted that, besides the principle of common but differentiated responsibilities and respective capabilities, Art 2(2) PA also refers the equity. The latter has been understood in legal literature as a broader concept, which includes and embeds the principle of differentiation. See in this sense T Deleuil (n 134) 271; P Cullet (n 134) 306. For a more general account, *cf.* F Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University Press 2009) 186.

¹⁹⁸ L Rajamani, 'Guiding Principles and General Obligation (Article 2.2 and Article 3)' in D Klein and others (eds) (n 114) 133.

¹⁹⁹ *Ibid*

²⁰⁰ *Ibid.* From this perspective, the Author underlines that Art 2(2) PA does not expressly deploy clearer formulations, such as 'each Party' or 'all Parties' of the Agreement, formulations which would more straightforwardly identify the subjects tasked with implementing the principle under scrutiny.

deficiencies from the perspective of the enforcement of Article 19(1)(a) of the Commission's proposal. In fact, for the purposes of the latter, GSP beneficiary countries would not be directly bound by the wording of Article 2(2) PA, which does not result incorporated *expressis verbis* in the proposal.

Instead, the key challenge would relate to the third shortcoming identified by Rajamani, *i.e.* the absence of a clear definition or interpretation of the principle of differentiation within the remit of international climate change law, with Article 2(2) PA not providing 'an authoritative account of this principle'.²⁰¹ Whereas it is undoubtedly true that legal principles are, by their very nature, 'highly abstract',²⁰² the diverging conceptualisations of the principle of CBDRRC, put forward from the advent of the UNFCCC²⁰³, might thus hinder the effective enforcement of Article 19(1)(a) of the Commission's proposal.²⁰⁴

Eventually, from a policy standpoint, it is important to point out that the principle of differentiation has been traditionally conceived as a principle aiming at integrating, within the multilateral climate change regime, the necessities of developing and least developed countries, notably through the conception of less cumbersome obligations incumbent on them.²⁰⁵ It would thus result counterintuitive to picture a situation in which this category of countries, which are the beneficiaries of the EU GSP regime, would be in violation of the principle of CBDRRC. Conversely, it is interesting to note that several developing countries have recently blamed the Union to be in violation of the mentioned principle, in particular in the drafting of unilateral trade measures aiming at implementing the Paris Agreement on climate change.²⁰⁶

²⁰¹ Ibid.

²⁰² See on the point G Marín Durán (n 134) 82-83. The Author emphasises that 'legal principles are highly abstract, embodying general standards against which to evaluate governmental decision-making but leaving considerable room for interpretation. Put differently, the CBDRRC principle is open-ended: while it may sway decision-makers in a particular direction, it does not itself specify particular actions'.

²⁰³ See for an overview T Deleuil (n 134) 272-273. For an insight concentrating on the normative content of the principle of CBDRRC, cf. L Rajamani (n 134); I Ibrahim, T Deleuil and PD Farah, 'The Principle of Common but Differentiated Responsibilities in the International Regime of Climate Change' in P Farah and E Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016) 146, 147-148.

²⁰⁴ For a comprehensive overview of the evolution of the principle of differentiation in the international climate change regime see L Rajamani (n 135).

²⁰⁵ See from this perspective cf. T Deleuil (n 134) 271. The Author, citing D Shelton, 'Equity' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 639, 647, argues that the principle of differentiation aims at acknowledging that 'imposing equal obligations on subjects of law that are unequal in relevant ways may be perceived as unjust if they exacerbate inequalities or impose unfair burdens on those least able to bear them'.

²⁰⁶ This has been the case in relation to Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, which has given rise to stark opposition from the so-called 'BASIC' countries, *i.e.* Brazil, South Africa, India and China. See in this respect South African Government, *Joint Statement issued at the conclusion of the 30th*

6. Concluding remarks

As the present article has attempted to illustrate, climate-led conditionality, as a specific category of environmental conditionality, has gradually developed and imposed in the generalised scheme of preferences' regime.²⁰⁷ If the first EU GSP Regulation was essentially apt at sustaining industrialisation and an export-oriented economic growth in developing and least developed countries, with no consideration being attached to environmental variables²⁰⁸, the system presently in force envisages the attainment of ecological and climate objectives as an integral component of the Union's common commercial policy, as mandated by the EU founding treaties.²⁰⁹ In this vein, the Union would concomitantly act on the international scene as a 'good global actor'²¹⁰ – an expression which anchors the external projection of the EU to the objectives that it shall fulfill globally *ex* Article 3(5) and 21 TEU – and as a 'market power'²¹¹, deploying an economic leverage for the externalization of its trade-related environmental agenda.²¹²

Indeed, it has been illustrated that the current GSP Regulation, under the GSP+ arrangement, subordinates the granting and the temporary withdrawal of additional tariff preferences for vulnerable developing countries to, *inter alia*, the ratification and effective implementation of given international conventions, amongst which the UNFCCC and Kyoto Protocol are encompassed. The reliance on conventional instruments (rather than EU standards) as yardsticks of both positive and negative conditionality would thus seem to suggest an express valorisation, by the EU, of the obligations contracted by GSP beneficiaries at international level, thus contributing to the 'strict observance and development of international law', as mandated by the objectives grounding the Union's external action.²¹³ Moreover, the possibility of

BASIC Ministerial Meeting on Climate Change hosted by India on 8th April 2021 (2021) at www.gov.za, para. 19, reading: '[m]inisters expressed grave concern regarding the proposal for introducing trade barriers, such as unilateral carbon border adjustment, that are discriminatory and against the principles of Equity and CBDR-RC'.

²⁰⁷ In this sense see also L Huici Sancho, 'What Kind of "Generalized" Systems of Preferences?' (2006) 21 *European Journal of Law and Economics* 267, 282.

²⁰⁸ Cf. G Marín Durán and E Morgera (n 5) 147.

²⁰⁹ Regulation 978/2012 (n 19) Preamble, para. 2.

²¹⁰ For a comprehensive examination of the concept within the remit of the Union's external action, see E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar 2022).

²¹¹ C Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682.

²¹² This approach results confirmed by the explanatory memorandum which accompanies the Commission's proposal, in which it is stated that: 'an extension of negative conditionality to environmental and good governance conventions would create similar opportunities to engage on such issues in support of the UN Sustainable Development Goals (SDGs) and the contribution of the EU's green agenda to GSP beneficiary countries'. See Proposal COM (2021) 579 final (n 23), explanatory memorandum 7.

²¹³ Art 3(5) TEU. See also Art 21(2)(b) TEU.

withdrawing tariff preferences upon, in particular, the failure to implement the mentioned climate change conventions constitutes a hard enforcement mechanism for ensuring compliance with the obligations contracted at international level, accordingly making up for the current lack of an effective dispute settlement mechanism under the aegis of the UNFCCC.

This notwithstanding, shortcomings persist. Whereas the capability of the present GSP Regulation to effectively deliver on its sustainability objectives by means of a conditionality approach has been, as shown, mainly contested under an effectiveness perspective²¹⁴, it shall also be highlighted that the current piece of legislation stops short of moving with the times of the international climate change regime, failing to include amongst the relevant conventions the landmark Paris Agreement on climate change.

It hence comes as no coincidence that in advancing its proposal for a novel GSP regulation the European Commission has underscored the inevitability to ‘improve the GSP’s overall efficiency and effectiveness to respond to future challenges’²¹⁵, proceeding along a bipartite guideline: on the one hand, streamlining negative climate conditionality also to the general GSP and EBA schemes; on the other, updating the list of the relevant conventions as also to include the PA. From this side of the spectrum, within the unilateral wave which currently typifies the CCP²¹⁶, the Commission’s proposal interestingly still aims at valorising the respect of international environmental law, continuing to refer to international standards as yardsticks of both positive and negative conditionality.

The article has then elaborated on the normative implications connected to the advanced prospect of subjecting all GSP arrangements to the respect of the Paris Agreement on climate change. As discussed, it can be inferred that the Commission’s proposal upholds a twin-track approach in the potential retraction of trade preferences at the occurrence of failures to effectively comply with the obligations and undertakings descending from the Paris Agreement on climate change, with GSP+ beneficiaries having to withstand a heavier burden, particularly represented by the all-embracing commitment to implement ‘integrally’²¹⁷ the PA. On the contrary, GSP and EBA beneficiary countries would undergo, in the light of the *generalis* withdrawal procedure enshrined in Article 19 of the proposal, the sole obligation to refrain from bringing about qualified breaches of the Paris Agreement on climate

²¹⁴ See *inter alia* W Zhou and L Cuyvers, ‘The Effectiveness of EU’s Generalised System of Preferences: Evidence from ASEAN Countries’ (2012) 11 *Journal of International Trade Law and Policy* 65; J Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 285; C Portela (n 47).

²¹⁵ Proposal COM (2021) 579 final (n 23) 2.

²¹⁶ On the point see specifically T Verellen and A Hofer, ‘The Unilateral Turn in EU Trade and Investment Policy’ (2023) 28 *European Foreign Affairs Review* 1.

²¹⁷ Art 2(11) Proposal COM (2021) 579 final (n 23).

change, *i.e.* 'serious and systemic violations of the principles laid down'²¹⁸ thereof. And yet, this bifurcation in the withdrawal mechanism of tariff preferences comes as no surprise, since the more demanding environmental obligations incumbent on GSP+ beneficiaries logically represent the counterbalance of the conferred additional tariff preferences.²¹⁹

Whilst, at first glance, it could be concluded that the *specialis* withdrawal mechanism established by the proposal denotes the most vigorous system to guarantee effective implementation of the Paris Agreement on climate change, it has been maintained that the latter presents systemic characteristics which may constitute an obstacle for the effective operationalisation of Article 15 of the Commission's proposal. These can be brought back to two major deficiencies: generally, the presence of few substantive obligations, worded in legally binding terms and incumbent on individual signatories; specifically, the exigence to duly consider the differential status enjoyed by developing country parties to the PA, these latter ones being subject to fewer obligations in comparison to developed country signatories.

On the other side of the spectrum, it has been emphasized that the *generalis* withdrawal mechanism mandated by Article 19(1)(a) of the Commission's proposal may be triggered only at the occurrence of a temporally generalised violation of the principle of differentiation, grave enough to engender an impact on the object and purpose of the Paris Agreement on climate change. In this respect, it can be claimed that the most severe setback in the implementation of the aforesaid proposal's provision would be to ascertain whether the principle of common but differentiated responsibilities could, *de facto*, undergo enforcement. In view of the limitations illustrated in section 5 this eventuality does not, to date, reveal plausible.

In light of the foregoing, the recent decision of the European Parliament and Council to extend the current GSP Regulation until 31 December 2027, while continuing to negotiate on the 2021 Commission's proposal, might thus represent an opportunity for the legislators to rethink from the inside the embraced approach to climate conditionality, being assigned the prospect to foster the GSP Regulation currently in force along a bipartite line.

On the one side, the assertion according to which negative conditionality shall represent the backbone of the novel GSP regulation should be recalibrated. As previously noted, the majority of legal commentators have considered the 'stick approach' to trade conditionality to be ineffective in fostering sustainable development beyond the Union's borders.²²⁰ Moreover, the present article has underlined, from an international climate change law perspective, the normative deficiencies which would render the triggering of both the *specialis* and the *generalis* withdrawal procedures highly trivial in practice.

²¹⁸ Art 19(1)(a) Proposal COM (2021) 579 final (n 23).

²¹⁹ In this sense also T Lebzelter and A Marx (n 42) 4.

²²⁰ See *inter alia* C Portela (n 47); K Yaraslau (n 84).

Accordingly and on the other side, positive climate conditionality could be conferred a more prominent role within the scaffold of the proposal, in the light of empirical evidence suggesting its more effective contribution to the furthering of environmental and climate protection in beneficiary countries.²²¹ A constructive contribution to the streamlining of positive, rather than negative, conditionality has been put forward by the European Parliament, suggesting to subordinate also the granting of general GSP tariff preferences to the ratification of the relevant conventions.²²² Additionally, in the enhancement of positive conditionality, attention shall be bestowed to the monitoring of the maintenance of ratification, along with the implementation of, the relevant conventions. Under this viewpoint, the proposition of the European Commission to introduce a ‘plan of action’ for implementation is hence to be welcomed.²²³ Yet, the proposal fails to detail the content of the plan, whilst its normative bindingness remains blurred.²²⁴ Improvements in this regard have been put forward by the European Parliament, integrating definitory elements which shall be proper of the plan²²⁵ while also explicitly subjecting the granting of the additional tariff preferences upon, amongst other things, whether the beneficiary country has ‘started implementing’²²⁶ it. Nonetheless, it remains to be seen whether the proposed amendments will, eventually, see the light of day.

In conclusion, whilst certainly ambitious on paper, the concrete effectiveness of the current GSP regime in fostering climate protection worldwide remains dubious, biting off more than it can chew.

²²¹ Cf. T Lebzelter and A Marx (n 42).

²²² European Parliament, ‘Report on the Proposal for a Regulation of the European Parliament and of the Council on Applying a Generalised Scheme of Tariff Preferences and Repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council (COM(2021)0579 – C9-0364/2021–2021/0297(COD))’ (17 May 2022) A9-0147/2022 at www.europarl.europa.eu.

²²³ According to Art 9(d) Proposal COM (2021) 579 final (n 23), the ‘binding undertaking to maintain ratification of the relevant conventions and to ensure effective implementation thereof’ shall be accompanied by a ‘plan of action for the effective implementation of the relevant conventions’.

²²⁴ In particular, it would not be clear from Arts 9-10 of Proposal COM (2021) 579 final (n 23), whether the granting of the status of GSP+ beneficiary shall be subordinated to the respect of the plan of action.

²²⁵ In accordance with amendment 35, introducing Art 2(10a) to the original Commission’s proposal for a novel GSP Regulation, the plan of action is defined as: ‘a forward looking and priority-oriented list of measures, including legislative measures, to be adopted and actions to be taken by a beneficiary country necessary to effectively implement the core international conventions referred to in Annex VI, and based on, *inter alia*, available information and in particular the most recent conclusions of the monitoring bodies of the conventions; the plan of action shall also provide for a timeframe for each listed measure and action and identify as precisely as possible the relevant institution or structure responsible in the beneficiary country for its implementation and oversight. Each listed measure and action, or set thereof, constitute the benchmarks for the progressive suspension of tariffs, as agreed in the tariff suspension schedule included to the plan of action’. See European Parliament (n 222).

²²⁶ Ibid See Amendment 52.