Trade Conditionality in the EU and WTO legal regimes[1]

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1. Introduction

Conditionality can be defined as granting benefits to a country subject to the beneficiary meeting certain conditions (Kishore, 2017), or as a mechanism to bring about policy reforms or impose policies that the beneficiary country would not voluntarily choose (Morrissey, 2005).

The European Union (EU) often uses conditionality in its trade policy, linking preferential access to its market to the achievement of Non-Trade Policy Objectives (NTPOs) in its trading partners. Indeed, the EU has often exploited its commercial power as a diplomatic tool.[2] It has been argued that "trade policy has always been the principal instrument of foreign policy for the EU" (Sapir, 1998). Access to the EU market, combined with financial aid, economic cooperation and infrastructural links have been used to foster the Union's geopolitical interests and NTPOs such as sustainable development, human rights, and good governance.

In this paper, we explore the design, scope and effectiveness of conditionality in EU trade policy. We focus on conditionality clauses related to NTPOs included in two main trade policy tools of the EU: trade agreements and the Generalized System of Preferences (GSP). Section 2 analyzes EU trade agreements, while Section 3 focuses on its GSP program. Finally, Section 3 concludes.

2. Conditionality in EU Trade Agreements

2.1. EU Trade Agreements

One general trend of the last few decades is the proliferation of regional trade agreements. There are around 280 of these agreements in force, with many more being negotiated, most of which take the form of free trade agreements (FTAs).[3]

[1] This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 770680.

[2] The EU is the world's largest exporter of manufactured goods and services and is itself the biggest export market for around 80 countries. Together, its current 28 members account for 16% of world imports and exports. See European Commission, http://ec.europa.eu/trade/policy/eu-position-in-world-trade/.

[3] The World Trade Organization (WTO) defines regional trade agreements as reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions. As of 1 May 2018, 287

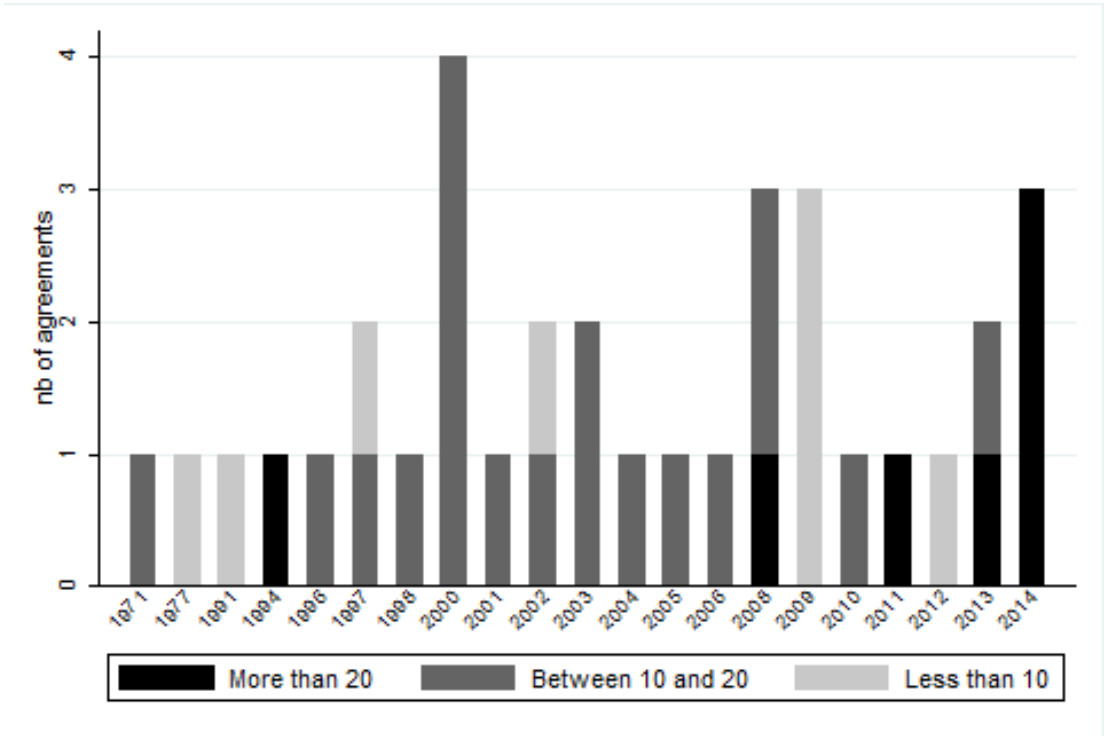
The EU has currently 36 agreements in force.[4] All agreements take the form of FTAs, with the exception of the one with Turkey, which is a customs union. Other agreements (with Canada, Singapore, Japan) have been signed but are not yet fully in force, and several others are under negotiation.

Trade agreements have not only increased in number, but have also become "deeper", encompassing many provisions that go beyond traditional trade policy. The World Bank dataset on the content of trade agreements (Hofmann *et al.*, 2018) can be used to document the increasing depth of EU trade agreements.

We focus on the 34 EU trade agreements that are in the World Bank dataset and are currently in force.[5] For each agreement, the dataset contains information on 52 different policy areas, falling both within and outside the current WTO mandate. Based on Hofmann *et al.* (2018), the depth of an agreement is computed as the simple sum of the policy areas that are covered by the agreement and that include legally enforceable provisions.

Figure 1 presents the depth of EU trade agreements over time. We classify agreements according to three different categories of depth: FTAs that cover more than 20, between 10 and 20, and less than 10 policy areas with legally enforceable provisions.

Figure 1. Number of agreements over time by depth (i.e. number of legally enforceable provisions)



RTAs were in force. These correspond to 459 notifications from WTO members, counting goods, services and accessions separately (WTO Secretariat).

[4] The European Community (EC) Treaty is excluded. The European Economic Area agreement (EEA) and the EC agreements with the individual members of the European Free Trade Association (EFTA), including Iceland, Liechtenstein, Norway and Switzerland, are considered as one agreement. The EU RTAs in force are available at: http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=918&lang=1&redirect=1.

[5] The World Bank dataset does not cover two EU agreements which are currently in force, namely the EU-Ghana and EU-Southern African Development Community Agreements.

The World Bank dataset reveals that the depth of EU trade agreements has increased over time. Agreements concluded between 1971 and 2007 are shallower, covering on average 12.95 areas.[6] Since 2008, the average number of areas covered by legally enforceable provisions has increased to 17.85.

2.2. NTPOs in EU Trade agreements

In order to have an overview of conditionality regimes within EU trade agreements, we rely again on the World Bank dataset and extract information on four NTPOs related to conditionality, namely human rights, labor, social matters, and environment. In the World Bank dataset, these four issues are defined as follows: provisions on *human rights* are related to the respect of human rights; *labor standards* refer to the regulation of the national labor market, the affirmation of International Labor Organization (ILO) commitments and enforcement; *social matters* include coordination of social security systems and non-discrimination regarding working conditions; finally, *environmental provisions* are related to the development of environmental standards, the enforcement of national environmental laws, and the establishment of sanctions for violation of environmental laws.

In the spirit of Horn *et al.* (2010), in Table 1, we analyze whether EU trade agreements include provisions related to these four issues and, if so, to what extent they are legally enforceable. We extend the study of Horn *et al.* (2010) to 29 EU trade agreements.[7]

Notice that around two thirds of EU trade agreements include provisions on human rights, social matters, and the environment, while around one third of the agreements also cover labor market regulations. When it comes to enforceability, it appears that the provisions on human rights cannot be enforced in any of the agreements.[8] Labor and environmental provisions are enforceable in 3 out of the 8, respectively 20, agreements covering them. As for social matters, they can be enforced in 8 out of the 19 agreements where they are included.

18 agreements incorporate provisions on at least 3 NTPOS. Notice, however, that only 10 of these agreements contain legally enforceable provisions in at least 1 of the policy areas. There are only 3 agreements in which more than two types of NTPOs can be enforced, namely the EEA, the EU-Cariforum and the EU-Moldova agreements. Although the agreements concluded after 2012 include all four types of NTPOs, none of the provisions related to these issues are enforceable (except for the EU-Moldova agreement).

Overall, as it can be seen from the bottom row of Table 1, only 22.22% (14 out of 63) of all provisions mentioned in the text of the 29 agreements under analysis are legally enforceable. Thus, while NTPOs are included in most EU trade agreements, they are usually not enforceable. As pointed out by Horn *et al.* (2010), "the EU agreements display a fair deal of legal inflation."

[6] One notable exception is the European Economic Area (EEA) in 1994, which is deeper than the other trade agreements concluded during the same period, including legally enforceable provisions in 36 areas.

[7] Horn *et al.* (2010) examine 14 trade agreements concluded by the EU with other WTO members before 2008 and analyze 52 policy areas, which fall both within and beyond the WTO mandate. Out of the 36 EU agreements in force, we retain the 29 agreements that are included in both the World Bank dataset and the DESTA dataset described below.

[8] This conclusion is solely based on Table 1, which relies on the World Bank dataset. In the next section, we will reach a different conclusion with respect to the enforceability of provisions related to human rights.

Table 1. Enforceability of NTPOs in the EU trade agreements (World Bank Classification)

Agreement (year of entry into force)	Human Rights		Labor		Social Matters		Environment		Total	
	AC	LE	AC	LE	AC	LE	AC	LE	AC	LE
EC-Syria (1977)									0	0
EU-Andorra (1991)									0	0
EEA (1994)									3	3
EC-Turkey (1996)									0	0
EC-Faroe Islands (1997)									0	0
EC-Tunisia (1998)									3	1
EC-Israel (2000)									3	1
EC-Mexico (2000)									3	0
EC-Morocco (2000)									3	1
EC-South Africa (2000)									3	0
EC-FYR Macedonia (2001)									3	1
EC-Jordan (2002)									3	0
EU-San Marino (2002)									2	1
EC-Chile (2003)									3	0
EC-Lebanon (2003)									1	0
EC-Egypt (2004)									3	0
EC-Algeria (2005)									3	1
EC-Albania (2006)									3	1
EC-Bosnia Herzegovina (2008)									0	0
EC-CARIFORUM (2008)									3	2
EC-Montenegro (2008)									0	0
EC-Côte d'Ivoire (2009)									0	0
EU-Serbia (2010)									0	0
EU-Korea (2011)									2	0
EU-Central America (2013)									4	0
EU-Colombia and Peru (2013)									4	0
EU-Georgia (2014)									4	0
EU-Moldova (2014)									3	2
EU-Ukraine (2014)									4	0
Total	16	0	8	3	19	8	20	3	63	14

Note: AC=area covered, LE=legal enforcement. In columns AC, the green cases indicate that the provisions are mentioned in the agreement, whereas the white cases indicate that the provisions are not included in the agreement. In columns LE, the white cases indicate that there are no legally enforceable provisions in an area, the green cases indicate legally enforceable provisions, whereas the grey cases indicate provisions that are legally enforceable, but explicitly excluded from the dispute settlement provision.

As an alternative way to examine the coverage of NTPOs in EU trade agreements, we use the Design of Trade Agreements (DESTA) dataset from Dür *et al.* (2014). In particular, we rely on data from the DESTA project on the degree of legalization of Non-Trade issues (NTIs) in EU trade agreements. While the DESTA database covers the four types of NTPOs included in the World Bank dataset, it relies on a different classification, bundling together two of the previous issues. Thus, the NTIs fall under three main categories: human rights, labor and social matters, environment. The concept of legalization is developed in Abbott *et al.* (2000):

"Legalization refers to a particular set of characteristics that the agreements may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. Obligation means that states are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules. "

Based on this concept, Lechner (2016) computes the degree of legalization, proceeding as follows. She considers all provisions on NTIs included in an agreement and classifies these provisions according to three dimensions of legalization: obligation, precision and delegation. A score for each dimension is computed as the total number of areas covered. The score for *obligation* is given by the number of clauses among the following ones: pre-conditionality clauses, sanctions in case of violation of NTIs, obligations to respect NTIs, obligations not to conduct economic actions to lower NTIs, cooperation and dialogue on NTIs, improvement of existing NTIs. The score for *precision* is computed as the number of international agreements referred to in the agreement for a given category of NTIs/or the number of specific non-trade issues within a broader class of NTIs. Finally, the score for *delegation* is the number of organisms monitoring the implementation of NTIs, filing disputes, solving disputes and implementing the decision with respect to NTIs. The final legalization score (for an agreement and for a type of NTI) is then the sum of the scores of the three dimensions. The higher the score, the higher the degree of legalization.

Table 2 presents the degree of legalization by type of NTIs in 32 EU trade agreements.[9] Looking at the last column, we can see that the degree of legalization of NTIs is higher in more recent EU trade agreements: on average, the overall degree of legalization of agreements concluded after 2008 is 32.71, while the corresponding degree for earlier agreements is 15.22.

The bottom row of the table reveals that, of the three NTIs, human rights is characterized by the lowest degree of legalization: during the entire sample period, EU trade agreements have an average legalization score for human rights of 5.65; the corresponding scores for labor and social matters is 9.18, while the score for environmental regulations is 8.03.

There is also heterogeneity across agreements with respect to the degree of legalization of a particular NTI. In particular, the degree of legalization related to human rights varies a lot even across recently negotiated agreements: while the ones with the Eastern partners (Georgia, Moldova and Ukraine) are characterized by a high degree of legalization, the agreements with Singapore and Vietnam have very low scores. With respect to the other two NTIs, the degree of legalization is higher in the "new

[9] The DESTA dataset encompasses the 29 EU agreements covered by the World Bank dataset, as well as three recently signed agreements, namely the EU-Canada, EU-Singapore and EU-Vietnam agreements.

generation" trade agreements. This finding is in line with the fact that recent trade agreements include a separate chapter on trade and sustainable development (TSD), regarding labor and social matters and environmental standards. The inclusion of TSD chapters is discussed in detail in the next section.

Table 2. Degree of legalization of NTIs in EU trade agreements (DESTA Classification)

Agreement (year of signature)	Human Rights	Labor and Social Matters	Environment	Total
EC-Syria (1977)	2	3	2	7
EU-Andorra (1989)	2	2	2	6
EEA (1992)	2	6	4	12
EC-Turkey (1995)	2	3	2	7
EC-Faroe Islands (1996)	2	2	2	6
EC-Tunisia (1995)	5	7	3	15
EC-Israel (1995)	6	7	5	18
EC-Mexico (2000)	2	2	2	6
EC-Morocco (1996)	5	10	3	18
EC-South Africa (1999)	8	8	5	21
EC-FYR Macedonia (2001)	7	10	6	23
EC-Jordan (1997)	7	6	4	17
EU-San Marino (1991)	0	3	3	6
EC-Chile (2002)	11	10	9	30
EC-Lebanon (2002)	5	7	4	16
EC-Egypt (2001)	8	8	5	21
EC-Algeria (2002)	6	7	6	19
EC-Albania (2006)	8	8	10	26
EC-Bosnia Herzegovina (2008)	8	7	10	25
EC-CARIFORUM (2008)	3	15	15	33
EC-Montenegro (2007)	11	8	8	27
EC-Côte d'Ivoire (2008)	4	4	4	12
EC-Serbia (2008)	11	7	8	26
EU-Korea (2010)	4	16	15	35
EU-Central America (2012)	8	14	13	35
EU-Colombia and Peru (2012)	4	17	16	37
EU-Georgia (2014)	9	16	15	40
EU-Moldova (2014)	10	16	14	40
EU-Ukraine (2014)	9	15	15	39
EC-Canada (CETA) (2016)	5	18	17	40
EC-Singapore (2016)	3	14	14	31
EC-Vietnam (2016)	4	18	16	38
Total	181	294	257	732

2.3. Conditionality in EU Trade Agreements

Over the last decades, the EU has abandoned its political neutrality and started to use its trade-based market power to pursue NTPOs in its trade agreements with both developing and developed countries.

EU trade agreements treat human rights conditionality separately from other forms of conditionality (related to labor rights, social matters and environmental standards). In what follows, we thus maintain this distinction and analyze conditionality regimes with respect to human rights and other NTPOs separately.

2.3.1. Human rights conditionality

Human rights were first mentioned in an EU trade agreement in Article 5 of the 1989 Lomé IV Convention with African Caribbean Pacific (ACP) countries (Bartels, 2013). However, this clause was rather an affirmation of the respect for human rights, without allowing the EU to impose any sanctions in case its trading partners under the arrangement violated human rights. Moreover, human rights were not considered as an essential part of the agreement (Miller, 2004).

Starting in the early 1990s, human rights provisions have been included in EU trade agreements on a more systematic basis (Velluti, 2015). The clauses have been formulated in such a way as to gain a more important place within the arrangement. Also, references were made to international human rights instruments, such as the 1948 Universal Declaration of Human Rights or the 1975 Helsinki Final Act and the 1990 Charter of Paris for a new Europe. Although a sanction-based mechanism for violations was still absent, the wording for human rights provisions was stronger than in the previous agreements (Miller, 2004). This is notably the case for the agreements concluded by the EU with Latin American partners, such as Argentina, Chile, Uruguay and Paraguay (Donno and Neureiter, 2018).

In 1991, the Council of Ministers adopted a positive approach towards the inclusion of human rights in its agreements, based on political dialogue, but provisions for sanctions against violating states were also included as a last resort (Miller, 2004). In 1992, the Council officially stated that respect for democratic principles forms an essential part of EU trade agreements. Thus, the agreements concluded with the Baltic States, Albania and other third countries during that period referred to human rights as an “essential element”. A mechanism allowing to impose sanctions or terminate the agreement in case of violations was also set under Article 60(3)(b) of the Vienna Convention. The clause included in these agreements stipulated that: “The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs”.

The EU has progressively shifted towards hard “human rights conditionality” in all its trade agreements starting in 1995. Compliance with human rights has been made an “essential element” of the EU reciprocal trade agreements and the “essential elements” clause was systematically accompanied by a “mechanism for consultation and suspension of cooperation should either party deem the other to be in violation” (Donno and Neureiter, 2018). This approach has been incorporated in all types of trade signed after 1995, including the association agreements with membership candidates, the Euro-Med Associations Agreements, the cooperation agreements with Asian and Latin American partners, the Lomé/Cotonou Agreement, etc.

With the entry into force of the Treaty of Lisbon, in 2009, the Charter of Fundamental Rights is made legally binding and human rights become a prominent value promoted by the EU through its trade policy. The treaty amends the EU’s two founding treaties, which are renamed as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Thus, the Article 21 (3) of the TEU states that trade is part of the external action of the EU, and trade policy must be conducted in line with the EU’s values, in which human rights prevail (Beke *et al.*, 2014).

All FTAs negotiated by the EU since the Treaty of Lisbon, namely the "new generation" FTAs, are part of broader political agreements, featuring cooperation in the field of human rights.[10] In all these agreements, the human rights clause is divided in two parts. The first one is an "essential elements" clause, included either in the agreement directly or through linkage to political agreements. This clause describes the principles that the parties engage to abide by, which can cover human rights, democracy and the rule of law.

The second one is a "non-execution" clause enabling one party to take "appropriate measures" in case the other party violates the "essential elements" clause. This formulation is known as the "Bulgarian" clause, since the "appropriate measures" to be taken are not specified, allowing for some degree of flexibility.[11] They may well refer to the suspension/termination of the agreement or other types of sanctions. However, according to the Commission, sanctions under the "non-execution" clause should be reserved only for the most extreme and flagrant violations of human rights (Velluti, 2016; Beke *et al.*, 2014; Bartels, 2013). It is stated that the parties should choose measures that least disturb the normal operation of the agreement. Since the measures should be proportional, this renders the possibility to terminate the agreement very unlikely. In certain agreements, a potential dispute settlement mechanism can also be set with respect to the human rights clause.

All in all, given the way human rights provisions are incorporated in EU trade agreements, they can be considered as legally binding and enforceable.[12]

2.3.2. Conditionality related to other NTPOs

The other NTPOs that the EU seeks to pursue through its trade policy (labor rights, social matters, and environmental standards) are usually tackled together, under the umbrella of "sustainable development".

Sustainable development has been referred to in EU trade agreements since the mid-1990s. The first agreement to mention the principle of sustainable development was the one with Hungary in 1993, followed by other agreements which have gone further by including sustainable development as an objective. However, it was not until the Treaty of Lisbon in 2009 that sustainable development became one of the key principles of the EU's trade policy (Velluti, 2016). The promotion of sustainable development through the EU's external action is clearly stipulated in Article 3(3) and (5) and Article 21 (2)(d) and (f) TEU, and Article 11 TFEU (Beke *et al.*, 2014).

The approach towards sustainable development has been given a new dimension in EU's "new generation" trade agreements, with the negotiation of TSD chapters, including provisions on labor and environmental standards. The first agreement to include a TSD chapter was the 2008 EU-Cariforum Economic Partnership Agreement. All EU FTAs concluded after 2008 and which are currently in force

[10] The economic partnership agreements with the ACP countries are framed within the Cotonou agreement. As such, the FTA with Korea (2010) is included in the EU-South Korea Framework Agreement, the FTA with Colombia and Peru (2012) is linked to a partnership and cooperation agreement with the Andean Community, while the Association agreements with Central America (2012) and with Georgia, Moldova and Ukraine (2014) cover both trade and political matters. Among the recently signed FTAs, the EU-Canada FTA is framed into a Strategic Partnership Agreement, the EU-Japan FTA is framed into an economic and partnership agreement, and EU-Singapore FTA is framed in a partnership and cooperation agreement.

[11] The "Bulgarian clause" replaced the "Baltic clause", which was specific to Baltic states before their accession, being characterized by a strict language and stating that a party could immediately suspend the agreement should human rights be violated.

[12] It should be stressed that this is in contrast with the conclusion we reached above based on the World Bank dataset, according to which human rights provisions are not legally enforceable.

include TSD chapters. This is the case for EU's FTAs with Central America, Georgia, Moldova, Ukraine, Peru and Colombia, and South Korea. Similarly, TSD chapters have also been included in the recently signed agreements, such as the EU-Singapore FTA, the EU-Vietnam FTA, the Comprehensive Economic and Trade Agreement (CETA) with Canada, or the EU-Japan FTA.

The underlying mechanisms of TSD chapters are common to all EU trade agreements, although there might be variations across agreements, depending on the context. First, TSD chapters include "substantive standards", meaning that there are minimum requirements for both parties to implement certain multilateral obligations (Harisson *et al.*, 2018). In the case of labor provisions, these minimum obligations refer to the ILO core labor standards, which are already binding on the parties due to their membership of the ILO.[13] When it comes to the environmental standards, the obligation to implement the multilateral environmental agreements is essentially a reaffirmation of obligations already binding on the parties under those agreements. Overall, it appears that these provisions are not new to any party (Bartels, 2013).

Second, TSD chapters include "procedural commitments", through which the parties engage in dialogue and co-operation. Moreover, they commit to transparency when introducing new standards and agree to monitor and review the impact of the agreement. The parties also agree not to undermine their existing labor and environmental standards and to seek to enhance the existing regulations (Harrison *et al.*, 2018).

Third, the implementation of TSD chapters is managed through "institutional mechanisms". As described by Harrison *et al.* (2018), "*Committees of state/EU officials from the two parties are established to oversee the implementation of the TSD chapter. These are advised by a civil society mechanism (CSM) that takes the form of a Domestic Advisory Group (DAG) including representatives of business, trade unions, non-governmental organizations (NGOs) and occasionally academia, with the DAGs of the two parties meeting together on an annual basis*.".

In contrast with the human rights clauses, the principle of sustainable development has not been considered as an obligation and the agreements do not consider the possibility of violating this principle (Bartels, 2013). While TSD chapters might promote compliance with international agreements on labor and environment, they do not appear equipped to address non-compliance in practice (Campling *et al.*, 2016; Marx *et al.*, 2016; Ebert, 2016; Marx and Soares, 2015; Velluti, 2015; Vogt, 2015).

2.4. Assessment of conditionality provisions in EU trade agreements

While the general framework of conditionality provisions is common to all EU trade agreements, there might be important differences in the drafting, scope and implementation of NTPOs across agreements, which may jeopardize the coherence and effectiveness of EU conditionality altogether. This section discusses the design, the implementation and the effectiveness of conditionality provisions in EU trade agreements, maintaining the distinction between human rights provisions and the other NTPOs.

[13] These minimum standards are also partly covered by the human rights clause, as acknowledged by the European Commission (Bartels, 2013).

2.4.1. Assessment of human rights provisions

Given the differences in the wording, scope and implementation of human rights provisions in the various trade agreements, serious questions emerge regarding the coherence and effectiveness of EU conditionality.

There are important differences with respect to the drafting of the human rights provisions may arise between EU trade agreements. The areas covered by the "essential elements" clauses and the references to international instruments used to substantiate these clauses may be different depending on the trading partner. Moreover, the "appropriate measures" to be taken under the "non-execution" clause may also differ across partners.

A comparison between three recently signed agreements (i.e. EU-Canada, EU-Japan and EU-Singapore FTAs) illustrates the inconsistency of the EU in drafting human rights provisions. In the case of the EU-Canada FTA, human rights conditionality was negotiated in the parallel Strategic Partnership Agreement (SPA) and linked to CETA in Article 28(7). The SPA includes an "essential elements" clause with an extensive scope and the "non-execution" clause allows for "appropriate measures" to be taken, in case of serious and substantial human rights violations. These measures refer to the irreversible termination of the agreement. Considering the track record of Canada in terms of respect of human rights, the wording of the "appropriate measures" clause is particularly strong (Meissner and McKenzie, 2018). In the case of CETA, the EU thus took a very strong stance in favor of the inclusion of the human rights provisions, emphasizing its forefront role as a promoter of NTPOs.

A similar situation occurred in the case of the EU-Japan FTA. Both countries share a similar view when it comes to human rights, except for the death penalty, which is allowed in Japan. While Japan was opposed to the inclusion of an "essential elements" clause in the SPA related to the agreement, the EU had a very strong position and the EU-Japan FTA followed the same pattern as the EU-Canada FTA (de Prado, 2017).

By contrast, the EU took a softer stance on human rights in its agreement with Singapore. In this case, Singapore did not accept to sign an agreement that would imply a change in its position on the death penalty, human rights, or governance. As this issue could have jeopardized the entire agreement, the EU took a weaker position, recognizing Singapore's human rights practices through a side letter to the human rights conditionality. As Mckenzie and Meissner (2018) argue, in the case of the EU-Singapore FTA, the pure commercial interests of the EU prevailed over its NTPOs.

The association agreements with Georgia, Moldova and Ukraine provide another example of the EU's heterogeneous approach with respect to human rights in its trade agreements. According to Velluti (2016), two different forms of conditionality are included in the association agreements. First, the "essential elements" clause partly incorporates provisions referring to the respect for human rights, democracy, and the rule of law. Second, it is stated that the Eastern Partners can gain additional access to the EU Single Market, should they successfully implement their legislative commitments. The human rights clauses incorporated in these agreements are different from other FTAs, due to the legal and political features of these countries. Moreover, beyond its comprehensiveness and complexity, the EU-Ukraine agreement is distinct from the two other association agreements in that it is characterized by strict conditionality. Thus, progress in cooperation with the EU depends on the respect for common values and progress in achieving convergence with the EU in political, economic and legal areas (Ghazaryan, 2015).

In terms of effectiveness, the mechanism for monitoring the respect of human rights in the trading partners appears to be problematic, as there are no habilitated organs to monitor the implementation

of the clauses (Bartels, 2013). Issues related to human rights provisions are to be discussed within the general committee in charge of overseeing and managing the agreement, or by parliamentary committees which are established by a number of agreements, but there is no apparatus in charge of monitoring the respect of human rights. However, in exceptional cases, the parties can take "appropriate measures" without consulting any of these committees. Thus, there are no standard procedures to investigate the cases where human rights are violated across EU trade agreements.

Finally, while the EU includes human rights conditionality in many of its trade agreements, it has never applied it, although there have been several instances in which its trading partners have violated human rights (Beke *et al.*, 2014).[14] Overall, the human rights conditionality policy lacks a proper mechanism for implementation, monitoring, and evaluation of the effectiveness of sanctions.

2.4.2. Assessment of other NTPOs

When it comes to the TSD chapters, their main value added is to enhance dialogue and cooperation in order to attain sustainable trade objectives.

While the monitoring processes within the TSD chapters are rather complex, with several specialized bodies and mechanisms ensuring a continuous dialogue with civil society groups, there are concerns regarding their power to address non-compliance with the labor and environmental objectives within EU trade agreements (Marx *et al*., 2017). Moreover, the TSD chapters do not allow a unilateral enforcement of the sustainable development obligations by any party and are excluded from the normal dispute settlement procedures established under the agreements. Disputes on labor and environmental matters "should be resolved in a self-contained system of dispute settlement involving consultations followed by referral to a panel of experts" (Bartels, 2013).

As previously highlighted, labor and environmental provisions included in TSD chapters do not involve enforcement mechanisms (Ebert and Posthuma, 2011). Therefore, the resolution of issues related to sustainable development is based on non-sanction procedures. This promotional approach to sustainable development in EU trade agreements and the dialogue- and cooperation-based solutions in case of violations have been considered "as lacking the necessary vigor" (Marx *et al.*, 2017).

3. Conditionality in EU GSP Programs

The EU's policy of conditioning its relations with third countries on compliance with *sustainable development and good governance*[15] principles dates back to the 1970s. Following a massacre in Uganda, the EU tried to establish a legal basis in the Lomé Convention that would permit the suspension of development aid to third countries involved in similar situations in the future (Bartels 2008). Since then, the EU included "human rights clauses" in various agreements (e.g. the 1990 EEC-Argentina cooperation agreement), up to formalizing in 1995 a policy of including such clauses systematically in agreements with all third countries (EU Commission, 1995). Hence, what originated as a mere "escape clause", enabling the EU to suspend its treaty relations with other states in cases of human rights violations, developed into a practice of conditioning the financial and trade benefits the EU grants to third countries on compliance with a range of NTPOs.

[14] The EU has only used conditionality with ACP countries, in the context of the Cotonou Partnership Agreement. However, this was a non-reciprocal agreement, whereby the EU unilaterally granted trade preferences to its former colonies. Even in this case, the clause was activated only for grave violations of human rights.
[15] This terminology is how the EU currently describes its system of positive conditionality in GSP.

In what follows, we use the following taxonomy, based on our own inspection of the principles and areas currently addressed by the system of conditionality in EU's GSP program.

1. Human rights
2. Economic, social and cultural rights
3. Environmental protection
4. Public health
5. Corruption

We examine the growing tendency on the part of the EU of using trade policy as an "instrument to pursue non-trade objectives" (Marx *et al.,* 2018), i.e. of governing *through* trade, by focusing on the forms of conditionality the EU includes in its trade agreements. The following sections take a close look at Generalized System of Preferences. We begin with a broad description of the origin and aims of GSP programs; subsequently we examine the main aspects of EU's GSP as they relate to provisions governing conditionality.

3.1. Generalized System of Preferences (GSP)

3.1.1. GSP establishment and main principles in the GATT/WTO

The Generalized System of Preferences (GSP) was founded on the idea of granting non-reciprocal and non-discriminatory preferential market access to developing countries, with the objective of increasing their export earnings, promoting their industrialization and accelerating their rates of economic growth (UNCTAD, 1968). [16] The original aims of the GSP were therefore of economic nature, free from any form of political conditionality, and guided by an intention of making the GATT regime more development friendly.

In its initial formulation, the GSP regime implied tariff discrimination against developed countries in violation of the GATT Article I, the most-favored-nation (MFN) obligation. The GATT contracting parties, however, agreed to legalize this exception to the MFN principle, first temporarily, by granting a 10-year waiver of Article 1 for the GSP programs, and then permanently, by adopting the *Enabling Clause*[17] in 1979. Since then, various developed countries have set up their own GSP regimes, the oldest of which is the European Union's commencing in 1971.

The vague formulation of the *Enabling Clause*, in terms of countries and goods that should be eligible for preferences, allowed a great deal of discretion on the side of the preference-granting countries (Ornelas, 2016). Beyond this feature built into the system since its inception, political considerations have often permeated the GSP establishment and its reform processes, effectively countervailing the willingness of granting "non-discriminatory" preferences across the board (Grossman and Sykes, 2005). Many developing countries produce goods that are considered 'sensitive' on the part of the EU, such as clothing and footwear, with this raising concern among firms in the import competing sectors; furthermore, granting preferences to certain developing countries appeared uneasy also from an ideological point of view. All these reasons affected the evolution of national GSP schemes offered by developed economies, and they came to include substantial limitations as to beneficiary countries and product coverage.

[16] Resolution 21(II) on "*Preferential or Free Entry of Exports of Manufactures and Semi-Manufactures of Developing Countries to the Developed Countries"*, UNCTAD meeting 1968.
[17] Formally, the GATT contracting parties' decision on 28 November 1979 on *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries.*

Along the way, the "non-reciprocal" aspect of GSP programs began to erode as well. The EU has introduced several conditions into its GSP program, consisting of deeper preferences in exchange for cooperation on various policy issues, or preferences removal as punishment in case of non-cooperation.

3.1.2. Evolution over time and eligibility based on economic criteria

The European Union was the first to introduce a GSP program, in 1971, right after the initial authorization by the GATT. Over time, the approach of the EU to its GSP has evolved considerably, through three main reforms in 1995, 2006 and 2014[18], respectively, which progressively went towards making the scheme more predictable, stable and limited to those countries most in need.

The system in place until 1995 was based on duty free or reduced-duty imports, subject to quantitative limits (quotas and ceilings). During this phase, the EU reviewed the scheme frequently, adjusting the depth of tariff cuts, the quotas and the ceilings, and changing the list of eligible products and beneficiary countries. These numerous interventions undermined the predictability of preferences, while the limitations with respect to product coverage and beneficiaries introduced several elements of discrimination amongst developing countries.

The EU simplified its GSP in 1995. This reform set the rules for the following decade and relied on tariff reductions instead of quotas and ceilings as a preference granting mechanism. The preference margin, with respect to MFN duties, was modulated depending on four categories of product sensitivity, with more generous tariff cuts for less sensitive products and duty-free access granted only to "non-sensitive" products.[19] Least-developed countries[20] (LDCs), however, benefited from duty-free access on all products covered by the scheme and, from 2001, on all product categories except armaments (European Union, 2001); this is the so-called "Everything but arms" (EBA) initiative.

The 1995 reform also introduced the possibility of countries and sectors graduating from the GSP: countries could be excluded completely from the system depending on a "development index", and specific sectors from particular countries could be graduated by a combination of factors relating to the competitiveness of that sector (specialization index or EU import share).

In 2006 the EU streamlined the scheme further, with the main amendments concerning the graduation mechanism and the creation of GSP+ (European Union, 2005). Beneficiaries could now graduate entirely if classified as high-income countries by the World Bank for three consecutive years or could graduate in specific sectors if exceeding a certain import share in the EU. The creation of GSP+, a sub-program of the main scheme granting deeper preferences in exchange for the ratification of a list of conventions on sustainable development, is the main instrument through which the EU currently imposes its conditionality in GSP and will be at the core of the remainder of the paper.

The most recent reform took place in 2014, when the EU re-focused its GSP to make tariff preferences more "meaningful" for the countries most in need. All upper-middle income countries were stripped of their GSP membership, together with the overseas territories under the administration of developed countries, thus restricting GSP beneficiaries to low and lower-middle income countries.[21]

[18] These reforms were introduced by, respectively, regulations published in 1994 (European Union, 1994), 2005 (European Union, 2005) and 2012 (European Union, 2012).

[19] From 2001 the categories of product sensitivity were reduced to two: sensitive, subject to tariff reductions, and non-sensitive, eligible for duty-free treatment.

[20] The identification of LDCs follows the UN definition, which is based on the three main criteria of income, human assets and economic vulnerability.

[21] This income-based definition includes all LDCs, which remain GSP beneficiaries under the special EBA scheme.

In addition, also countries with alternative preferential trade agreements with the EU, such as the economic partnership agreements, were excluded from the program. In fact, the number of beneficiaries was more than halved on aggregate and went from 177 to 88. Further, it was established that, in order to grant more stable and predictable preferences, GSP+ members would no longer be subject to the threat of graduating in case their competitiveness grew beyond the established import share thresholds (European Union, 2012).

3.2. Conditionality in EU's GSP

Alongside the evolution of its GSP in terms of eligibility on economic grounds, the EU has introduced in the GSP Regulations several conditionality provisions aimed at pursuing various non-trade objectives, with the view that "economic benefits are privileges to be granted to developing countries that comply with democratic principles and human rights, and to be withdrawn from those that do not" (Bartels, 2008). In order to implement such governance *through* trade, a system of positive and negative conditionality is established, the former rewarding compliant countries with additional preferences, the latter suspending or removing preferences in case of violations of certain principles.

3.2.1. Positive conditionality

The first element of positive conditionality in EU's GSP, placing certain responsibilities on (handpicked) recipient countries in exchange for a preferential treatment, appeared in 1991 (European Union, 1990). To discourage the production of narcotic drugs and to stimulate planting of substitute crops, the EU granted additional trade preferences, in form of duty-free market access, to Bolivia, Colombia, Ecuador and Peru. In the following years, the EU enlarged what was called the "drugs arrangement" to Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Venezuela, justifying the more preferential treatment for these additional countries with the intention of combatting also the trafficking of drugs, besides production (European Union, 1991).

The "drugs arrangement" type of conditionality would later be challenged in the WTO dispute settlement system, to which we turn below. Prior to this challenge, however, the EU used the 1995 reform to add to its GSP Regulation two Special Incentive Arrangements.[22] The first comprised a set of provisions granting an additional preferential margin to beneficiaries that could prove to have adopted and applied domestically certain labor conventions set under the auspices of the International Labor Organization (ILO). [23] Second, additional preferences were made available to countries adhering to environmental standards laid down by the International Tropic Timber Organization (ITTO) relating to the sustainable management of forests (European Union, 1994). To obtain these additional preferences, written applications needed to be made to the European Commission (EC), with details about the domestic legislation incorporating the conventions and the measures taken to monitor their application. The EC could then decide whether to grant the preferences included in the Special Incentive Arrangement to the applying country as a whole, or only to some sectors, if it considered that the conventions were effectively applied. Applications for the labor standards arrangement were filed by Georgia, Mongolia, Russia, Ukraine, Uzbekistan, Sri Lanka

[22] Although the intention of introducing the Special Incentive Arrangement concerning labor rights and environmental protection appeared for the first time in the 1995 GSP reform (European Union, 1994), these arrangement were fully developed and applied only by the 1998 GSP Regulation (European Union, 1998:a).

[23] The ILO conventions No. 87, 98 and 138, concerning the freedom of association, the protection of the right to organize and bargain collectively and the convention concerning the minimum age for employment.

and Moldova, but only the two latter countries were granted preferences. China filed an application for the arrangement concerning the environmental convention.

In 2001, the addition of Pakistan to the drugs arrangement triggered the first reaction in front of the WTO about the discriminatory nature of these conditionality provisions in GSP. India filed a complaint, which resulted in the "drugs arrangement" to be ruled WTO-inconsistent. The response of the EU was to rearrange all the conditionality provisions of the drugs, labor and environmental arrangements, respectively, into the *Special Arrangement for Sustainable Development and Good Governance*, also known as GSP+, a single arrangement which was introduced with the 2006 GSP reform.

Under the GSP+, a proper sub-scheme of the main program, the EU offers duty-free market access on all GSP eligible products to eligible countries that have ratified and applied a list of 27 international conventions on human rights, sustainable development and good governance. These 27 conventions broaden and deepen the range of NTPOs addressed so far by the conditionality system in EU's GSP. Human rights and corruption were added to the areas covered by the previous scheme, and a great deal of additional provisions were added in terms of labor rights, environmental protection and public health, respectively, thereby deepening the extent to which these NTPOs are addressed.

Table 3: Evolution over time of areas target of conditionality provisions in EU's GSP

	1991	**1998**	**2006**
ARRANGEMENTS WITH CONDITIONALITY PROVISION IN GSP REGULATIONS	Drugs arrangement	Drugs arrangement; Special Incentive Arrangements concerning labor rights and environmental protection	Special Incentive Arrangement for Sustainable development and Good Governance
NTPO AREAS CONCERNED	Public health	Public health	Public health
		Economic, social and cultural rights	Economic, social and cultural rights
		Environmental protection	Environmental protection
			Human rights
			Corruption

In 2006, the scheme was originally offered for three years, and it was renewed in 2009 and 2014, with the latter reform setting the rules which currently apply until 2023.

Unlike in the case of EBA and standard GSP, respectively, countries that wish to benefit from these preferences need to apply individually to join the list of GSP+ beneficiaries, and need to fulfil a vulnerability criterion, expressed in terms size (the country's EU import-share of total GSP imports being less than 1%) and diversification of their export portfolio (share of five largest sectors in total GSP exports being larger than 75%).[24] In its initial (2006) formulation, the list of 27 conventions was

[24] The vulnerability definition was eased in the 2014 reform: the size threshold was increased from 1% to 2% and diversification would be computed out of the share of the seven largest sectors in total GSP exports, instead of just five

divided in two sub-lists of core and non-core conventions. GSP+ applicants needed to have ratified all of the 15 core conventions, relating to human and labor rights, and at least seven other conventions relating to environmental protection, drug production and trafficking. In addition, countries needed to commit to having ratified all remaining conventions by 2008. This ratification requirement was amended in the 2009 version of the GSP+, which imposed the ratification of the entire set of 27 international conventions in order for a country to be eligible for GSP+ preferences. Importantly, similarly to the Special Incentive Arrangements in force pre-2006, GSP+ applicants needed to maintain implementation of the conventions and accept regular monitoring and review of the status of such implementation (European Union, 2005, 2013:a).

From the outset, fifteen countries joined the GSP+: the eleven original members of the drugs arrangement excluding Pakistan[25], plus Moldova, Mongolia, Sri Lanka and Georgia. In 2009, all GSP+ members re-applied for the scheme, except Panama, which failed to apply in time[26], and Moldova, that left the GSP program altogether because it signed a more favorable trade agreement with the EU. In addition, Armenia, Azerbaijan and Paraguay joined to the list of beneficiaries (European Union, 2008b). In 2010, Venezuela and Sri Lanka lost their GSP+ preferences. Venezuela failed to ratify the UN convention against corruption and therefore lost its membership permanently; Sri Lanka's violation was less severe, as it failed to implement effectively some of the conventions[27], reason why its preferences were only suspended, from 2010 to 2017 (European Union, 2009, 2010 and 2017).

The 2014 reform re-shuffled the membership basis of GSP+ more significantly (European Union, 2014:a). Colombia, Honduras and Nicaragua fell back on the standard GSP scheme. The 2014 reform also established that countries that have become part of alternative preferential trade agreements with the EU would lose their GSP benefits: for this reason, Costa Rica, Panama, Peru and El Salvador were excluded from the GSP+ program in 2016 (European Union, 2014:b) and Georgia in 2017 (European Union, 2015). Some other countries, instead, joined the GSP+ scheme: Cape Verde and Pakistan entered the scheme in 2014, the Philippines entered in 2015 and Kyrgyzstan in 2016 (European Union, 2014:c, 2016). Table 4 provides an overview of the accession and exit process from GSP+, together with information on the reasons for leaving the program.

Table 4: GSP+ membership over time

GSP+ MEMBER	ENTRY	EXIT	REASON OF EXIT
BOLIVIA	2006	Current member	
COLOMBIA	2006	2014	GSP standard
ECUADOR	2006	2015	Income
COSTA RICA	2006	2016	PTA with EU
EL SALVADOR	2006	2016	PTA with EU
GEORGIA	2006	2017	PTA with EU
GUATEMALA	2006	2016	PTA with EU
HONDURAS	2006	2014	GSP standard
MOLDOVA	2006	2008	PTA with EU
MONGOLIA	2006	Current member	
NICARAGUA	2006	2014	GSP standard
PANAMA	2006	2016	PTA with EU

[25] Pakistan did initially not classify as a vulnerable country, being its import-share larger than the 1% threshold established in 2005. Pakistan became eligible for GSP+ in 2014, when the threshold was raised to 2%.
[26] Panama re-joined the GSP+ scheme at the next available date, in 2014.
[27] The International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

PERU	2006	2016	PTA with EU
SRI LANKA	2006	Current member	
VENEZUELA	2006	2010	Sanctioned
ARMENIA	2009	Current member	
AZERBAIJAN	2009	2011	GSP standard
PARAGUAY	2009	Current - 2019	Income
PAKISTAN	2014	Current member	
CAPE VERDE	2014 (check)	Current member	
PHILIPPINES	2015	Current member	
KYRGYZSTAN	2016	Current member	

Source: personal elaboration based on EU regulations.

3.2.2. Negative conditionality

There are two sets of negative conditionality provisions in EU's GSP regulation. First, as explained in the previous section, GSP+ preferences can be revoked in case of a failure of either ratifying the necessary conventions, or effectively implementing them. There can be a formal defect due to the national legislation no longer incorporating the substance of the 27 conventions, or a failure in its implementation, as reported by the monitoring bodies. The only two cases in which this negative conditionality has been applied in practice concerned Venezuela, which permanently lost its GSP+ membership, and Sri Lanka, from which preferences were temporarily withdrawn. Both countries were "downgraded" to the standard GSP membership. On two other occasions, the EU Commission launched an investigation but did not withdraw the GSP+ status from the countries concerned: in 2008 El Salvador was investigated over its compliance with the ILO Convention on freedom of association, and in 2012 Bolivia was investigated over the alleged failure to implement the UN Convention on Narcotic Drugs (EPRS, 2018).

The second system of negative conditionality affects the standard GSP and EBA preferences (as well as GSP+ preferences), which can potentially be withdrawn from a beneficiary for a variety of reasons. A mix of trade and non-trade reasons can lie behind preference removal; in fact, a country might temporarily lose its GSP or EBA preferences, for all products, or certain products:

- In case of serious and systemic violation of principles laid down in the conventions used as a basis for the GSP+;
- In case a country exports products made by prison labor;
- in case of serious shortcomings in custom controls on the export and transit of (illicit) drugs, or failures in compliance with international conventions on anti-terrorism[28] and money-laundering;
- In case of fraud, serious and systematic unfair trading practices[29], irregularities or failure to comply with the rules of origin, failure to provide administrative cooperation for the implementation and control of the GSP arrangements;
- In case of serious and systematic infringements of the objectives adopted by Regional Fishery Organizations, or any arrangements concerning the conservations and management of fishery resources.

The first three of the above items are classic NTPOs that are sanctioned with the potential loss of trade preferences in case of non-compliance. In case a violation is reported, the EU commission carries out

[28] The antiterrorism provision was introduced in the 2014 reform (European Union, 2012).

[29] This provision will not apply for those products which are already subject to anti-dumping or countervailing measures.

an investigation, consults the beneficiary concerned and can eventually decide to suspend the GSP preferences. Preference withdrawal is therefore a gradual process and is meant to allow the country to remedy the alleged violation. If a decision about a suspension of preferences is finally made, it is initially for six-months, after which the EU decides to either terminate or extend the suspension (European Union, 2012).

Besides Sri Lanka, there have been only two additional cases of temporary withdrawal of preferences, concerning Myanmar (an EBA member) and Belarus (a standard GSP member), because of their violation of labor standards. The EU sanctioned Myanmar in 1997, because of its use of forced labor, and then re-admitted the country into the GSP program in 2013 (European Union, 2013:b). The sanction for Belarus occurred in 2007, as a consequence of the country's non-compliance with the Convention on freedom of assembly and collective bargaining (European Union, 2006). Belarus' sanction implied a fall back on standard non-preferential tariffs, as the country is not a WTO member and therefore not even entitled to WTO MFN treatment. Currently Belarus is no longer eligible for the GSP scheme.

3.3. Considerations regarding the effectiveness of conditionality provisions in GSP+

An in-depth discussion about the effectiveness of GSP+ in promoting sustainable development goals is beyond the scope of this work. We are not aware of any quantitative assessment of the impact of conditionality on NTPOs up to this date, although there is a sizeable debate among political scientists criticizing the lack of transparency, double standards and ineffectiveness of EU's GSP conditionality system (Orbie and Tortell, 2009; Beke and Hachez, 2015; Velluti 2016). We first consider aspects of the actual burden imposed by the EU on developing countries to access the extra-preferences granted to GSP+ members, subsequently, we report some of the views on the effectiveness of the conditionality regime in reaching its stated goals.

In our view, the ratification requirement seems to not have represented a major hurdle for the average GSP+ applicant. The core conventions, which some of the early (2006) GSP+ members ratified around the accession date, are limited in number and are those concerning child labor (Colombia, Venezuela, Sri Lanka), forced labor (Bolivia and Mongolia), collective bargaining (El Salvador), torture (Nicaragua) and the crime of genocide (Bolivia). By contrast, more than half of the initial GSP+ countries, instead, had ratified all the 15 core conventions long before 2006.[30] Among the non-core conventions, which needed to be ratified before 2009 to maintain the GSP+ status, it was only the Stockholm Convention, the Cartagena Protocol and the Convention against Corruption that most countries ratified after joining the program.[31] These three conventions are the most recent international agreements among those on the list drawn up by the EU, and became effective between 2003 and 2005: it is therefore not surprising that the most of the initial GSP+ members ratified them between 2006 and 2008. Armenia, Azerbaijan and Paraguay, the second wave of joiners, had to satisfy the stricter requirement of having ratified all 27 conventions before becoming eligible for GSP+: Armenia ratified some of the core labor conventions in 2006 and that against corruption in 2007, but Azerbaijan and Paraguay had already ratified the entire list of conventions by 2005. Finally, the countries that joined the GSP+ at a later stage, exhibited a similar ratification timing to that described so far, with the difference that they had ratified all the necessary conventions long before becoming GSP+ members.[32] Taken together,

[30] Ecuador, Panama and Peru' had ratified all of the 27 conventions by 2005.

[31] Ten countries ratified the Convention against Corruption, five countries ratified the Stockholm convention and three the Cartagena Protocol. As an exception, Honduras ratified two of the conventions against drugs in 2005. The list of the 27 conventions is provided in the Appendix.

[32] The information on the year of ratification of the conventions was extracted from the UN: http://treaties.un.org

the timing of these ratifications suggests that this condition imposed by the EU on developing countries may not have represented a significant hurdle for them to obtain a more preferential access to the EU market, as the vast majority of the conventions were not ratified with the intention of becoming eligible for GSP+.[33]

Besides ratifying the conventions, the EU also requires developing countries to guarantee their effective implementation, and periodically monitors the application of the provisions contained in these treaties. The effectiveness of GSP+ in promoting the sustainable development of developing countries could therefore lie mostly in the monitoring and advisory role that the EU fulfils, in its attempt to make sure that human and labor rights are guaranteed, that environmental protection is pursued, and the production and trafficking of drugs are combatted. In various instances, however, a compliance gap between the commitments of GSP+ members and the effective implementation of the conventions has been reported (Richardson *et al.*, 2017; Marx *et al.*, 2018). These authors, as well as the mid-term evaluation of the latest GSP regulation carried out by the European Commission (European Commission, 2017), report many instances of "non-compliance on the ground", represented by violations of human and labor rights reported in Pakistan, Bangladesh, Bolivia, China and Ethiopia.[34]

The EU has limited the use of negative conditionality provisions to only a few cases, despite the emergence of the compliance gap mentioned above. This can partly be explained by the international trend, embraced by the EU, of shying away from large scale economic sanctions and exploiting targeted sanctions instead (EU Council, 2012). This position is backed by an EU policy of generally refraining from measures that can be harmful to a target population, together with practical considerations revolving around the idea that general economic sanctions are ineffective in changing the policies of a country (Bartels, 2008). In the two cases in which the EU withdrew preferences from non-GSP+ countries, Myanmar and Belarus, there were in fact more comprehensive political motivations,[35] which compounded the violations of labor rights, which possibly determined the decision of the EU Commission.

The scarce use of negative conditionality makes it difficult to comment on the general effectiveness of the entire conditionality system, both from an economic and from a NTPO point of view. Some observers have raised the issue of a proper imbalance of conditionality (Beke and Hachez, 2015), between the readily available trade preferences and the limited sanctions for beneficiaries who do not respect their commitments. This imbalance is likely to limit the space for success of non-trade goals and, together with the selectivity in applying conditionality, has triggered doubts about the relative weight of NTPOs versus other (commercial) interests of the EU in the application of economic sanctions (Orbie and Tortell, 2009; Borreschmidt, 2014).

The sanctions imposed to Myanmar and Belarus had very limited economic impact (Zhou and Cuyvers, 2011; Gnutzmann and Gnutzmann-Mkrtchyan, 2017). Sri Lanka, conversely, was more severely affected (Bandara and Naranpanawa, 2015) because in contrast to Myanmar and Belarus, Sri Lanka's exports were more concentrated in sectors subject to GSP preferences, and therefore more dependent on EU benefits.[36] From a human and labor rights perspective, instead, the three countries

[33] Bartels' (2008) reaches a different conclusion, as he considers the extra-ratifications a success of the positive conditionality provisions in GSP+. His analysis, however, is limited to the first three years of existence of the program only.
[34] Bangladesh and Ethiopia are EBA beneficiaries, whereas China was a standard GSP beneficiary until 2015.
[35] This political dimension comes across in the preambles of the GSP regulations, e.g. European Union, 2008:a.
[36] In particular, the garment industry of Sri Lanka was affected by the removal of GSP+ preferences.

subject to EU sanctions did initially little to remedy the violations reported (EPRS, 2018). Over time, however, Myanmar and Sri Lanka underwent a regime change which led to the re-establishment of GSP and GSP+ preferences. The assessment of whether the political reforms undertaken by these countries are sufficient to bring about a meaningful improvement of human and labor rights conditions remains difficult, and beyond the scope of this overview.

3.4. WTO legality of GSP conditionality provisions

The international legal basis for GSP programs in the WTO context is the *Enabling Clause*. In order to be compatible with the *Enabling clause*, a GSP should grant "generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries" and should "respond positively to [their] development, financial and trade needs" (GATT, 1979).

3.4.1. Legality of the drugs arrangement

The 1990 drugs arrangement, which introduced the first positive conditionality provisions in EU's GSP, contained the important feature of being available only to a selected list of beneficiaries, which eventually led to the accusation of discriminatory treatment among developing countries. This happened with the addition of Pakistan to this scheme[37], in 2001, which distorted the competition between India and Pakistan in the export of textile and clothing. The WTO Appellate Body (AB) report *EC-Tariff Preferences* [38] (Appellate Body, 2004) held that the drugs arrangement discriminated between developing countries, and did not establish any objective criteria that, if met, would allow other developing countries to be included as beneficiaries of the arrangement. The AB also stated that additional preferences would be permitted if identical treatment were made available to all similarly situated[39] GSP beneficiaries which "share the needs to which the preferential treatment responds" (Jayasinghe, 2015). In the wording of the *Enabling Clause*, extra preferences need to represent a "positive response" to an objective "development, financial or trade need"; although the interpretation given by the AB allows preference-granting countries to respond to needs which are not necessarily common or shared by all developing countries (Kishore, 2017).

3.4.2. Legality of GSP+

The EU response to the AB's ruling on the drugs arrangements was to introduce a new scheme by which to pursue its NTPO agenda, the GSP+. It is in light of the principles contained in the *Enabling Clause*, together with their interpretation in the *EC-Tariff Preferences* AB report, that the WTO legality of the GSP+ program could be assessed. The latter interpretation, however, failed to provide unambiguous guidance, as it did not define many of the key terms, such as to which extent reciprocity would be admitted and what kind of development should be addressed by GSP schemes (Jayasinghe, 2015). The AB allows donors to distinguish between beneficiaries, and therefore to impose conditions, as long as the distinctions are based on objective criteria. The term "objective", however, as well as who bears the "burden of proof to prove the objectivity of the criteria", was not defined (Kishore,

[37] The European Commission justified the preferential treatment for Pakistan with the intention of rewarding the country for its position against the Taliban (EU Response to the 11 September: European Commission action, http://europa.eu/rapid/press-release_MEMO-02-53_en.htm)

[38] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004: III, 925.

[39] "Similarly affected by the drug problem" (Appellate Body 2004) in this circumstance, but the AB intended this principle as applicable to other situations: when objective needs arise, all similarly situated developing countries need to be treated without discrimination.

2017). Similarly, assessing which of the potential beneficiaries are "similarly situated" appears challenging, considering that there might be a variety of needs to be addressed (Bartels, 2007).[40] Further, the AB did not require GSP donors to respond to all possible development, financial, and trade needs, leaving discretion to choose the problems dealt by the conditionality provision in GSP+.

These ambiguities lie behind the multiple interpretations provided in the international law literature about the legality of GSP+. Although the overall intentions of the EU are often seen as salutary,[41] there is a consensus about the dubious legality of the GSP+ in the WTO context (Bartels, 2007, 2008; Wardhaugh, 2013; Jayasinghe, 2015; Kishore, 2017).

GSP+ applications could initially be made only every 18 months (European Union, 2013:a). This temporal condition, hardly justifiable on the basis of administrative convenience[42], had the effect of creating a "closed list" of beneficiaries, which had been one of the main problems of the drugs arrangement (Bartels, 2008). This flaw, however, is no longer a concern, as it was amended with the 2014 GSP reform, which now allows countries to make a GSP+ application at any time.

The economic eligibility criterion, which defines a vulnerable country in terms of the size and diversification of its export basket, is questionable in light of the *Enabling Clause*. Economic vulnerability can be considered an objective canon, but it is hard to see how this relates to a country's "development, financial or trade needs" (Bartels, 2008). The distinction this criterion makes among developing countries, therefore, cannot be reconciled with the AB interpretation of the *Enabling Clause* (EESC, 2004; Kishore, 2017) in *EC-Tariff Preferences*.

The requirement of ratification of international conventions is another point that many scholars find problematic, from a legal point of view, as it introduces elements of discrimination among beneficiaries. Bartels (2008) argues that these ratifications cannot be made a condition for obtaining trade preferences, unless the ratification can be described as a "development need". Further, by requiring this ratification, the EU makes an *a priori* distinction between countries with the same objective development needs, but which, for whatever reason, decide to ratify or not ratify the listed treaties (Bartels, 2007). Shaffer and Apea (2005) note that the list of GSP+ conventions is a great deal more demanding than the ratifications required under the pre-GSP+ special incentive agreements, and that there is no choice other than ratifying the entire lot of treaties, to access the extra trade preferences. Some countries might not be in the position to fulfil these more stringent conditions (EESC, 2004), and more importantly, the list of conventions itself might be of questionable objectivity, as it might have been drawn up to benefit certain countries more than others. So "a *de jure* non-discriminatory scheme may lead to *de facto* discrimination" (Kishore, 2017), as this standardized conditionality can discriminate among countries at different levels of development.

Bartels (2008), Jayasinghe (2015) and Kishore (2017) also question the causal link between the grant of preferences and the needs addressed by the GSP+ conditionality provisions. Drawing on the AB ruling in *EC-Tariff Preferences*, Bartels argues that GSP+ preferences must be a "positive response" to a certain development need. It is not enough that the international conventions concern aspects that may (or may not) be defined as a development need, but there must be a causal link between the treatment offered by the EU and the need which is object of the condition. For instance, as desirable

[40] Countries might be in a similar situation concerning one need, but in different situations concerning other needs.

[41] The WTO legality of GSP+ is largely hypothetical, and mostly of academic interest, because "it is difficult to see who would bring a complaint" (Bartels, 2008).

[42] The pre-GSP+ labor and environment special incentive arrangements accepted application on a continuous basis.

as the prevention of apartheid and genocide might be from a human rights perspective, it might be discussed whether this classifies as a development need (and it probably does), but what is more questionable is how this need would be addressed by better market access in the EU. Jayasinghe also notices that, formally, the EU makes the GSP+ treatment available to developing countries that have already ratified and effectively implemented the conventions listed in the GSP Regulation. Hence, the nexus between trade preferences and development needs becomes even harder to draw, as the objective of the EU has already been achieved *ex ante* granting the GSP+ benefits.

A subtler legal issue of GSP+ concerns the extent of the concept of development, which is addressed by the non-trade conditions in the scheme. The literature is divided on this as, on one side, it might be argued that development includes a wide spectrum of social issues, such that "development needs" can be interpreted in a broad sense, thereby validating the GSP+ provisions referring to non-economic issues (Bartels, 2007). On the other side, a distinction can be made between provisions which explicitly refer to "sustainable development" and that make a disjunctive use of development and environmental aspects (e.g. the WTO Agreement), and provisions which do not qualify the term development further (e.g. the *Enabling Clause*). Jayasinghe (2015) argues that, because of such distinction, the term development in the *Enabling Clause* cannot be broadly interpreted and must be restricted to economic and trade-related matters, this taking away the legal basis for including non-trade conditions in GSP+.

The *Enabling Clause* appears in contrast with the positive conditionality in GSP+ also because of the reciprocity implied by the latter. "The developed countries do not expect reciprocity, …[they] do not expect developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs" (GATT, 1979). However, the GSP Regulation sets the GSP+ up as an exchange, where trade preferences should help vulnerable countries "assume the special burden and responsibilities resulting from the ratification of core international conventions" (European Union, 2012). The reciprocity to which the Enabling Clause refers to is, unfortunately, not defined explicitly, and doubts have arisen about whether developed countries are allowed to seek some contributions, those which are consistent with the development needs of developing countries, or no contributions at all. Bartels (2003, 2007) favors the first interpretation, i.e., non-reciprocity only concerns concessions involving a reduction in trade barriers. Jayasinghe (2015), instead, posits that also non-trade commitments are incompatible with the nature of GSP, for two reasons: firstly, because it was not the intention of developing countries to exchange tariff concessions for non-trade commitments[43], and secondly, because the exchange of concessions for non-tariff compensation is in violation with the purpose of the WTO. The preamble to the GATT states that its objectives are to be achieved through the substantial reduction of tariffs and other trade barriers. Non-trade concessions fall into the remit of non-trade barriers (Jayasinghe, 2015), so that the failure to grant a preference effectively amounts to imposing a barrier to trade.[44]

Above all, the EU's GSP+ scheme has been criticized because of its interference with the internal affairs of developing countries. The provisions that appear particularly problematic are those concerning the monitoring of the effective implementation of the conventions, as they limit the control that beneficiaries have over their own affairs. Also, the ratification of the convention is an attribute of sovereignty, which cannot be required by an international actor such as the EU (Jayasinghe, 2015). It must be said it is in the beneficiaries' powers to consent to the GSP+ conditions, and to therefore

[43] Historically developing countries had a reservation for the need of a world trade regime and, more specifically, were opposed to the insertion of social clauses when negotiating for preferential treatment (Deacon, 1999).

[44] This interpretation of Jayasinghe (2015) of the GATT preamble goes also against the interpretation of the Enabling Clause provided by the AB in *EC-Tariff Preferences*.

accept the interference of the donor, but it must also be accounted that the bargaining power of the vulnerable countries eligible for GSP+ cannot be compared with that of the EU. This aspect of GSP+ is therefore perhaps less worrisome from a legal point of view, but it appears of relevance given that the human rights clauses contained in many of the EU's bilateral and multilateral agreements have been considered less intrusive than the GSP+ ones (Jayasinghe, 2015).

Finally, the EU's system of negative conditionality has been found problematic too. In light of the *EC-Tariff Preferences* ruling, any preferential treatment must be a positive response to a development need. Withdrawing preferences in case of some violation amounts to granting additional preferences to the remaining beneficiaries (Bartels, 2008). This implication is the core of the issue, as withdrawing preferences could still be considered a positive response to the needs of the countries affected by the withdrawal (although Kishore (2017) is against this interpretation), but the additional grant of preferences to third countries cannot be considered a positive response to the needs of the former ones (Bartels, 2008).

4. Conclusion

The EU Treaties stipulate that the EU's external action should be conducted in a way to promote the European principles and values, such as the development of poorer countries, high social and environmental standards and respect for human rights. Consequently, NTPOs are increasingly included by the EU in its reciprocal trade agreements and GSP programs.

Most EU trade agreements include provisions in the areas of human rights, labor standards, social matters and environmental regulations. Nevertheless, the provisions in these areas are characterized by a lack of enforceability, emphasizing the "legal inflation" of EU trade agreements.

Moreover, even when these provisions are enforceable in principle, enforcement does not occur in practice. In particular, Beke *et al.* (2014) point out that the EU "regularly leaves human rights violations by partner countries unpunished." In this sense, the mechanism of monitoring the respect of human rights in the countries with which the EU has concluded trade agreements appears to be particularly weak. There are no habilitated organs to monitor the implementation of the human rights clauses and there are no standard procedures to investigate human rights violations in a partner country. Furthermore, the differences in the drafting and scope of human rights clauses, although motivated on historical, geographical, or political grounds, create heterogeneity in the obligations of the EU trading partners. This casts doubts on the overall effectiveness of human rights clauses in EU trade agreements, making of EU "a conflicted trade power" (Meunier and Nicolaidis, 2006). As Beke *et al.* (2014) put it, "this attitude has been analyzed as a sign of weakness or pusillanimity from the EU, who would be talking the talk but would not dare walking the walk."

Given the lack of enforcement, it has often been argued that the only effective way to enforce human rights provisions would be a sticks-and-carrot approach, where trade benefits are dependent upon compliance with human rights (Hafner-Burton, 2005). However, in the case of EU trade agreements, where preferences are granted on a long-term and reciprocal basis, using access to the EU market as a carrot-and-stick mechanism to promote NTPOs in partner countries appears particularly difficult.

By contrast, the GSP preferences appear to be better equipped to promote NTPOs based on a carrot-and-stick approach, as they granted on a unilateral and temporary basis and can thus more easily be revoked. More preferential market access can be offered to countries that pursue these NTPOs (positive conditionality) and the EU can drop from the list of beneficiaries those countries that violate human rights (negative conditionality).

However, the effectiveness of GSP programs to promote NTPOs is also questionable. Concerning the positive conditionality system in GSP+, there are at present various concerns about a compliance gap emerging “on the ground”, between the commitment undertaken by beneficiaries, and the effective implementation of the conventions in reality. Various human and labor rights violations have been reported (see details in the previous section), with varying reactions from the side of the EU, thus raising questions about the effectiveness of the negative conditionality system. GSP+ preferences were withdrawn from Sri Lanka, but not from other countries where investigations were carried out due to concerns about human rights violations. Perhaps more strikingly, it appears that beneficiaries of the standard GSP program are not subject to the same rigor as GSP+ countries when negative conditionality should apply. Congo, Rwanda, Burundi, Algeria, Sierra Leone and Egypt are among the biggest perpetrators of human rights violations (Jayasinghe 2015), but from none GSP preferences were withdrawn. The only two episodes of complete preferences removal (Sri Lanka fell back to standard GSP preferences during the years when it was excluded from GSP+) were Myanmar and Belarus, and in both cases the EU invoked general concerns due to the political situation in these countries, in addition to the labor rights violations.

The legality of both the positive and negative GSP+ conditionality provisions has also been put under scrutiny. The economic vulnerability criterion, which makes countries eligible for GSP+, is not seen as directly related to the development needs that would justify a more preferential trade treatment, and hence discriminates among GSP beneficiaries on the wrong grounds. Also, the requirement of ratification of a fixed set of international conventions can be a source of inadmissible discrimination, because countries at different levels of development are treated equally in this respect. As Wardhaugh (2013) notices, when referring to the mandatory nature of the ratification and implementation of the conventions, “the menu is set without regard to the dietary needs of the patrons, and you had better finish your dinner!” Causality between treatment and outcomes is considered necessary to justify the GSP+ benefits granted to certain developing countries, but authors doubt the nexus between better market access in the EU and the achievement of NTPOs. Not only is this causal link questioned, but the exchange of trade preferences versus the ratification and implementation of conventions is seen as introducing an illegal form of reciprocity in the GSP. Finally, the withdrawal of preferences motivated by violations of non-trade provisions is intrinsically discriminatory, since the removal of trade preferences from one country indirectly implies more preference being granted to another one.

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Appendix

	Convention	NTPO area
	1. Convention on the Prevention and Punishment of the Crime of Genocide	Human rights
	2. International Convention on the Elimination of All Forms of Racial Discrimination	Human rights
	3. International Covenant on Civil and Political Rights	Human rights
	4. International Covenant on Economic, Social and Cultural Rights	Economic, social and cultural rights
	5. Convention on the Elimination of All Forms of Discrimination against Women	Economic, social and cultural rights
	6. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	Human rights
	7. Convention on the Rights of the Child	Economic, social and cultural rights
	8. Convention concerning Forced or Compulsory Labor, No. 29	Economic, social and cultural rights
	9. Convention concerning Freedom of Association and Protection of the Right to Organise, No. 87	Economic, social and cultural rights
	10. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No. 98	Economic, social and cultural rights
	11. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value, No. 100	Economic, social and cultural rights
	12. Convention concerning the Abolition of Forced Labor, No. 105	Economic, social and cultural rights
	13. Convention concerning Discrimination in Respect of Employment and Occupation, No. 111	Economic, social and cultural rights
	14. Convention concerning Minimum Age for Admission to Employment, No. 138	Economic, social and cultural rights
	15. Convention concerning Minimum Age for Admission to Employment, No. 182	Economic, social and cultural rights
	16. Convention on International Trade in Endangered Species of Wild Fauna and Flora	Environmental protection
	17. Montreal Protocol on Substances that Deplete the Ozone Layer	Environmental protection
	18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal	Environmental protection
	19. Convention on Biological Diversity	Environmental protection
	20. UN Framework Convention on Climate Change	Environmental protection
	21. Cartagena Protocol on Biosafety	Environmental protection
	22. Stockholm Convention on Persistent Organic Pollutants	Environmental protection
	23. Kyoto Protocol to the United Nations Framework Convention on Climate Change	Environmental protection

	24. UN Single Convention on Narcotic Drugs	Public health
	25. UN Convention on Psychotropic Substances	Public health
	26. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Public health
	27. UN Convention against Corruption	Corruption