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BOOK REVIEW EDITOR

Professor Sven Biscop

EGMONT, Royal Institute
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Rue de Namur 69
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Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA

In all other countries sold and distributed by:
Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1384-6299

© 2009 Kluwer Law International BV

2010 (4 issues): Institutional: USD465.00 / EUR349.00 / GBP256.00 (print).
Private: USD122.00 / EUR117.00 / GBP73.00 (print).

(2009) 14 EFA Rev. should be used to cite this volume.

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The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?

JAN ORBIE* AND LISA TORTELL**

Abstract. In the past decade, the European Union (EU) has committed itself to promoting the social dimension of globalization, focusing mostly on the promotion of labour standards internationally through increased cooperation with the International Labour Organization (ILO) and by means of its external trade policies. This article addresses these two dimensions of the Union's global social policies, by examining whether EU practise in Generalized System of Preferences (GSP) labour conditionality has been consistent with ILO assessments. In particular, we utilize a 'hierarchy of condemnation' to examine the implementation record of core labour standards (CLS), as evaluated by the ILO committees entrusted with assessing countries' observance of conventions. This analysis makes clear that, although EU decisions to sanction countries through its GSP scheme are traceable to the level of condemnation by the ILO, consistency between the granting of GSP+ incentives and ILO assessments is less clear-cut and cannot entirely be explained by the EU's attempts to use GSP+ to stimulate the implementation of CLS. Finally a number of explanations for these findings are given, pointing in particular to path-dependent processes in the EU decision-making system.

I Introduction

In the past decade the European Union (EU)¹ has committed itself to promoting the social dimension of globalization. It is argued that the Union could export several elements of the European social model, which ensures that social and economic aims go hand in hand, to the world scene. The EU has mostly focused on the promotion of labour standards internationally through increased cooperation with the International Labour Organization (ILO) and by means of its external trade policies. This article addresses these two dimensions of the Union's global social policies by examining the role of the ILO in the EU's Generalized System of Preferences (GSP). It raises the question of whether EU practice in GSP labour conditionality has been consistent with ILO assessments. In particular, we tackle the thorny question of implementation of the fundamental ILO

* Centre for EU Studies, Ghent University.

** DINAMIA-ISCTE, Lisbon.

¹ The terms 'European Union' (EU), 'Union' or 'Europe' are used interchangeably, even when strictly speaking the European Community (EC) applies.

Conventions in those countries benefiting from the EU's trade incentives, the 'GSP+' beneficiaries.

The first section of this article elaborates on the EU's policies in promoting the social dimension of globalization through GSP conditionality and in cooperation with the ILO. The second section analyses the increasing relevance of the ILO in the GSP Regulations of the EU, which now explicitly require 'ratification and effective implementation' of the ILO fundamental conventions and refer to ILO activities. Nevertheless, while the GSP+ beneficiary countries have ratified the relevant ILO Conventions, their implementation has been questioned by policy makers, academics and civil society groups. In order to solve this puzzle, the third section establishes a 'hierarchy of condemnation' allowing us to analyse the implementation record of GSP+ beneficiaries as evaluated by the ILO committees. It appears that the application of GSP sanctions by the EU links with ILO assessments, but that the consistency between GSP+ incentives and ILO findings is less clear-cut. Several countries have received GSP+ preferences despite being seriously criticized by the authoritative ILO committees for their implementation of the relevant conventions. The conclusions give a number of explanations why certain countries have been included in the GSP+ system and why the EU has been reluctant to withdraw trade preferences, despite serious condemnations by the ILO. It will become clear that this is, to a large extent, a story of path-dependent logics in the EU's decision-making system.

This analysis has wide-ranging implications for the current debate on the application of GSP labour standard conditionality. In 2004, the then Trade Commissioner Pascal Lamy hailed the GSP conditionality system as a clear example of Europe's 'soft power' and as a 'step toward better global governance'.² However, Members of the European Parliament,³ representatives from the trade unions and development non-governmental organizations (NGOs),⁴ as well as academics,⁵ have criticized the current system, suggesting that the EU is too reluctant to sanction developing countries that are condemned by ILO organs, and that some countries have benefited from incentives despite ILO criticism.⁶ This debate has,

² P. Lamy, *Financial Times*, 21 Oct. 2004.

³ See, e.g., EP Resolution OJ ref B6-0583/2006 PE 381.813v01-00; Written Questions E-3338/07, E-4197/06, E-4090/06, P-4146/06; and Oral Question with Debate O-0093/06.

⁴ E.g., 'Civil Society Dialogue meeting on New Scheme of Generalized Tariff Preferences' <http://trade.ec.europa.eu/doclib/docs/2007/july/tradoc_135225.pdf>, 10 Aug. 2008; ICFTU/WCL/ETUC, 'Reports on Core Labour Standards in the Countries Applying for the GSP-Plus', <www.icftu.org/www/PDF/GSP.pdf>, 10 Aug. 2008.

⁵ See T. Novitz, 'In Search of a Coherent Social Policy: EU Import and Export of ILO Labour Standards?', in *The European Union and the Social Dimension of Globalization: How the EU Influences the World*, eds J. Orbie & L. Tortell (London and New York: Routledge, 2008), 34–35; T. Greven, *Social Standards in Bilateral and Regional Trade and Investment Agreements* (Geneva: Friedrich-Ebert-Stiftung, 2005).

⁶ See also the transcripts of a debate between academics, policy makers, NGOs and trade unions on the EU and the social dimension of globalization at <www.eu-sdg.ugent.be> (2 Jan. 2009).

to date, been based only on anecdotal arguments. This article attempts a more systematic analysis of the consistency between the application of EU conditionality and ILO assessments. In doing so, it also provides an empirical contribution to scholarly research on EU conditionality toward developing countries, on the normative power Europe thesis, and on the relationship between the EU and international institutions.

II Promoting the Social Dimension of Globalization

The EU has highlighted its commitment to promoting the social dimension of globalization in several policy documents.⁷ In line with the report of the ILO World Commission on the Social Dimension of Globalization, the Union considers this global governance objective in the widest sense, as involving decent work, sustainable development, democracy and accountability, and gender equality. This covers a range of policies (for example, jobs and decent work, health, education, social security) and policy instruments (development aid, trade relations, social and development policies, political dialogue) pursued in the EU's neighbourhood, in other parts of the world and in various multilateral institutions. EU initiatives have mainly focused on the promotion of international labour standards as defined by the ILO. In its global social policies, the EU has largely strived to advance the four core labour standards (CLS) abstracted from eight fundamental ILO Conventions, as stated in the 1998 ILO Declaration on Fundamental Rights and Principles at Work.

The EU has pursued the CLS through two mechanisms, namely trade conditionality and cooperation with the ILO. As explained in the introductory article to this special issue and in the contribution by Brian Burgoon, attempts by European Commission and most Member States to integrate CLS at the level of the World Trade Organization (WTO) began in 1994. Although the EU has always insisted that it aims at rewarding, rather than sanctioning, countries, and that it does not seek harmonization of social policies and wages but confines itself to promoting the most fundamental standards linked with respect for human rights, it has not been very successful. Evading this stalemate at the multilateral level, the EU introduced labour standards in its unilateral GSP trade regime. Under international trade law, the GSP constitutes a major exception of the Most-Favoured Nations (MFN) principle for developing countries. The MFN rule (General Agreement on Tariffs and Trade (GATT) Article 1) requires that members of the WTO cannot discriminate between their trading partners, but the GSP (legalized by the Enabling Clause within the framework of the GATT) allows for a more favourable treatment for developing country imports. The GSP systems established by industrial countries typically differentiate market access according to the development level of the recipient country and the sensitivity of certain products. In addition, a GSP

⁷ For an overview, see Orbie & Tortell (eds), *supra* n. 5.

can include labour standard conditionality,⁸ whereby violation of labour standards leads to the withdrawal of trade preferences (sliding back to MFN rates) and compliance leads to additional GSP preferences (between normal and tariff-free access). In that sense, the threat of sliding back to MFN rates can be seen as a stick, and the possibility of being granted additional preferences leading to a tariff-free access operates as a carrot.

Since 1995 the EU has included such a social ‘carrot and stick’ conditionality in its GSP. Subsequent revisions of the European GSP Regulations in 1998, 2001 and 2005 have modified and expanded the role of labour standards in Europe’s GSP. The GSP sanction clause was introduced in 1995 and has since been applied to Burma (1997) and Belarus (2007). The incentive regime, established in 1998 and reformed into the GSP+ system in 2005, has granted more favourable market access to fifteen countries. As explained below, the ILO takes an increasingly prominent place in the application of this social conditionality system.

This is the second priority area of EU international social policies: in addition to the trade track, the EU has strengthened its cooperation with the ILO since 2001. At a general level, both institutions have emphasized their harmonious relationship and the convergence between Europe’s regional social model and the ILO’s global social agenda. The European Commission played an active role in the process of the ILO World Commission on the Social Dimension of Globalization. The importance of the ‘European model’ for a social globalization was highlighted in the report of the World Commission and in various speeches by ILO officials and EU policy makers.⁹ Institutionally, cooperation between both institutions intensified with an exchange of letters in 2001. Since then, high-level meetings between the Commission and the ILO have been held annually. In 2004 the EU and the ILO engaged in a Strategic Partnership explicitly targeted to developing countries. Under this framework more specific activities have been developed, involving European Commission co-funding of ILO initiatives or the ILO involvement in EU programmes.¹⁰

Such collaboration could increase the power and legitimacy of both the EU and the ILO. However, some comments should be noticed.¹¹ First, the European Commission’s capacity to act in the ILO is limited. Member States have always resisted granting formal competences to the Community in the context of the ILO.

⁸ L. Compa & J.S. Vogt, ‘Labor Rights in the Generalized System of Preferences: A 20-Year Review’, *Comparative Labor Law & Policy Journal* 2, no. 3 (2001): 199–238.

⁹ E.g., European Commission and ILO, ‘Final Joint Conclusions of the 5th High-Level Meeting’ (Geneva, 13 Oct. 2006); A. Diamantopoulou, ‘Address at the Seminar on the social dimension of globalisation organized by the European Commission and the WCSDG’ (Brussels, 3 Feb. 2003).

¹⁰ J. Orbie & O. Babarinde, ‘The Social Dimension of Globalization and European Union Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility’, *Journal of European Integration* 3 (2008): 465–469.

¹¹ See also the discussion in J. Orbie & L. Tortell, ‘Exporting the European Social Model: Broadening Ambitions, Increasing Coherence?’, *Journal of European Social Policy* (2009): 99–104.

Within the ILO the European Commission is a non-voting observer, incapable of voting on the adoption of conventions or recommendations; nor is it possible for the EU to ratify ILO Conventions.¹² Second, the asymmetrical nature of the EU-ILO relationship has been criticized, which is particularly relevant because both organizations have a different mandate. Since the ILO is the most vulnerable partner, its social purposes may be eroded by the market-oriented influence of the EU.¹³ Third, even when the EU is exporting its ambitious social rules to the level of the ILO, this may have adverse consequences for the ILO and its non-EU members. Kissack's empirical research shows that the EU's promotion of ambitious ILO Conventions has the perverse effect that their international diffusion is limited: the more the EU is involved in drawing up an ILO Convention, the less ratification the resulting convention receives from ILO members. Questioning the often assumed 'natural synergy' between the two institutions, he claims that 'exporting the EU model into the ILO creates a lose-lose scenario, where the ILO gets a widely ignored maximal standard, and the EU gets a negligible extension of its own standards internationally'.¹⁴

How can we explain the new-found enthusiasm of the EU within the ILO? For one thing, the ILO has successfully reinvented itself by the end of the 1990s in the context of the social clause debate in the WTO. The ILO seems a more realistic and more credible alternative for the impasse of the social debate at the multilateral trade level. Another reason why the European Commission embraced the ILO's agenda on the social dimension of globalization and decent work is that this normative and development-oriented agenda is less contested by EU Member States than the formal drafting of labour standard conventions. More generally, the EU's growing commitment to multilateralism since the end of the 1990s¹⁵ makes the ILO one of the multilateral organizations central in the EU's global governance policies. By anchoring its external policies in the cosmopolitan values promoted by multilateral institutions such as the ILO, the EU strengthens its legitimacy and its assumed role as a normative power in the world.

¹² T. Novitz, *supra* n. 5. But the intensity, quality and scope of EU coordination in the ILO – executed by the Commission in tandem with the Council Presidency – may have increased since 2001. R. Delarue, 'ILO-EU Cooperation on Employment and Social Affairs', in *The United Nations and the European Union*, eds J. Wouters et al. (The Hague: TMC Asser Press, 2006), 93–114; P. Nedergaard, 'The EU at the ILO's International Labour Conference: A "Double" Principal-Agent Analysis', in *The European Union and International Organizations*, ed. K.E. Jørgensen (London and New York: Routledge, 2008), 149–166; M. Riddervold, 'Interest or Principles? EU Foreign Policy in the ILO', *RECON Online Working Paper* 9 (2008). A. Johnson, 'EU-ILO Relations between Regional and Global Governance', in Orbie & Tortell (eds), *supra* n. 5, 81–97.

¹³ Novitz, *supra* n. 5.

¹⁴ Kissack, "'How to Lose Friends and Alienate People?'" Uploading European Labour Standards into the ILO', *Journal of European Social Policy* 19, no. 2 (2009): 99–116, at 115.

¹⁵ European Commission, 'White Paper on European Governance', 25 Jul. 2001.

III The Growing Role of the ILO in the EU's GSP Regime

When analysing the EU's GSP Regulations, an increased role for the ILO can be discerned. When the sanction clause was introduced in 1995, the ILO was scarcely involved. The legal basis for temporary withdrawal under the social GSP was 'practise of any form of forced labour' or 'export of goods made by prison labour'.¹⁶ The European Commission had a relatively large margin of appreciation in the suspension procedure in case of violations of the relevant labour standards, although the final responsibility lay with the Council of Ministers.¹⁷ ILO findings were not mentioned in the sanctioning process.

This system soon resulted in two complaints by the international trade union movement against alleged abuses of labour rights. In the case of Burma/Myanmar, the Commission decided to investigate practises of forced labour. In March 1997 the Council approved the Commission's conclusion that Burma's tariff preferences should be withdrawn.¹⁸ By contrast, a complaint in 1997 against child labour in Pakistan never resulted in an investigation, let alone a withdrawal of trade preferences, allegedly because the social GSP clause did not yet allow for a suspension on the basis of child labour.¹⁹

In 2001 the EU extended the reasons for temporary withdrawal to include 'serious and systematic violation of any standards referred to in the ILO Declaration on Fundamental Principles and Rights at Work'.²⁰ In addition, ILO findings will serve as the 'point of departure' in the investigation as to whether temporary withdrawal is justified (consideration 19):

The available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO, including in particular Article 33 procedures should, serve as the point of departure for the examination of requests for the special incentive arrangements for the protection of labour rights, as well as for the investigation as to whether temporary withdrawal is justified on the grounds of violations of ILO Conventions.

Since then only Belarus has joined Burma on the list of Europe's GSP sanctions. Following a complaint in 2003 and subsequent investigation, in 2005 the

¹⁶ Article 9(1).

¹⁷ B. Brandtner & A. Rosas, 'Trade Preferences and Human Rights', in *The EU and Human Rights*, ed. P. Alston (New York: Oxford University Press, 1999), 715.

¹⁸ Council Regulation, OJ 1997, L 85.

¹⁹ Other reasons have been advanced: see G. Tsogas, 'Labour Standards in the Generalized Systems of Preferences of the European Union and the United States', *European Journal of Industrial Relations* 3 (2000): 362; M. Dispensyn, 'La dimension sociale dans le Système des Préférences Généralisées de l'Union Européenne', *Revue du Droit ULB* 23 (2001): 109; E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague/London/New York: Martinus Nijhoff, 2003), 367; Brandtner & Rosas, *supra* n. 17, 717–718.

²⁰ The provision on exports of goods made by prison labour remains unchanged.

Commission found that Belarus was in violation of ILO Conventions Nos 87 and 98.²¹ At the end of 2006 the Council of Ministers agreed on trade sanctions, which have been implemented since 21 July 2007.²²

Since 1998, developing countries have been entitled to apply for the social incentive regime. Again, the European Commission plays an important role in decisions on GSP preferences, with the decision-making procedure not referring to ILO findings.²³ This has been criticized because the Commission lacks the means and expertise to make such evaluations and that, once an incentive tariff has been granted, the monitoring of labour rights largely depends on Europe's confidence in, and cooperation with, the beneficiary country's authorities.²⁴ Substantially, the GSP Regulation referred only to a limited number of the core ILO Conventions: beneficiaries of the additional trade preferences had to comply with the freedom of association and child labour conventions, but the forced labour and discrimination conventions were not mentioned. This provoked the criticism that the EU was adopting 'double standards'.²⁵ Equally, some Member States²⁶ wanted more consistency with the ILO's 1998 Declaration.

These issues were addressed in a 2002 reform. The new GSP Regulation required the EU to take the findings of the ILO into account when examining applications for GSP incentives. Thus the Commission and the GSP committee should no longer exclusively rely on autonomous investigations. Additionally, the legal basis of the incentive clause was extended to all eight of the ILO core conventions. As pointed out by Alston, the key reference in the EU GSP Regulations is to the specific and hard law ILO Conventions rather than the softer principles in the 1998 Declaration.²⁷ However, it should be noted that the GSP Regulations talk about the incorporation of the 'substance of' the relevant ILO Conventions in national legislation and about the effective implementation of these labour rights; until 2005, there was no requirement to ratify these conventions.

A more fundamental reform of the EU's GSP conditionality system was implemented in 2005. One reason for this overhaul was its limited success: only Moldova (2000)²⁸ and Sri Lanka (2004)²⁹ had successfully applied for the social incentive

²¹ Commission Decision, OJ 2005, L 213.

²² Council Regulation, OJ 2007, L 405.

²³ The Commission makes an inquiry into the eligibility of the country involved. It can also carry out on-site inspections, assisted by the country's authorities and possibly also by EU Member States. After consulting with the GSP Committee, the Commission decides whether the preferential margin will be granted.

²⁴ Dispersyn, *supra* n. 19, 103.

²⁵ Tsogas, *supra* n. 19, 363–364.

²⁶ It concerns Sweden, Netherlands, UK, Germany, Denmark and Finland. See GSP Working Party, 21 Dec. 1998.

²⁷ P. Alston, "'Core Labour Standards' and the Transformation of the International Labour Regime", *European Journal of International Law* 3 (2004): 492.

²⁸ Council Regulation, OJ 2000, L 189.

²⁹ *Ibid.*, L 346.

system.³⁰ This disappointing result can be explained by the cumbersome administrative procedures, the relatively limited preferential benefits compared with the standard GSP, the availability of alternative trade systems for exporting to the EU market, and ideological resistance against the idea of a social clause.³¹ But a more pressing reason for GSP reform was a case brought against the EU's GSP system before the Dispute Settlement Body of the WTO.

Shortly after 9/11 the EU added Pakistan to the beneficiaries of the GSP drugs system, which provided additional trade preferences to Latin American countries³² fighting drug trafficking and production. This provoked the Indian government to vehemently argue that the EU's decision was motivated by foreign policy and geopolitical motivations and not justified under the GATT Enabling Clause. Although this challenge did not directly concern the labour standard arrangements, it risked undermining the legality of any GSP conditionality system.³³ The WTO Appellate Body, however, ruled that developed countries could grant additional preferences if these "respond positively" to the "needs of developing countries".³⁴ Thus, if it is based on objective and transparent criteria, discrimination between developing countries may be consistent with international trade law.

As a consequence, Europe's social GSP necessarily had to become more objective and transparent. In the new GSP Regulation, the EU abandoned the separate social, environmental³⁵ and drugs clauses and incorporated these into a broader 'sustainable development and good governance' regime.³⁶ All 'vulnerable'³⁷ countries are eligible for these 'GSP+' incentives, provided that they 'ratify and effectively implement' sixteen human rights conventions, including the eight fundamental ILO Conventions,³⁸ and at least seven (out of eleven) conventions

³⁰ Pending the GSP reform, there was no decision on the requests by Ukraine, Uzbekistan, Georgia and Mongolia. Russia also applied but requested to postpone the decision for special incentives in 2002. Georgia and Mongolia became beneficiaries of the GSP+ scheme (see *infra*).

³¹ Orbie, *supra* n. 11.

³² Since 1990 this system had granted additional market access to Andean Community members (Bolivia, Colombia, Ecuador, Peru and Venezuela); in 1998 it was extended to members of the Central American Common Market (Costa Rica, Guatemala, Honduras, Nicaragua, El Salvador and Panama).

³³ See, e.g., R. Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy', *Chicago Journal of International Law* 2 (2003).

³⁴ WTO Appellate Body Report, European Communities – Conditions for the granting of tariff preferences to developing countries, para. 165.

³⁵ The environmental clause included since 1998 had never been used.

³⁶ Article 8-11.

³⁷ The definition of 'vulnerable' is based on a developing country's share in imports into the EU and not on objective development criteria (Art. 9(3)). For a critique, see L. Bartels, 'The WTO Ruling on EC – Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programs', in *Human Rights and International Trade*, eds T. Cottier et al. (Oxford: Oxford University Press, 2005), 742.

³⁸ In addition to the eight fundamental ILO Conventions, this includes: International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights;

on environment and governance³⁹ by the end of 2008. The Regulation also stipulates that the Commission's examination of countries requesting special incentives 'shall take into account the findings of the relevant international organisations and agencies' (Article 11(1)); and once a country has been granted these GSP+ preferences, the Commission 'should monitor the effective implementation of the international conventions in accordance with the respective mechanisms thereunder...' (consideration 11), implying that beneficiary countries' compliance with CLS should be monitored making use of the findings of the relevant ILO bodies.

Thus, the relevance of the ILO has increased considerably through subsequent reforms of Europe's GSP labour standard conditionality system, both in relation to the decision-making procedure (taking ILO findings into account) and the substantive content (ILO Conventions). Three stages can be discerned in this evolution: in the first GSP Regulation the ILO was barely mentioned (1995); second, the contents of some (but not all) conventions were mentioned but without a ratification requirement (1998 and 2002); and finally the ratification and effective implementation of the eight fundamental ILO Conventions became a necessary condition (2005).⁴⁰

The ILO's growing role can be explained by the variety of factors mentioned above, in addition to the WTO case by India against Europe's GSP implying that the labour standard conditionality system had to be made more objective. While references to ILO Conventions and activities in the Union's GSP increase the legitimacy of its labour standard conditionality system, this raises the obvious question of whether the new system is more than a 'tick the box' exercise of ratified international conventions.

Fifteen countries were included in the GSP+ scheme from 1 January 2006 (see Figure 2). These countries are required, by virtue of the scheme, to ratify and implement the international labour standards contained in the eight core ILO Conventions. The list of beneficiaries⁴¹ reveals that all former drugs beneficiaries from the Andean Community and the Central American Common Market successfully

International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Suppression and Punishment of the Crime of Apartheid.

³⁹ Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Stockholm Convention on Persistent Organic Pollutants; Convention on International Trade in Endangered Species; Convention on Biological Diversity; Cartagena Protocol on Biosafety; Kyoto Protocol to the UN Framework Convention on Climate Change; UN Single Convention on Narcotic Drugs (1961); UN Convention on Psychotropic Substances (1971); UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); Mexico UN Convention against Corruption.

⁴⁰ Conditionality provisions in the latest GSP amendment (July 2008) are identical to the existing system. Council Regulation, OJ 2008, L 211.

⁴¹ Commission Decision, OJ 2005, L 337.

switched over to GSP+ incentives.⁴² This raises the question whether the GSP+ reform merely amounts to a recycling of the former drugs system, and whether ratification of the relevant conventions constitutes anything more than an easy way to continue preferences already granted under the previous system.⁴³ In the ILO system, ‘ratification is cheap’ as there is little consequence for governments for ratifying conventions, yet failing to observe their provisions.⁴⁴ Compa talks of the ‘crudeness of ILO ratifications as an indicator of respect for workers’ freedom of association’.⁴⁵ In any case, the lack of effective implementation of the ILO core conventions by the Latin American beneficiaries has been profoundly criticized by policy makers and NGOs (see Introduction). The GSP Regulation requires the European Commission to monitor the implementation of conventions by the GSP+ beneficiaries, taking the ILO findings into account. Although the Commission’s internal evaluation is apparently based on interpretations of ILO reports, it is unclear what methodology is being used. For all these reasons, the next section engages in a more systematic analysis of the implementation record of the countries affected by GSP labour standard conditionality, as assessed by the ILO bodies.

VI Assessing Implementation beyond Ratification: A Pyramid of ILO Condemnation

1. *Implementation beyond Ratification: Constructing a Hierarchy of ILO Condemnation*

The previous section illustrates that the ILO’s role in the Union’s GSP conditionality has become more important; determining the impact of this is more difficult. Clearly, assessing ratification of conventions is a simple matter as a country has either ratified or not; the EU can simply ‘tick the box’ in relation to countries’ obligations, without needing to look any deeper. In this regard, two observations can be made. First, the EU has only granted GSP+ incentives to countries that have ratified the relevant ILO Conventions. In comparison, before 2005, ratification of these conventions was not required by GSP drugs beneficiaries. Second, the prospect of additional market access⁴⁶ under GSP+ appears to have positively

⁴² The remaining GSP+ beneficiary countries are Georgia, Mongolia, Moldova and Sri Lanka. The first two countries had applied for the social incentives under the previous GSP, the latter two were already beneficiaries of this system.

⁴³ J. Orbie & F. De Ville, ‘Core Labour Standards in the GSP Regime of the European Union: Overshadowed by Other Considerations’, in *Human Rights at Work: Perspectives on Law and Regulation*, eds C. Fenwick & T. Novitz (Oxford: Hart Publishing, 2009 forthcoming).

⁴⁴ E. Neumayer & I. de Soysa, ‘Globalisation and the Right to Free Association and Collective Bargaining: An Empirical Analysis’, *World Development* 34, no. 1 (2006): 31–49, at 34.

⁴⁵ L. Compa, ‘Assessing Assessments: A Survey of Efforts to Measure Countries’ Compliance with Freedom of Association Standards’, *Comparative Labour Law and Policy Journal* 24 (2005): 283–320, at 286.

⁴⁶ Imports from GSP+ beneficiaries into the EU increased in 2006 and 2007 with 15% and 10%, respectively.

affected ratification of ILO core labour conventions in a number of countries – that is, Bolivia, Colombia, Venezuela, Mongolia, and El Salvador each ratified one or more of the core labour conventions during the period 2005–2006 (see Table 1), seemingly because, without those ratifications, they would have lost their beneficiary status. The effect of the GSP carrot is most obvious in the case of El Salvador, where ratification followed the provisional granting of GSP+ preferences. In October 2005, the EU temporarily granted El Salvador trade preferences on the understanding that the country would ratify ILO Conventions Nos 87 and 98. In September 2006, just weeks short of the EU's deadline when, apparently, trade preferences would be withdrawn without full ratification of the ILO core conventions, El Salvador ratified both conventions. The Council accordingly granted El Salvador the right to access the GSP+ scheme for the following two years, on the basis of the simple fact of ratification.⁴⁷ However, these preferences may be withdrawn following a ruling by El Salvador's Constitutional Court that the ratification of Convention No. 87 is inconsistent with its constitution.⁴⁸

Table 1. EU GSP Conditionality

Country	Status anno 2008	Status anno 2005	Date of complete ratification of all fundamental labour conventions	
Bolivia		Drugs GSP (AC)	May 2005	
Colombia		Drugs GSP (AC)	January 2005	
Costa Rica		Drugs GSP (CACM)	September 2001	
Ecuador		Drugs GSP (AC)	September 2000	
El Salvador		Drugs GSP (CACM)	September 2006	
Georgia	GSP+ since 2005	Normal GSP	July 2002	
Guatemala		Drugs GSP (CACM)	October 2001	
Honduras		Drugs GSP (CACM)	October 2001	
Moldova		Social GSP	June 2002	
Mongolia		Normal GSP	March 2005	
Nicaragua		Drugs GSP (CACM)	November 2000	
Panama		Drugs GSP (CACM)	October 2000	
Sri Lanka		Social GSP	January 2003	
Peru		Drugs GSP (AC)	November 2002	
Venezuela		Drugs GSP (AC)	October 2005	
Pakistan		Normal GSP	Drugs GSP (2002-2005)	July 2006
Burma/Myanmar		GSP sanctions (since March 1997)		(2 ratifications)
Belarus		GSP sanctions (since June 2007)		October 2000

AC = Andean Community; CACM = Central American Common Market.

⁴⁷ Council Decision, OJ 2006, L 365.

⁴⁸ The European Commission has begun investigating the impact of this ruling on the observance of Convention No. 87 in El Salvador: Commission Decision, OJ 2008, L 108/29.

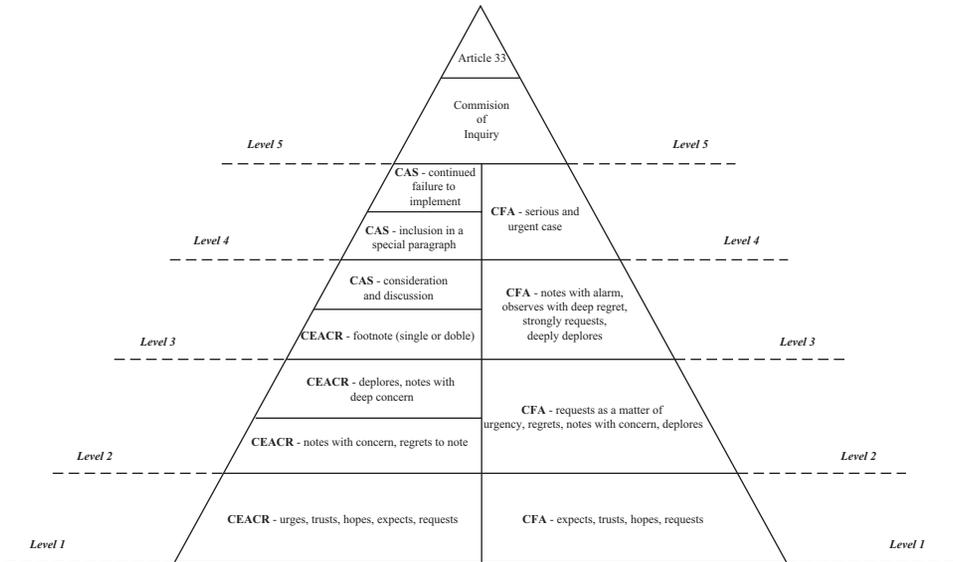
As far as implementation of international labour standards is concerned, the various ILO committees are expert decision makers through their assessments of Member States' observance of the ratified conventions. Once each year, two committees supervise the requirement on Member States to report on their implementation of the Conventions that they have ratified. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) provides technical supervision of the ILO Conventions and considers the reports made by individual countries; these reports are then considered by the Conference Committee on the Application of Standards (CAS) which is a tripartite committee allowing dialogue between governments and the representatives of employers and workers. For cases involving freedom of association, the quasi-judicial Committee on Freedom of Association (CFA) decides upon complaints three times each year. At the apex of this monitoring system is the Commission of Inquiry (COI), an ad hoc body set up by the ILO's Governing Body in relation to individual complaints.

The reports of these four committees, therefore, provide the authoritative technical assessments of labour standards implementation and amount to formal ILO decisions. Nevertheless, it is necessary to decode the 'very guarded language' of the reports resulting from the 'constraints of diplomatic niceties' that make them difficult to interpret for outsiders.⁴⁹ ILO criticism of a country's observance of conventions is rarely glaringly obvious; the Organization favours encouraging improvements over punishing failures. Furthermore, most committees reflect the ILO's tripartite nature, which inevitably involves a great deal of consensually negotiated decisions as to individual countries' observance of the CLS.

A 'systematic analysis of code phrases' (*ibid.*) used by the committees when considering individual countries' observance of conventions is, however, possible. An assessment of implementation of ILO labour standards requires analysis of the wording of the reports that the committees produce recording their consideration of each Member State's observance of conventions. This can be argued to result in a 'hierarchy of condemnation' by the ILO's formal monitoring system relating to the Organization's condemnation of particular countries. The pyramid below is a simplified heuristic tool that 'decodes' ILO code phrases, highlighting the relative seriousness which the ILO has assigned to particular infringements of Conventions by individual countries through listing the code phrases in an order that indicates the levels of seriousness that they represent. The code phrases are therefore incorporated into a scale which indicates the seriousness of CLS breaches by placement in one of a series of levels of condemnation. This pyramid was created through an analysis of the committees' reports, taking into account past experience within the International Labour Standards Department of the International Labour Office.

⁴⁹ Compa, *supra* n. 46, 306.

Figure 1. Decoding ILO Assessments: A Pyramid of ILO Condemnation



2. Judging EU GSP Decisions against ILO Assessments

The following sections will use this pyramid to assess the level of criticism made by the ILO of GSP+ beneficiaries and GSP sanctioned countries. It attempts to gain more analytical insight into (in)consistencies between the Union's application of GSP incentives and the implementation of CLS *as assessed by the ILO* in respect to the EU's stated objective to act in conformity with multilateral organizations such as the ILO.

(a) *Sanctions: drawing a clear line between levels 4 and 5.* There is a clear consistency between the application of GSP sanctions by the EU and the hierarchy of ILO condemnation. Since 1995 when the unilateral withdrawal of trade preferences became possible, the EU has taken steps to impose sanctions only in relation to Burma and Belarus. Equally, in the same period, the ILO has established a COI only in relation to Burma and Belarus. As noted above, the COI is the highest ILO committee in terms of a simple hierarchy of condemnation.

Thus, the EU appears to draw a line between levels 4 and 5 on the hierarchy of condemnation in its decisions to withdraw GSP preferences. This is not only in line with a strong denunciation on the part of the ILO, but is also in line with a more general disapproval of the international community: GSP sanctions against Burma and Belarus are embedded in a set of broader foreign policy initiatives targeting the ruling regimes of these countries.⁵⁰ The EU would only withdraw trade preferences

⁵⁰ E.g., ban on entry visas, suspension of high-level visits, expulsion of Burma's military personnel in Europe, suspension of development aid, arms embargo. See Council Common Position, OJ 2006, L 116.

for breach of labour standards in cases in which the ILO has unambiguously held that such breach has not only occurred but has been persistent and serious.

The case of Pakistan seems to confirm the observation that Europe will not apply sanctions before the establishment of a COI. In 1997 the EU received a complaint alleging the use of child labour in the country. ILO committees had not commented on its observance of the child labour conventions in 1997, simply because the country had not ratified those conventions and so was not bound by either of them. Another possible trade union action at the international level was through the EU, although the complaint had to be worded as forced labour to fit within the GSP Regulation at the time. Although various other reasons could explain the EU's decision in this case,⁵¹ the absence of formal condemnation of Pakistan by the ILO may have contributed. In any event, the EU could not refer to any formal and legal decisions of ILO supervisory bodies, expressing the ILO's technical opinion, as there were none.

Despite significant criticism of Pakistan by the ILO since then,⁵² Pakistan became a beneficiary of Europe's GSP drugs preferences regime in 2001. Condemnation at level 3 of the pyramid seems not to be a sufficient reason to change GSP status. This observation will be confirmed in the analysis of GSP+ beneficiaries (see below).

Thus, the EU threshold for GSP sanctions is high. When the GSP+ system was proposed, Trade Commissioner Pascal Lamy wanted to ease developing countries' resistance to a social clause and talked about 'a distinctive type of foreign policy built around persuasion and incentives rather than threats and demands'.⁵³ Accordingly, the question is raised whether these incentives have been consistently and successfully applied.

(b) Incentives: anything under level 5 is fine. The question of GSP incentives is more difficult to assess. Here, the full complexity of assessing implementation of labour standards is evident. On the surface, it appears that any country judged to fall below level 5 on the pyramid – the apparent threshold for GSP sanctions – is eligible for incentives. There seems to be no differentiation by the EU between the varying levels of condemnation below the most serious.

This is clear in relation to the situation in 2005, when the decision to include fifteen countries in the GSP+ scheme was taken, as many of those countries were not performing well in terms of implementation. A 'snapshot' of what the ILO committees had concluded about those countries in the months immediately prior to the time that the decision was taken shows that there were instances of real concern with implementation. Most obviously, Panama, Guatemala, Venezuela and Colombia

⁵¹ See *supra* n. 19.

⁵² Pakistan has been condemned at level 3 of the pyramid: re-freedom of association and collective bargaining, see, e.g., CFA Case 2096 (2004) and the CAS 1998 and 2001; re-forced labour, see CAS 2002.

⁵³ Lamy, *supra* n. 2.

were called before the CAS on account of their observation of Convention No. 87 in 2005, one month before the decision to include these countries in the GSP+ scheme was taken. This places these three countries at level 3 of the pyramid in terms of seriousness. Equally, in the three sessions of the CFA in 2005, 40 of the 105 cases – concerning ten of the fifteen countries⁵⁴ – related to GSP+ beneficiary countries. In other words, of the cases alleging breach of freedom of association submitted to the ILO in that year, a disproportionate number were in relation to countries then chosen for the GSP+ scheme. While these countries may not in fact be the worst examples of non-observance of freedom of association in the world, workers' and employers' organizations chose to focus on those cases over others.

Even at the less serious levels of the pyramid, it is clear that the CEACR had concerns about various of the GSP beneficiary countries in the year before they were awarded the incentives. Georgia had not submitted any periodic reports for the CEACR report published in 2005, suggesting a lack of commitment to the ILO's labour standards, as well as its process; it was condemned at level 2 on the pyramid. Sri Lanka, Mongolia and Costa Rica equally failed to provide some reports for that year. El Salvador submitted some reports, but the CEACR expressed its 'deep concern' about certain matters in the country; for that reason, it falls within level 2 of the pyramid. Despite the provision of reports by Moldova and the enactment of new legislation, the Committee found it necessary to 'request once again' certain information that had not been provided by the Government.

On the other hand, others of the fifteen countries could be rated more positively. The CEACR 'noted with satisfaction', its most positive evaluation, changes in relation to the freedom of association conventions in Nicaragua. While the Committee was also positive about some changes in Nicaragua in relation to Convention No. 182, it was concerned about other matters falling within this convention. Likewise, Honduras, Ecuador and Bolivia were all the subject of positive affirmations on account of some changes, accompanied by less positive statements; these countries were condemned at level 1 of the pyramid.

Thus, it seems that in 2005 the group of fifteen countries awarded trade preferences by the EU could in no way be considered to be a homogenous group in terms of their implementation of core labour conventions. In fact, the diversity of their implementation is striking, with some countries having shown clear signs of an improving implementation, and others being seriously criticized. For those countries with positive comments from the ILO committees, it could be argued that inclusion within the GSP+ scheme was a reward for improvements in their implementation of labour standards. That, however, is clearly not so for all the fifteen countries chosen to receive trade preferences under the GSP+ scheme in 2005.

For these countries, membership in the GSP+ scheme can only be justified as having been intended to provide an incentive to improvement in behaviour. But,

⁵⁴ Only Bolivia, Ecuador, Georgia, Honduras and Moldova were not criticized by the CFA during 2005.

although inclusion into the GSP+ might indeed have stimulated the ratification of CLS by some countries (see above), an improvement in implementation over time is not evident. In the majority of cases, the level of condemnation on the pyramid has remained fairly static. This is the case in relation to Honduras, Ecuador, Nicaragua, Georgia, Peru and Moldova; in relation to Guatemala, Costa Rica, and Venezuela, the position on the pyramid may be static, but it is high – these countries have continued to be considered by the CAS in relation to the freedom of association conventions during this time, remaining at level 3 on the pyramid. Colombia has equally continued to be seriously condemned by the CFA, constantly remaining at level 3 or 4 on the pyramid. Panama, Mongolia and Bolivia have continued to provide late reports for the CEACR, suggesting a less than committed stance toward labour standards. The only suggestions for slight improvements are the cases of El Salvador (cf. also ratification – see above), whose implementation of the child labour conventions has improved, and Sri Lanka, in which there are improvements in relation to its provision of reports and legislative changes. Incidentally, both these countries have recently been investigated for violations of the GSP+ conventions (see below).

In other words, the EU GSP+ scheme has not led to an overall improvement in labour standards implementation in those countries. This is exemplified by the cases considered by the CFA. For example, in its last session for 2007, the CFA considered an extraordinarily large number of cases from the GSP beneficiary countries. Of the thirty-six cases considered by the Committee in that session, twenty-two were from GSP+ countries – that is, ten of the fifteen GSP+ countries were the subject of a consideration by the Committee of Freedom of Association, and fell at least on level 1 of the pyramid.⁵⁵ Furthermore, of the six cases singled out for special mention as ‘special and urgent cases’, three were from GSP+ countries: one was a case against Colombia, and two were Guatemalan. These cases were, therefore, classified at level 4 on the pyramid of condemnation. Of the remaining cases considered by the Committee, many were serious cases, falling at levels 2 (Colombia, Venezuela, Costa Rica, and Guatemala) or 3 (Honduras).

V Conclusions

Committed to promoting the social dimension of globalization, the European Union has highlighted its strengthened cooperation with the ILO as well as the labour conditionality in its trade instruments. The EU’s GSP scheme combines both elements, by granting or withdrawing trade preferences according to a developing country’s observation or violation of labour standards. This article has shown

⁵⁵ That is, Colombia, Sri Lanka, Moldova, Venezuela, El Salvador, Costa Rica, Ecuador, Guatemala, Honduras and Peru; while Georgia, Mongolia, Bolivia, Nicaragua and Panama were not the subject of cases in this session.

that the role of the ILO in the Union's GSP has gradually increased: the CLS as embodied in the eight core ILO Conventions are now explicitly used as a point of reference, and the Union has also indicated its intention to take the findings of the ILO bodies into account when sanctioning or rewarding third countries. There are several explanations for the growing role of the ILO in the Europe's external relations. However, the proof of the pudding is in the eating, and various actors have questioned whether beneficiaries of the Union's GSP incentives have indeed implemented the relevant ILO Conventions. It is clear that the EU considers ratification as a necessary precondition, but even when considering the conclusions of the competent ILO bodies there is the suggestion that labour standard conditionality has not been consistent with implementation records.

In order to provide a more systematic analysis, we developed a 'pyramid of ILO condemnation' as a heuristic tool for decoding the phrases used by the various ILO committees. First, the application of sanctions by the EU in its GSP scheme is consistent with ILO specialist assessments of countries' observance of ILO Conventions. In sanctioning developing countries the Union has drawn a clear line between levels 4 and 5 on the pyramid of condemnation. It seems that the EU would only take such drastic steps as the withdrawal of trade preferences for breach of labour standards in cases in which the ILO bodies (and other institutions) have unambiguously held that such breach has not only occurred but has been persistent and serious. Thus, the EU has lived up to its intention to use incentive-based rather than punitive social clauses.

Second, the EU's granting of GSP+ incentives is less clearly consistent with a reading of the ILO committees' reports. The system has been successful in ensuring the full ratification of the eight fundamental labour standards among the beneficiary countries, as exemplified by the case of El Salvador. However, several countries have received GSP+ trade preferences despite being seriously criticized by the authoritative ILO committees for their *implementation* of the relevant conventions. Looking more closely at the position of the GSP+ beneficiaries on the pyramid, it can be concluded (1) that there is a large variety between these countries in terms of implementation, ranging from relatively serious condemnations (for example, in the case of Colombia, Guatemala, Venezuela) to rather positive remarks (for example, for Bolivia, Ecuador, Honduras); and (2) that these observations are relatively static over time with no real noticeable changes between 2005 and 2008.

This suggests that, in the selection of GSP+ beneficiaries, path dependencies from the previous GSP drugs and labour regimes have played a role. When the GSP drugs arrangement was ruled illegal by the Appellate Body of the WTO, the Union reformed its GSP and introduced the GSP+ conditionality system. In 2005 all the former drugs beneficiaries became GSP+ countries, so that they did not suffer from decreased access to the European market. In order to be eligible, some of these Latin American countries had to ratify the relevant ILO Conventions, but implementation requirements have been more vague. Thus, the GSP

reform of 2005 was less radical than it seems. The new list of GSP+ beneficiaries of December 2008 confirms this.⁵⁶ Since some countries that are high on our scale of condemnation still benefit from GSP+ preferences, the EU remains vulnerable for criticism that it only considers the ratification criterion. For example, when the EU rejected the GSP+ applications by Nigeria and Gabon because they had not ratified one of the relevant conventions, this formal shortcoming was contrasted with Colombia's continuing GSP+ treatment despite serious violations of basic labour rights.⁵⁷

Third, there are no cases of GSP+ preferences being withdrawn, despite the Regulation providing for such a 'middle-ground' option whereby sanctioned countries would move back not to MFN tariffs but to standard GSP rates. European policy makers may have reasoned that the diplomatic damage from sanctions would be greater than the expected benefit in pushing countries into implementation of ILO Conventions. Even excluding diplomatic costs, however, the effectiveness of sanctions to stimulate implementation of labour standards can be doubted, thus justifying its careful use. Path dependencies also explain why the EU's institutional system makes it relatively difficult to remove GSP+ beneficiaries from the incentive system: it is biased toward the *status quo* since any Commission initiative to withdraw incentives can be challenged by a blocking minority in the Council of Ministers – unless it concerns gross violations of ILO Conventions that cannot easily be ignored by the Council.⁵⁸

In the near future the EU's willingness and ability to withdraw GSP+ preferences may become clearer, following ongoing investigations against violations of the GSP+ conventions in El Salvador and Sri Lanka.⁵⁹ However, the 2008 list of GSP+ beneficiaries already confirms that several countries that are placed relatively high on the pyramid of ILO condemnation will continue to benefit from special preferences.⁶⁰ The European Commission's report on the effective implementation of the

⁵⁶ The list remains largely unchanged. Panama and Moldova have disappeared but not for political reasons (see *infra*); while Paraguay, Armenia and Azerbaijan are added. Commission Decision, OJ 2008, L 334/90.

⁵⁷ David Cronin, IPS, 22 Dec. 2008.

⁵⁸ The case of Belarus shows that even the 'normal' sanctioning procedure is time consuming and prone to opposition from EU Member States. While the complaint against Belarus was made in 2003, it took until 2007 before sanctions were established. The delay was partly caused by the EU's wish to monitor the situation in Belarus and wait for ILO reports in this regard, but also related to practises of 'classic horse-trading' between Member States. When the Commission proposed sanctions, these were opposed by Poland, Lithuania and Latvia because they would hurt ordinary Belarusians and because they would damage their own cross-border importers; Italy, Greece and Cyprus also opposed the sanctions wishing to punish the UK, Germany and Sweden for blocking antidumping measures against Chinese shoes (*EU Observer*, 29 Sep. 2006).

⁵⁹ In the case of El Salvador, it concerns labour standard conventions (see *supra*). In the case of Sri Lanka, it concerns violations against the Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of Child. See Commission Decision, OJ 2008, L 277/34.

⁶⁰ Panama was excluded because its application missed the deadline, and Moldova because it

conventions according to the international monitoring bodies merely reproduces comments for each country and each convention, while analysis is limited to the statement that these ‘reveal various shortcomings in the implementation process but in general demonstrate a satisfactory state of play’.⁶¹

A more sophisticated analysis in conformity with assessments of international bodies would allow for a more refined use of the GSP conditionality system, in particular its middle-ground option.⁶² Further differentiation among potential GSP+ beneficiaries, in conformity with ILO and other assessments over time, may be justifiable. This would help the EU to move beyond ‘ticking the box’ in terms of ratifications. The impact of the EU’s GSP+ on ratification of ILO Conventions suggests that this option could influence countries’ implementation of CLS as clearly the EU has the trade leverage to cause changes when it takes a determined line. Such an approach could allow the EU to focus on applying pressure on countries in relation to the more serious of breaches of core conventions, without resorting to the use of a ‘stick’. In doing so, it could be considered to reinforce the ILO committees’ work in relation to the observance of the fundamental conventions⁶³ and increase the legitimacy of the ILO as a whole. It would address the concern that countries which have repeatedly been condemned by the ILO receive GSP+ preferences and thus increase the legitimacy of the EU’s conditionality system. Ultimately, an objective and transparent use of the Union’s GSP sticks and carrots, in accordance with ILO findings, may help to break the impasse in the debate on a social clause and re-establish the legitimacy of labour considerations in the international trade regime.

exports under another trade arrangement; these decisions are unrelated to implementation of the conventions.

⁶¹ European Commission, ‘Report on the status of ratification and recommendations by monitoring bodies’, 21 Oct. 2008.

⁶² Of course, creating a finite and non-porous line between imposing sanctions and granting incentives requires a subtlety beyond that contained in the pyramid. It also involves a political decision by the EU, based on matters that are outside the inherent logic of the ILO system. For example, the European Parliament has suggested that GSP+ preferences should be withdrawn when the ILO CAS has devoted a ‘special paragraph’ to a country – i.e., between levels 3 and 4 of our pyramid. European Parliament, ‘Draft legislation resolution on the proposal for a Council Regulation applying a GSP scheme from 1 January 2009 to 31 December 2011’ (Committee on International Trade, 29 May 2008), 18.

⁶³ Although note, of course, that the ILO committees’ reports are intended to provide technical and tripartite consideration of the implementation of labour standards for the purposes of the governments involved – and are not intended to operate as sources for external assessments. Their use in what could amount to trade disadvantage could potentially be argued to harm the ILO system, with its exclusively non-sanction-based approach.

AIMS

The aim of the *Review* is to consider the external posture of the European Union in its relations with the rest of the world. Therefore the *Review* will focus on the political, legal and economic aspects of the Union's external relations. The *Review* will function as an interdisciplinary medium for the understanding and analysis of foreign affairs issues which are of relevance to the European Union and its Member States on the one hand and its international partners on the other. The *Review* will aim at meeting the needs of both the academic and the practitioner. In doing so the *Review* will provide a public forum for the discussion and development of European external policy interests and strategies, addressing issues from the points of view of political science and policy-making, law or economics. These issues should be discussed by authors drawn from around the world while maintaining a European focus.

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The editors will consider for publication unsolicited manuscripts in English as well as commissioned articles. Authors should ensure that their contributions will be apparent also to readers outside their specific expertise. Articles may deal with general policy questions as well as with more specialized topics. Articles will be subjected to a review procedure, and manuscripts will be edited, if necessary, to improve the effectiveness of communication. It is intended to establish and maintain a high standard in order to attain international recognition.

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