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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INTERNATIONAL CONSULTATION "ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPMENT ACTIVITIES OF INTERNATIONAL INSTITUTIONS" ORGANIZED IN COOPERATION WITH THE HIGH COUNCIL FOR INTERNATIONAL COOPERATION (FRANCE)

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The social dimension of the European Union's Generalized System of Preferences (GSP)

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SUMMARY

This background paper focuses on the topic of the call for papers, namely, economic, social and cultural rights and development strategies and deals primarily with the first part: development strategies and the recognition of economic and social rights. It also discusses the second part, i.e. the inclusion of economic and social rights in existing mechanisms.

The purpose of the background paper is to study the social dimension of the European Union's Generalized System of Preferences (GSP). A special incentive arrangement on labour rights has been implemented since 1998 as part of the European Union's system of generalized tariff preferences. The arrangement takes the form of preferences in addition to the basic preferential margin. These preferences may be granted to developing countries which request them and provide evidence that they have adopted and are applying domestic legal provisions incorporating the substance of International Labour Organization (ILO) Conventions Nos. 87 and 98 concerning the right to organize and to bargain collectively and ILO Convention No. 138 concerning the minimum age for admission to employment.

This special arrangement might be called a social clause which is incentive-based and part of the European Union's development policy. The aim is to encourage GSP beneficiary countries to comply with certain internationally recognized social standards and to prohibit some practices such as child labour, which are often associated with underdevelopment, without, however, forcing them formally to ratify the ILO Conventions embodying such standards. The inclusion of a social dimension in the European Union's international trade is undeniably a major innovation. The special arrangement is a basic instrument for the promotion and development of fundamental labour rights.

Over two years after the adoption of the regulation implementing the social clause, it must be recognized that special incentive arrangements concerning labour rights have had little success. Only the Republic of Moldova has requested and obtained access to the special arrangement. The Russian Federation has also applied for such an arrangement and its application is under review. The results of special incentive arrangements are thus quite meagre and the background paper tries to determine the reasons for this lack of success, proposes possible solutions and suggests the possibility of cooperation between the Committee on Economic, Social and Cultural Rights, the ILO and the EU.

There is also a general clause on the temporary withdrawal of GSP benefits. In this connection, it is a welcome development that the European Union has, for the first time, penalized the Union of Myanmar (Burma), a country which violates fundamental social rights. It is to be hoped, however, that this procedure will not be applied only to countries with the weakest economic power. The background paper evaluates the possibility of the withdrawal of benefits.

1. The European Union grants preferential access to its market for certain products originating in developing countries. The aim of this Community development policy is to facilitate the gradual integration of the developing countries into the world economy. The main objective of Community development cooperation policy is, moreover, to promote the sustainable economic and social development of the developing countries, particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; and the campaign against poverty in the developing countries.[1]

2. Preferential access to the market of the European Union varies, however, depending on the developing country in question. We shall first look at the position of the generalized system of preferences (GSP) in what is commonly known as the pyramid of trade preferences (I) and then go on to consider a recent major development in the European Union's generalized system of preferences, namely, the inclusion of a social dimension (II). In our opinion, it is preferable to refer to a "social dimension" rather than to a "social clause" because the arrangement introduced in the generalized system of tariff preferences is designed to encourage the protection of some fundamental labour rights and it is promotional, incentive-based and optional in nature, and not a genuine binding social clause to which penalties attach. It will, however, be seen that there is a fine line between an incentive arrangement which may be withdrawn and which may be similar to a penalty, and a social clause, non-compliance with which may be penalized. We will therefore also use the term "social clause" to refer to this new social dimension. The present background paper, which is necessarily limited, will analyse and evaluate this new social dimension, which is recent and not very well known, but will not analyse the concept of a social clause as such and will, in particular, not refer to the arguments for and against this clause, which has been extensively studied in the abundant scientific literature.

I. THE GENERALIZED SYSTEM OF PREFERENCES IN THE PYRAMID OF TRADE PREFERENCES

3. In some cases, treatment is more preferential than in others. Very schematically, the top of the pyramid includes the African, Caribbean and Pacific Group of States (ACP countries), which were linked to the European Union by the fourth ACP-EEC Convention of Lomé, of December 1989, as revised by the agreement signed in Mauritius on 4 November 1995. This Convention was followed by the ACP-EU Partnership Agreement signed on 23 June 2000.[2] The ACP countries are at the top of the hierarchy of trade preferences in terms of levels of tariff reductions and categories of products covered. In practice, they may export industrial products duty free and without any quantitative restriction, while agricultural products are virtually exempt from customs duties.

4. Lower down on the pyramid are the countries linked to the European Union by bilateral, economic and trade agreements. The European Union has concluded such agreements with southern European countries (Cyprus, Malta and Turkey), with Eastern Mediterranean countries (Israel, Jordan, Lebanon, Syria) and with North African countries (Algeria, Egypt, Morocco, Tunisia). The purpose of these agreements is the granting of trade preferences for exports to the member States of the European Union. Such preferences are usually lower than those granted to the ACP States.

5. At the base of the pyramid are the Asian and Latin American countries, which have benefited from the Generalized System of Preferences since 1971. Some Andean countries (GSP since 1990) and Central American countries (GSP since 1992), which are taking part in action to combat drugs, benefit from a more favourable GSP, at a level that is comparable, for some products, to the preferences granted under the Lomé Convention.

6. Since tariff concessions for the other countries are lower than those under the Lomé Convention and the Mediterranean Agreements, it is primarily the Asian and Latin American countries which will actually use the GSP, even though all developing countries may theoretically be GSP beneficiaries. In principle, the GSP covers all of the 180 beneficiary countries listed in Annex III of Regulation No. 2820/98,[3] but, in practice, the majority of preferential industrial imports, of which there are many more than agricultural imports, focuses on about a dozen countries, of which China is the first beneficiary country. It is also first in terms of total preferential imports, far ahead of the other beneficiary countries.

7. The purpose of the system is to promote the economic and industrial development of the developing countries. The system was set up by derogation from the GATT rules.[4] It was adopted for a period of 10 years and has been renewed since 1980 by virtue of a permanent derogation.[5] Although it is based on article 133 of the Treaty on European Union,[6] which relates to the foundations of the common commercial policy, the GSP is also an instrument for the development of the least developed countries and it is an instrument that supplements GATT in the sense that it is designed to enable the least developed countries to become part of the international economy and join the World Trade Organization (WTO).

8. The first generalized tariff preference scheme was thus adopted by the Community in 1971. In accordance with the offer it made in the context of the United Nations Conference on Trade and Development,[7] the Community opened up generalized tariff preferences for some agricultural and industrial products from developing countries as of 1971. The scheme was available for an initial period of 10 years and ended on 31 December 1980. It was renewed for a further 10-year period, which ended on 31 December 1990. It was then changed and extended until 31 December 1994, when the second generalized tariff preference system was established. At that time, the Community opened a further 10-year period (1995-2004) for its offer.

9. The first scheme provided for an exemption from import duties for nearly all manufactures and for a reduction in duties for some agricultural products. Quantitative restrictions were, however, established for some products, such as textiles and other products regarded as sensitive, in order to protect the interests of Community industries for which such imports would give rise to problems. Although imports of agricultural products were not subject to quotas, the number of agricultural products in question and the preferential margins were usually not very high. The GSP involves granting tariff reductions on imports from developing countries. It is a unilateral, non-reciprocal and generalized tariff instrument, in that reductions are in principle applicable to all developing countries.

10. The Lomé Convention did not contain a genuine social clause involving a specific penalty for non-compliance with particular social standards. In the version revised by the November 1995 agreement, it did, however, contain some very general provisions on respect for human rights, democratic principles and the rule of law.[8] There was also a clause suspending

development assistance in the event of non-compliance with these elements. The same is true of the Cotonou ACP-EU Partnership Agreement, in which the parties reiterate their deep attachment to human dignity and rights and undertake to promote and protect all fundamental freedoms and all human rights, especially economic and social rights.[9] The Agreement also provides[10] that, if a party considers that the other has failed to fulfil an obligation relating to respect for human rights, democratic principles and the rule of law, a procedure is provided that may also lead, in the last resort, to suspension. Other instruments, such as some bilateral trade agreements, also contain general clauses of this kind relating to respect for fundamental rights.

11. The case of the Community GSP is entirely different and will therefore be the main focus of our attention. The generalized tariff preferences system set up in 1971 did not contain any provision that could be construed as a kind of social clause. A social dimension was introduced in the GSP on 1 January 1995 and it was considerably strengthened by the adoption of an implementing regulation which entered into force on 5 June 1998.[11]

12. The second generalized system of tariff preferences (GSP), as extensively amended, was set up by Council Regulations (EC) Nos. 3281/94 and 1256/96 of 19 December 1994 and 20 June 1996, respectively.[12] The first Regulation was applicable for the period from 1 January 1995 to 31 December 1998 in respect of certain industrial products originating in developing countries. The second was applicable from 1 January 1997 to 30 June 1999 in respect of certain agricultural products originating in those countries.

13. The GSP provides for a general arrangement and special incentive arrangements. The current general arrangement[13] includes a modulation mechanism, a graduation mechanism, a safeguard clause and two support arrangements, one for the least developed countries and the other for the fight against drugs.

14. The modulation mechanism modulates the preferential margin according to the degree of sensitivity of products imported into the European Union market. Each product is classified according to its sensitivity in one of the four categories corresponding to different preferential margins. These categories are: very sensitive products, for which the preferential margin is 15 per cent (the preferential duty applicable to products in this category is thus equal to 85 per cent of the Common Customs Tariff duty applicable to the product in question, without prejudice to the provisions on the special incentive arrangements which will be referred to below), sensitive products, for which the preferential margin is 30 per cent, semi-sensitive products, for which the preferential margin is 65 per cent, and non-sensitive products, for which the preferential margin is 100 per cent.

15. A graduation mechanism was set up in 1986. Its purpose is to prevent some GSP beneficiary countries from carving out an essential share of the total GSP, since all countries do not have the same needs in terms of preferential advantages. Consequently, the mechanism provides that, when a country has achieved a particular level of development and thus of competitiveness, this leads to a gradual withdrawal of preferential treatment. The GSP is thus intended to be transitional.

16. The least developed countries[14] benefit from an even more favourable support arrangement. Council Regulation (EC) No. 602/98 granted the least developed countries which are not members of the Lomé Convention advantages equal to those granted to the member countries of that Convention.[15] Council Regulation (EC) No. 416/2001[16] extended duty-free access without any quantitative restrictions to products originating in the least developed countries, with the exception of weapons and ammunition.

17. A similar support arrangement was implemented in 1990 for four Andean Community countries (Colombia, Ecuador, Peru, Bolivia), to which a fifth Andean country, Venezuela, was added in 1995. Six Central American countries belonging to the Central American Common Market (Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama) have also benefited from this support arrangement since 1992.[17] Common Customs Tariff duties are totally suspended for the countries taking part in the fight against drugs in order to reduce their economic dependence on drugs.

18. The GSP scheme also contains a safeguard clause providing that, where a product originating in one of the countries or territories listed in Annex III of Council Regulation (EC) No. 2820/98 is imported on terms which cause or threaten to cause serious difficulties to a Community producer of like or directly competing products, Common Customs Tariff duties on that product may be reintroduced at any time at the request of a member State or on the Commission's own initiative.[18] This clause has been applied in only one case. In 1998, Spain requested[19] the reinstatement of the Common Customs Tariff for tinned tuna originating in Ecuador, but then withdrew its request[20] and the procedure was therefore dropped.

19. Special incentive arrangements[21] are applicable in principle as from 1 January 1998. They take the form of additional preferences, over and above the basic preferential margin. They may be granted to developing countries which request them and provide proof that they have adopted and actually apply domestic legal provisions incorporating the substance of the standards laid down in International Labour Organization Convention Nos. 87 and 98 concerning the right to organize and the right to bargain collectively and Convention No. 138 concerning the minimum age for admission to employment. The special incentive arrangement is what might be called a social clause, which is primarily incentive-based and part of the European Union's development policy. The aim is to encourage GSP beneficiary countries to comply with certain internationally recognized social standards and to prohibit some practices that are often associated with underdevelopment, such as child labour, without forcing these countries formally to ratify the international ILO conventions embodying these standards.

20. The modalities for the implementation of the special incentive arrangements and their intensity are to be determined later, following a review by the Council on the basis of internationally accepted, objective and operational criteria. As the Regulation invited it to do, the Council carried out this review on the basis of the Commission's reports on the results of the studies carried out, inter alia, by the ILO, the World Trade Organization (WTO) and the Organisation for Economic Cooperation and Development (OECD) on the relationship between trade and labour rights. In the light of this review, the Council took the view that the results of the international discussion on the social and environmental clauses constituted an incentive to prepare a positive instrument encouraging respect for social and environmental standards. The Council therefore adopted Regulation (EC) No. 1154/98 of 25 May 1998 applying the special

incentive arrangements concerning labour rights and environmental protection provided for in articles 7 and 8 of Regulations (EC) No. 3281/94 and (EC) No. 1256/96 applying multiannual schemes of generalized tariff preferences in respect of certain industrial and agricultural products originating in developing countries.[22] This Regulation entered into force on 5 June 1998 and expires on the date of expiration of Regulations (EC) No. 3281/94 and (EC) No. 1256/96, i.e. 30 June 1999, the date of expiration of Regulation (EC) No. 1256/96.[23]

21. A new regulation on generalized tariff preferences granted to developing countries to encourage their exports to the European Union was adopted on 21 December 1998, namely, Council Regulation (EC) No. 2820/98 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001.[24] Council Regulations (EC) No. 3281/94 of 19 December 1994 on industrial products and No. 1256/96 of 20 June 1996 on agricultural products were merged on the basis of this new Regulation, which also incorporates various other texts, including Regulation (EC) No. 1154/98 of 25 May 1998 applying special incentive arrangements for the protection of labour rights and environmental protection. It should be noted, however, that this new Regulation did not make any particular changes in the rules for the implementation of the social clause (special incentive arrangement for the protection of labour rights), which were described briefly above and will be analysed in part II of this paper. The special incentive arrangement for the protection of labour rights is the only one that will be dealt with in this paper.

22. A scheme for the period 2002-2004 is already being prepared. A proposal by the Commission will probably be submitted to the Council in March 2001. The basic principles of the GSP, which were decided on in 1995 for a 10-year period, will be reviewed in 2004 in the light of new elements, such as new multilateral trade liberalizations within the World Trade Organization, the adoption of the Cotonou ECP-EU Partnership Agreement and prospects for the possible expansion of the European Union.

II. THE SOCIAL DIMENSION OF THE EUROPEAN UNION'S GENERALIZED SYSTEM OF PREFERENCES

23. The special incentive arrangement for the protection of labour rights[25] mainly provides for an additional reduction in the applicable preferential duty, which varies according to the type and sensitivity of products.

24. The additional preferential margin applicable to agricultural products in Chapters 1 to 24 of the Common Customs Tariff listed in Annex I of the Regulation is 10 per cent of the Common Customs Tariff duty for very sensitive products (the normal preferential margin, as indicated above, being 15 per cent, the total preferential margin, i.e. the normal margin plus the additional margin, is therefore 25 per cent), 20 per cent of the duty for sensitive products (total margin, 50 per cent) and 35 per cent of the duty for semi-sensitive products (total margin, 100 per cent). The additional preferential margin applicable to industrial products in Chapters 25 to 97 of the Common Customs Tariff, excluding Chapter 93, which are listed in Annex I of the Regulation is 15 per cent of the duty for very sensitive products (total margin, 30 per cent), 25 per cent of the duty for sensitive products (total margin, 55 per cent) and 35 per cent of the duty for semi-sensitive products (total margin, 100 per cent).

25. The technique used is thus to grant an additional preference to countries which request it and which provide proof that they have implemented legislation incorporating the substance of internationally recognized social standards. The procedure provides that these reductions are applicable to products originating in the beneficiary countries concerned,[26] on condition that the authorities of these countries have addressed a written request to the Commission for the granting of the special arrangement for products originating in these countries and specifying: the domestic legal provisions, the complete text of which must, together with an authentic translation into one of the languages of the Community, be annexed and incorporate the substance of the provisions of International Labour Organization (ILO) Conventions Nos. 87, 98 and 138, the measures taken to ensure implementation and monitoring and the commitment fully to assume monitoring of the implementation of the special arrangement and the related administrative cooperation methods. It should be noted that the beneficiary countries of the special incentive arrangement must not necessarily have ratified these ILO Conventions. It is the incorporation of the substance of these standards in their legislation that is taken into account.

26. Of the standards covered by the many ILO Conventions, those relating to trade union freedom and the protection of trade union rights (Convention No. 87, 1948), the right to organize and to bargain collectively (Convention No. 98, 1949) and the minimum age for admission to employment (Convention No. 138, 1973) seem to be the most likely to improve social progress. It should be recalled that Convention No. 87 relates to the freely exercised right of workers and employers, without distinction, to organize to promote and defend their interests. Convention No. 98 relates in particular to the protection of workers who exercise the right to organize. It provides for non-interference between workers' organizations and employers' organizations and the promotion of voluntary collective bargaining. Convention No. 138 prohibits child labour and defines the minimum age of employment in relation to the school-leaving age (usually at least 15 years). It provides that the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons should not be less than 18 years.

27. Some member States and various trade union circles said it was regrettable that discrimination had not been taken into account. ILO Conventions such as the Equal Remuneration Convention (No. 100, 1951) and the Discrimination in Respect of Employment and Occupation Convention (No. 111, 1958) could have been added to the body of standards referred to in the social clause. However, in view of the status of the implementation of these standards in potential beneficiary countries, it may be considered that, if these conventions had been added, these countries would have requested the granting of the special incentive arrangement for labour rights even less. Because of the relative failure of the social clause (see below), it is quite unlikely that the substance of the social clause will be amended in the next GSP or during the next 10-year period. It is, however, likely that, during the next revision of the social clause, the Worst Forms of Child Labour Convention (No. 182, 17 June 1999), which follows on from the Minimum Age for Admission to Employment Convention (No. 138, 26 June 1973), will be incorporated in the social clause. This would, moreover, be in keeping with a recommendation by the Commission to the member States on 15 September 2000 concerning the ratification of Convention No. 182.[27]

28. The purpose of the GSP is therefore unilaterally to promote compliance with certain standards of conduct through the social clause, and this may be open to criticism. It should also be noted that respect for the provisions of ILO Conventions is being imposed unilaterally, even though they have not necessarily been ratified by all member States of the European Union. For example, as at 31 December 1999, Convention No. 138 had not yet been ratified by Austria and the United Kingdom.[28] The credibility of the mechanism would be strengthened if all member States of the European Union had ratified all three Conventions.

29. It will be further noted that the approach followed is that of the ILO, namely, a non-binding and promotional approach to fundamental social rights to be protected,[29] which does not try, as on social issues within the member States of the European Union (admittedly in a limited way), to find a form of harmonization by normative and binding means. This approach has therefore not been transposed to relations between the member States and third States, since it is limited to the promotion of respect for standards of conduct acceptable to all.

30. The submission of a request by a beneficiary country is announced by the Commission in the Official Journal. The notice states that any useful information relating to the request may be communicated to the Commission by any interested physical or legal person. The Commission then considers the request. It determines not only whether the legislation incorporates the substance of the standards, but also what measures have been taken to ensure the effective application and monitoring of these provisions. The Commission may ask for any information it deems necessary and check this information with competent persons. It may also carry out checks in requesting countries, in cooperation with them, in order to verify all or part of the information collected. The Commission then decides to grant the benefit of the special arrangement to products originating in the requesting country or not to grant the benefit of this arrangement if it considers that the legislative implementing and monitoring provisions of the country concerned do not guarantee the effective application of ILO Conventions Nos. 87, 98 and 138. The Commission may also decide to grant the benefit of the special arrangement to certain production sectors only if, following its review, it considers that these three Conventions are being fully implemented only in these sectors. Thus far, there has been no case of the application of the special arrangement to one sector.

31. The procedure thus has several components: the evaluation by the Commission of the ILO Conventions on the basis of the definition of the substance of the standards adopted by the ILO, the monitoring and evaluation by the Commission of means of ensuring compliance with the Conventions and the decision by the Commission. It may be asked whether the Commission has the necessary resources and know-how to carry out these tasks, in particular with regard to the actual assessment of the incorporation of the substance of ILO standards. Because of the small number of requests,[30] the problem has so far probably not been too serious, but the request recently made by the Russian Federation, or a large number of new requests, might create additional work for the Commission and thus require new measures to cope with it.

32. In this connection, consideration should probably be given to the possibility of cooperation with the United Nations Committee on Economic, Social and Cultural Rights, which is the guardian of the International Covenant of 19 December 1966 on Economic, Social and Cultural Rights and a subsidiary body of the Economic and Social Council, as well as with the International Labour Organization. The States parties to the Covenant undertake, inter alia, to

ensure the right to trade union freedom and protection of trade union rights, based on respect for ILO Convention No. 87 of 1948.[31] They also recognize that children and young persons should be protected from economic and social exploitation and that age limits below which the paid employment of child labour should be prohibited and punishable by law should be set.[32] As these rights are also referred to in the provisions of ILO Conventions Nos. 87, 98 and 138, which are the subject of the social clause, cooperation and technical assistance between the Committee on Economic, Social and Cultural Rights, the ILO and the European Union might therefore be usefully established.

33. Part IV of the Covenant states that the Economic and Social Council may make arrangements with the specialized agencies of the United Nations in respect of the submission of reports on the progress made in achieving the observance of the provisions of the Covenant.[33] The Council may also bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in part IV of the Covenant which may assist such bodies in deciding on the advisability of international measures likely to contribute to the effective progressive implementation of the Covenant. Such measures include the furnishing of technical assistance.[34]

34. Regulation (EC) No. 2820/98 also provides for a monitoring procedure and administrative cooperation methods. Monitoring is based primarily on confidence in the authorities of the beneficiary countries and the cooperation of the beneficiary countries, which are called on to certify that the products manufactured in those countries have been manufactured under conditions complying with the provisions of the three Conventions. The future will show how effective this monitoring is.

35. Two years after the adoption of the Regulation instituting the social clause, it must be recognized that the special incentive arrangements for the protection of labour rights have had little success. Only the Republic of Moldova requested the benefit of the special arrangement on 11 February 1999.[35] The arrangement was granted to it by Regulation (EC) No. 1649/2000 of 25 July 2000,[36] since the Commission considered that the domestic legal provisions of the Republic of Moldova did incorporate the substance of the standards embodied in International Labour Organization Conventions Nos. 87, 98 and 138 and that the Moldovan authorities had taken all the necessary measures for the effective application and monitoring of those provisions. This Regulation entered into force on 1 November 2000.

36. The Russian Federation also submitted a request to the Commission.[37] On 9 June 1999, the authorities of the Russian Federation submitted a copy of their domestic legal provisions incorporating the substance of International Labour Organization Conventions Nos. 87, 98 and 138. This request is under consideration by the Commission.

37. The special incentive arrangement concerning labour rights may be temporarily withdrawn in whole or in part from a country where there is sufficient evidence to establish that that country has not complied with its commitments to implement legislation incorporating the substance of the standards embodied in ILO Conventions Nos. 87, 98 and 138. It should be noted that this is not strictly speaking a penalty, but a withdrawal of the benefits of the special arrangement. It may be asked whether this distinction is not purely theoretical. The withdrawal

decision is not automatic. It may be adopted only following a specific procedure. As only one country has quite recently obtained the benefit of the special arrangement, as indicated above, there have naturally not yet been any cases where this withdrawal procedure has been applied.

38. The withdrawal of the advantages of the special arrangement does not, however, prejudge the possible application of the general temporary withdrawal clause, which may also be seen as a "penalty" provided for by article 22 of Regulation (EC) No. 2820/98 of 21 December 1998. This provision refers to the possibility of the temporary withdrawal in whole or in part of all the advantages of the generalized system of preferences provided for by Regulation No. 2820/98 (the general system and, if so agreed, the special arrangement) in the following circumstances:

Practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and International Labour Organization Conventions No. 29 and No. 105;

Export of goods made by prison labour;

Manifest shortcomings in customs controls on export or transit of drugs (illicit substances or precursors) or failure to comply with international conventions on money laundering;

Fraud or failure to provide administrative cooperation as required for the verification of certificates of origin;

In manifest cases of unfair trading practices on the part of a beneficiary country. The withdrawal must be in full compliance with WTO rules;

Manifest cases of infringement of the objectives of international conventions such as the Northwest Atlantic Fisheries Organization (NAFO), the North East Atlantic Fisheries Commission (NEAFC), the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the North Atlantic Salmon Conservation Organization (NASCO) concerning the conservation and management of fishery resources.

39. Temporary withdrawal is not automatic, but follows specific procedural requirements.[38] Cases which might lead to temporary withdrawal measures may be brought to the Commission's attention by a member State or by any natural or legal person or association not endowed with legal personality which can show an interest in such withdrawal. The Commission examines the complaint in consultation with the Generalized Preferences Committee.[39] Where the Commission finds, following these consultations, that there is sufficient evidence to justify the initiation of an investigation, it announces the initiation of the investigation in the Official Journal and conducts the investigation for up to one year in consultation with the Committee. It seeks any information it deems necessary and verifies it with economic operators and the competent authorities of the beneficiary country concerned. It may dispatch its own experts to that country. When the investigation is completed, the Commission submits a report on its findings to the Committee. If the Commission considers temporary withdrawal unnecessary, it

publishes a notice in the Official Journal announcing the termination of the investigation and setting out its main conclusions. If it considers temporary withdrawal necessary, it submits the proposal to the Council, which decides on it by a qualified majority within 30 days.

40. The procedure thus involves three phases. The first is the phase of consultation with the Committee. This phase is confidential and is designed to determine whether there is sufficient evidence to justify the opening of an investigation. The second phase is the investigation itself, which is also confidential. It is initiated by the publication of a notice in the Official Journal and is conducted by the Commission in consultation with the Committee. The third phase is the decision-making phase, which may lead to a notice of termination or to the temporary withdrawal of the system of preferences.

41. Thus far, two complaints have been introduced under this procedure, the first relating to Myanmar (Burma) and the second to Pakistan. Only the first led to the temporary withdrawal of GSP advantages (only the general system was involved). The case was brought as a result of a joint complaint filed on 7 June 1995 by the International Confederation of Free Trade Unions (ICFTU) and the European Trade Union Confederation (ETUC),[40] on the grounds of the forced labour practised in Myanmar. The consultations held in late 1995 led to the opening of an investigation[41] in early 1996. Upon completion of the investigation, a report was submitted to the Generalized Preferences Committee on 4 December 1996. On the basis of this report and on the proposal of the Commission, access to the generalized tariff preferences granted by Regulations (EC) No. 3281/94 and (EC) No. 1256/96 was wholly withdrawn on a temporary basis from the Union of Myanmar by Council Regulation (EC) No. 552/97 of 24 March 1997.[42]

42. During the Commission's investigation, it was found that the Myanmar authorities resorted to the systematic and widespread use of forced labour, which was imposed on everyone - men, women and children, without distinction as to age or state of health and without the slightest remuneration. The only way to avoid it was to pay "compensation" to the authorities and only privileged persons could do so. Forced labour was used not only for military operations (porterage for the army in some areas of conflict with ethnic minorities), but also to build civilian and military infrastructures (roads, railway, landing strips, army buildings and civilian buildings such as hotels). It should be noted that the Myanmar military regime tried to refute these allegations, which had, however, been established by many documents and testimonies, and refused to receive a commission of inquiry in the country.

43. According to the Regulation, the total withdrawal of GSP benefits from Myanmar, i.e. the withdrawal of the application of tariff preferences to industrial and agricultural products originating in Myanmar, will end when it has been found, on the basis of a report by the Commission, that an end has been put to the practice of any form of slavery, as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No. 29 and No. 105, namely, the practices which led to the withdrawal from Myanmar of access to generalized tariff preferences.

44. A second complaint was filed on 12 June 1995, also on the grounds of forced labour. The complaint concerns Pakistan and it was filed by the European Trade Union Confederation (ETUC) and the International Confederation of Free Trade Unions (ICFTU). In this case as well, only the general system was involved. The procedure stopped at the

consultation phase. The Commission decided to keep the case open, but not to go on to the second phase in order to give priority to cooperation with the Pakistan authorities. A distinction was made between the forced labour of children, the subject of the complaint, and child labour, which is often necessary in developing countries in order to help ensure the survival of families. The Pakistan authorities eventually adopted measures in order to find a solution to the problem of child labour.

45. The inclusion of a social dimension in the European Union's international trade is undeniably a major innovation. The special incentive arrangement concerning labour rights is a basic instrument for the promotion and development of fundamental labour rights.

46. However, the special incentive arrangement for labour rights is limited in scope. It has no impact on products which are already admitted to the Community market at the zero tariff level, such as non-sensitive products and those originating in the Andean countries (support system for action to combat drugs) and the least developed countries (support system for the least developed countries). Perhaps consideration should be given to the possibility of adopting additional special measures for these countries.

47. The GSP - and this will probably also be the case of the special arrangements - is, as stated above, very focused in geographical terms and limited to a small number of countries.

48. The results of the special incentive arrangement are also quite meagre, since only two countries have requested access to the special arrangement, namely, the Republic of Moldova and the Russian Federation, and only Moldova has obtained access so far.

49. There are several reasons for this lack of success. In the first place, some developing countries are fundamentally opposed to or at least wary of a social clause mechanism creating a link between trade and social - or environmental - standards. Some countries fear not only interference by the Commission in their internal affairs, considering that it is not qualified to take decisions, but also a negative response by the Commission to any request they might make.

50. In addition, the social clause is not understood as an incentive-based and optional mechanism, but, rather, as a penalty.

51. It may also be noted that some countries probably take the view that the additional margins are not worth the effort they are required to make in return The information given to potential beneficiary countries is definitely insufficient, especially as many countries do incorporate the substance of ILO standards in their legislation.

52. With regard to the temporary withdrawal clause, it is to be welcomed that, for the first time, the European Union has penalized a country which violates fundamental social rights. It is, however, to be hoped that this procedure will not be applied only to countries with the weakest economic power.

Notes

[1] TEU, art. 177 (ex. art. 130u).

[2] Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its member States, of the other part, signed in Cotonou, Benin, on 23 June 2000, OJEC, L 317, 15 December 2000.

[3] For this Regulation, see below.

[4] General Agreement on Tariffs and Trade. Derogation from article 1, by a decision of the GATT Contracting Parties dated 25 June 1971.

[5] Under an enabling clause adopted by the GATT Contracting Parties on 28 November 1979.

[6] TEU, art. 133 (ex. art. 113).

[7] UNCTAD.

[8] Article 5 of the Lomé Convention.

[9] Article 9.2 of the Agreement.

[10] Article 96 of the Agreement.

[11] See below for Regulation No. 1154/98 of 25 May 1998.

[12] Council Regulation (EC) No. 3281/94 of 19 December 1994 applying a multiannual scheme of generalized tariff preferences for the period 1995-1998 in respect of certain industrial products originating in developing countries, OJEC, 31 December 1994, No. L 348, p. 1. Last amended by Council Regulation (EC) No. 602/98, OJEC, 18 March 1998, No. L 80, p. 1. Council Regulation (EC) No. 1256/96 of 20 June 1996 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1996 to 30 June 1999 in respect of certain agricultural products originating in developing countries, OJEC, 29 June 1996, No. L 160, p. 1. Last amended by Council Regulation (EC) No. 602/98.

[13] The analysis of the current general arrangement is based on Council Regulation (EC) No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001, OJEC, 30 December 1998, No. L 357, arts. 2 to 7. For this Regulation, see below.

[14] For the list of these countries, as recognized by the United Nations, see the list contained in Annex IV of the Regulation, p. 82.

[15] Council Regulation (EC) No. 602/98, OJEC, 18 March 1998, No. L 80, p. 1.

[16] Council Regulation (EC) No. 416/2001 of 28 February 2001 amending, inter alia, article 6 of Regulation (EC) No. 2820/98 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, OJEC, 1 March 2001, No. L 60, p. 43.

[17] The list of these countries is contained in Annex V of the Regulation.

[18] Article 28 of Council Regulation (EC) No. 2820/98. This provision was supplemented by a clause providing for the temporary suspension of preferences in the event of massive increases in imports of products originating in the least developed countries, as added by Council Regulation (EC) No. 416/2001.

[19] Opinion No. 98/C 8/04, OJEC, 13 January 1998, C/8, p. 3.

[20] Opinion No. 98/C 357/06, OJEC, 21 November 1998, C/357, p. 14.

[21] Articles 7 and 8 of Regulations (EC) No. 3281/94 and No. 1256/96 define the principle of the social clause. For the principle of the environmental clause, see article 8 of these Regulations and below.

[22] OJEC, No. L 160 of 4 June 1998, pp. 1-10.

[23] Regulation (EC) No. 3281/94 was supposed to expire on 31 December 1998, but it was extended until 30 June 1999 by Council Regulation (EC) No. 2820/98 of 21 December 1998. For the latter Regulation, see below.

[24] Council Regulation (EC) No. 2820/98 of 21 December 1998 applying a multiannual system of generalized tariff preferences for the period 1 July 1999 to 31 December 2001, OJEC, 30 December 1998, No. L 357, pp. 1-14 and annexes, as well as the corrigendum thereto, OJEC, 17 July 1999, No. L 184, p. 50.

[25] Council Regulation (EC) No. 2820/98 of 21 December 1998, articles 8 to 15.

[26] These countries are listed in Annex III.

[27] Recommendation by the Commission of 15 September 2000 on the ratification of International Labour Organization Convention No. 182 of 17 June 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. C (2000) 2674)-(2000/581/EC), 28 September 2000, OJEC, L 243, p. 41.

[28] International Labour Conference, 88th session, 2000, List of Ratifications by convention and by country (as at 31 December 1999), International Labour Office, Geneva, pp. 160-161.

[29] See the Declaration on Fundamental Principles and Rights at Work, adopted on 18 June 1998 in Geneva by the 86th International Labour Conference.

[30] On this question, see below.

[31] International Covenant on Economic, Social and Cultural Rights, done at New York on 19 December 1966, part III, article 8.

[32] Idem, part III, article 10.

[33] Idem, part IV, article 18.

[34] Idem, part IV, articles 22 and 23.

[35] Notice regarding the request submitted by the Republic of Moldova to take advantage of the special incentive arrangement concerning labour rights (1999/C 176/14), OJEC, 22 June 1999, C 176, p. 13.

[36] Commission Regulation (EC) No. 1649/2000 of 25 July 2000 granting the Republic of Moldova the benefit of the special incentive arrangement concerning labour rights, OJEC, 27 July 2000, L 189, p. 13.

[37] Notice regarding the request submitted by the Russian Federation to take advantage of the special incentive arrangement concerning labour rights (1999/C 218/02), OJEC, 30 July 1999, C 218, p. 2.

[38] Council Regulation (EC) No. 2820/98 of 21 December 1998, articles 22 to 26.

[39] This Committee, which is referred to in article 31 of Regulation (EC) No. 2820/98 (see below), was established by article 17 of Regulation (EC) No. 3281/94. It is composed of representatives of member States and presided over by a representative of the Commission.

[40] This complaint was subsequently also supported by Human Rights Watch.

[41] Opinion No. 96/C 15/03, OJEC, 20 January 1996, No. C 15.

[42] Council Regulation (EC) No. 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, OJEC, 27 March 1997, No. L 85, pp. 8-9. According to Council Regulation (EC) No. 2820/98 of 21 December 1998, Council Regulation (EC) No. 552/97 of 24 March 1997, which refers to Regulations (EC) No. 3281/94 and (EC) No. 1256/96, is supposed to refer, mutatis mutandis, to Regulation No. 2820/98.
