

## University of Minnesota Law School Scholarship Repository

---

Minnesota Law Review

---

2011

# Expanding the Role of Trade Preference Programs

Monica Patel

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

 Part of the [Law Commons](https://scholarship.law.umn.edu/mlr)

---

### Recommended Citation

Patel, Monica, "Expanding the Role of Trade Preference Programs" (2011). *Minnesota Law Review*. 456.  
<https://scholarship.law.umn.edu/mlr/456>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

---

---

## Note

### Expanding the Role of Trade Preference Programs

Monica Patel\*

“[N]ations that trade with each other do not go to war.”<sup>1</sup> A developed country that assists developing countries with international trade and economic growth creates benefits for both sides. However, many developing countries face difficulty when it comes to economic growth. The Generalized System of Preferences (GSP) program’s goal is to help developing countries’ economies grow by providing “temporary preferential advantages”<sup>2</sup> in which developed countries lower the custom duties on goods imported from qualified developing countries.<sup>3</sup> Given all of the history and text regarding the program,<sup>4</sup> one would think it would get adequate attention and resources. On the contrary, the U.S. GSP program only has, on average, two em-

---

\* J.D. Candidate 2011, University of Minnesota Law School; B.A. 2007, University of California, Berkeley. I would like to thank Professor Gregory Shaffer for his insight and suggestions; the Editors and Staff of the *Minnesota Law Review*, especially Emily Gleiss, Joe Hansen, and Wendy Lisman; and my family and friends for their support and encouragement. Copyright © 2011 by Monica Patel.

1. Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 *FORDHAM INT’L L.J.* 345, 346 (2009) (“Trade creates economic ties and generates more prosperity; thus it contributes to peace and security, since nations that trade with each other do not go to war.”).

2. Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b), 98 Stat. 3018, 3018.

3. See SEC’Y-GEN., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE 9 (1982) (“The solution proposed was the creation of a system of non-reciprocal preferences, under which the developed countries would lower the custom duties they assessed on goods imported from developing countries.”); *Information on Countries Eligible for GSP*, OFF. U.S. TRADE REPRESENTATIVE, [http://www.ustr.gov/sites/default/files/ATT%20\(A\)%20-%20090417%20GSP\\_BDC.pdf](http://www.ustr.gov/sites/default/files/ATT%20(A)%20-%20090417%20GSP_BDC.pdf) (last visited Mar. 4, 2011) (listing the eligible countries).

4. See *infra* Part I.A (discussing the Most-Favoured Nation (MFN) rule, which initially precluded the possibility of giving trade benefits to developing countries until the global community gradually accepted the idea).

ployees.<sup>5</sup> With such lofty and demanding responsibilities, the two GSP employees leave late on a daily basis due to the immense workload.<sup>6</sup> At times, their efforts push countries, like Afghanistan, to export just one more product, such as dried apricots.<sup>7</sup> Yet GSP celebrates seemingly small results because it means one more exporter will utilize the program's duty-free treatment.<sup>8</sup> Though based on great intentions, GSP's attempt to increase exports from developing countries barely produces any significant increase in trade or, more importantly, economic growth for developing countries and the global economy.<sup>9</sup>

In the late 1960s, many members of the World Trade Organization (WTO) first expressed the need for trade preference programs.<sup>10</sup> These members realized that more needed to be done to industrialize developing countries,<sup>11</sup> typically low- and middle-income countries.<sup>12</sup> Trade preference programs lower

---

5. Telephone Interview with Marideth Sandler, Exec. Dir., GSP Program, Office of U.S. Trade Representative (Dec. 28, 2009).

6. *Id.*

7. *Id.*

8. *Id.*

9. Kevin Moss, Note, *The Consequences of the WTO Appellate Body Decision in EC—Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa*, 38 N.Y.U. J. INT'L L. & POL. 665, 671 (2006) (“[T]he overall impact of the last thirty years of preferential treatment for developing countries has been meager. Developing countries have increased their share of world merchandise trade from twenty percent in 1973 to only twenty-eight percent twenty-five years later.”).

10. See Gregory Shaffer & Yvonne Apea, *Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences?*, 39 J. WORLD TRADE 977, 979 (2005).

11. See Cosmas Milton Obote Ochieng, *The EU-ACP Economic Partnership Agreements and the ‘Development Question’: Constraints and Opportunities Posed by Article XXIV and Special and Differential Treatment Provisions of the WTO*, 10 J. INT'L ECON. L. 363, 374–75 (2007) (stating that General Agreement on Tariffs and Trade (GATT) members recognized that different strategies were necessary for trade rules based on a country's level of development); see also Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 A.B.A. J. LAB. & EMP. L. 487, 499 (2010) (suggesting that trade preference programs are important since they have helped encourage better workers' rights in developing countries).

12. See *How We Classify Countries*, WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited Mar. 4, 2011); see also *Who Are the Developing Countries in the WTO?*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Mar. 4, 2011). See generally JONATHAN E. SANFORD & ANJULA SANDHU, *DEVELOPING COUNTRIES: DEFINITIONS, CONCEPTS AND COMPARISONS*, at vii (2003) (explaining that a country may be designated “developing” on the basis of per capita income, economic and social structure, social conditions, or the prevailing level of economic and political freedom).

trade barriers and open opportunities in consumer-driven markets which, in turn, increases trade and economic growth.<sup>13</sup> Thus, the programs reduce the cost of exporting goods for participating developing countries by providing duty-free treatment that allows exporters in the developing countries to more easily compete in developed countries' markets.<sup>14</sup> Because existing trade principles in the WTO prohibit differential treatment, the WTO drafted the Enabling Clause in the WTO Agreement to allow developed countries to establish trade preference programs.<sup>15</sup> Unfortunately, the ensuing programs simply have not done enough to aid developing countries, and thus achieve the desired increase in trade for all countries.<sup>16</sup> Though preference programs produce some results,<sup>17</sup> they barely provide meaningful achievement for developing countries<sup>18</sup> because the programs are limited in scope.<sup>19</sup> The programs typically offer duty-free treatment for products that are not feasibly

---

13. See TRACY MURRAY, TRADE PREFERENCES FOR DEVELOPING COUNTRIES 147 (1977) (finding that developing countries have "high production costs, . . . less frequent transportation services . . . and less effective marketing and distribution channels"); SEC'Y-GEN., *supra* note 3, at 9 (stating that "preferential tariff rates in the markets of developed countries could provide impetus for the industrial development of the Third World," allowing them to "overcome difficulties . . . arising from high initial costs").

14. See MURRAY, *supra* note 13, at 147.

15. See Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507, 509 (2003).

16. Compare Moss, *supra* note 9, at 671 (explaining that developing countries' share of world trade has increased only slightly and concluding that "the overall impact of the last thirty years has been meager"), with SEC'Y-GEN., *supra* note 3, at 10 (noting that the "objectives of the system would be: (a) to increase developing countries' export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth").

17. See SEC'Y-GEN., *supra* note 3, at 12 ("From 1976 to 1980 . . . [t]he positive influence of the GSP on the evolution of imports from developing countries can be seen from the fact that imports benefiting from GSP treatment grew over the period at an average rate of nearly 27 per cent per year.").

18. See MURRAY, *supra* note 13, at 149 ("G.S.P. benefits represent only 1 per cent of total developing-country exports to the preference-giving countries."); Moss, *supra* note 9, at 671 (stating that the impact of preferential treatment for developing countries is weak).

19. See Moss, *supra* note 9, at 671-72 ("The GSP has fallen short of expectations largely because benefit-granting countries have failed to include meaningful preferential treatment in the areas of production most important to the economic development of beneficiary countries, namely textiles, apparel, and agriculture.").

---

---

profitable without taking into consideration the large initial costs of export preparation.<sup>20</sup>

This Note argues that the existing trade preference programs do not effectively help developing countries increase their share in trade or economic growth. Part I sets forth the WTO's recognition of the need for trade preference programs, the resulting laws, and the potential flaws in the current strategies. Part II argues that mismatched product coverage, the short-term nature and unreliability of the programs, and exportation obstacles that are unique to developing countries hinder the effectiveness of trade preference programs. Part III suggests that the United States modify its trade preference programs to maximize efficiency by more actively seeking out and easing the export process for qualified developing countries. Based on participant observation and an interview with the GSP Program Executive Director, this Note proposes that the success of the GSP program depends on the interrelationship between the GSP office and the developing country. Only when the GSP office assumes responsibility as an agent for the developing country will this program truly aid these countries and, in turn, the global economy.

#### I. THE EFFECT OF TRADE PREFERENCE PROGRAMS ON EXISTING LAW AND DEVELOPING COUNTRIES

This Part examines the development of and history behind trade preference programs. It looks both at the impetus behind the programs' formation and whether current programs effectively accomplish their stated goals. An examination of the history behind trade preference programs reveals that these programs were formulated to correct economic imbalances that hinder the economic success of developing countries.

##### A. JUSTIFYING TRADE PREFERENCE PROGRAMS WITHIN INTERNATIONAL TRADE LAW AND PRINCIPLES

The WTO is an organization that produces rules and agreements that govern the trading relationship of its members (which consists of 153 countries and amounts to about ninety-seven percent of international trade).<sup>21</sup> Accordingly, a country

---

20. See *infra* Parts II.A, II.C.

21. *Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 4, 2011); *The World Trade Organization in Brief*, WORLD TRADE ORG. (2009), [http://www.wto.org/english/res\\_e/download\\_e/inbr\\_e.pdf](http://www.wto.org/english/res_e/download_e/inbr_e.pdf).

cannot establish a program that grants preferential treatment to a select few without conflicting with international trade law and the WTO Agreement.<sup>22</sup> Nonetheless, the idea behind trade preference programs eventually gained sufficient support in the WTO for inclusion within the WTO Agreement.<sup>23</sup>

A fundamental WTO principle is that the world economy benefits most when WTO members trade freely with each other based on supply and demand, rather than on noneconomic interests.<sup>24</sup> Countries should prioritize market efficiency over economic protectionism through trade barriers.<sup>25</sup> In 1947, the WTO Agreement legalized this principle under the Most-Favoured Nation (MFN) rule, which requires a WTO member to offer, immediately and unconditionally, any advantage or privilege regarding custom duties for imports and exports given to the like product for all other contracting parties.<sup>26</sup> In other words, the MFN rule prohibits WTO members from providing benefits solely to developing countries.<sup>27</sup>

Gradually, however, the idea of granting Special and Differential Treatment (S&DT)<sup>28</sup> to developing countries, based on

---

22. See General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

23. See *infra* notes 35, 37 and accompanying text.

24. See Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 J. INT'L ECON. L. 617, 620 (2009) ("If products are to flow freely between countries, which is necessary if the benefits of the efficiency model are to be realized, demand for them must be based on price and quality, while country of origin must, by and large, be irrelevant.").

25. *Id.* at 619 (arguing that the WTO prohibits unequal treatment because individual governments tend to favor their own industries).

26. GATT, *supra* note 22, art. I (stating that the MFN rule, "[w]ith respect to customs duties" related to imports and exports, is that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"); see also Moon, *supra* note 24, at 619–20 (noting that products of WTO-member countries get most favorable treatment from member countries and that "[i]f a WTO member country makes a distinction, such as setting a lower tariff for a product from one country, the like product of other WTO-member countries will immediately and unconditionally become entitled to that lower tariff").

27. See Bartels, *supra* note 15, at 514 ("[T]rade concessions can have the effect of undermining the WTO rights of other Members.").

28. See Moon, *supra* note 24, at 618 (stating that despite MFN, "WTO law includes roughly 150 provisions known as Special and Differential Treatment (S&DT), which purposively treat members unequally by granting developing countries' products especially favorable treatment in trade").

exceptional circumstances,<sup>29</sup> formed from the idea that trade is not equal between nations who are at different levels of industrialization.<sup>30</sup> The WTO preamble states that members should assist developing countries to “secure a share in the growth of international trade commensurate with the needs of their economic development.”<sup>31</sup> In 1971, the WTO granted a waiver, based on the exceptional circumstances standard in Article IX of the WTO Agreement,<sup>32</sup> to create a trade preference program.<sup>33</sup> Though the WTO does not define “exceptional circumstances,” it found an “exceptional situation” because the Andean nations needed “to expand their trade and economics” and granted the United States a waiver for the Andean Trade Preferences Act (ATPA).<sup>34</sup> Thus, the WTO grants waivers to estab-

---

29. See Marrakesh Agreement Establishing the World Trade Organization art. IX, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

30. See Ochieng, *supra* note 11, at 374 (stating that developing countries emphasized the “different stages of development” to pave the way for the concept of S&DT and the creation of the Enabling Clause); see also Patricia Michelle Lenaghan, *Trade Negotiations or Trade Capitulations: An African Experience*, 17 LA RAZA L.J. 117, 117 (2006) (arguing that MFN did “not take into account existing inequality in economic structures as well as levels of development between developed and developing (less developed) countries” and that trade preferences were expected to overcome these disadvantages); Omar T. Mohammedi, *International Trade and Investment in Algeria: An Overview*, 18 MICH. ST. J. INT’L L. 375, 395 (2010) (stating that developing countries believed “their markets were too small to support the development of manufacturing industries”); John I. Huhs, Note, *Trade Preferences for Developing Countries: Options for Ordering International Economic and Political Relations*, 20 STAN. L. REV. 1150, 1164 (1968) (calling GATT a “rich man’s club” (quoting S. DELL, TRADE BLOCS AND COMMON MARKETS 244 n.4 (1963))).

31. PETER GALLAGHER, GUIDE TO THE WTO AND DEVELOPING COUNTRIES 22 (2000); see also GATT, *supra* note 22, pmb. (“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce . . .”).

32. See Marrakesh Agreement, *supra* note 29, art. IX; see also Daniel Marinberg, Note, *GATT/WTO Waivers: “Exceptional Circumstances” as Applied to the Lomé Waiver*, 19 B.U. INT’L L.J. 129, 130 (2001) (“Article IX of the WTO Agreement provide[s] for a waiver of the obligations . . . in cases of exceptional circumstances.”).

33. *Generalized System of Preferences*, L/3545 (June 25, 1971), GATT B.I.S.D. (18th Supp.) at 24 (1972); see also Bartels, *supra* note 15, at 511 (stating that GSP needs a waiver “to enable developed countries to grant preferences to developing countries without also granting the same preferences” to all other member countries); Moss, *supra* note 9, at 669 (commenting that in 1971 the WTO waived MFN obligations for ten years).

34. Marinberg, *supra* note 32, at 150–51. Some commentators suggest that the WTO will not grant a waiver to remedy economic injury alone or to achieve a situation that could be accomplished through other methods. *Id.* at

lish trade preference programs that bypass the MFN rule as one way to respond to the need for S&DT.<sup>35</sup>

Another method became available when, in the Tokyo Round of trade negotiations in 1979, the WTO members created the Enabling Clause,<sup>36</sup> which allows WTO members to provide S&DT through trade preference programs.<sup>37</sup> Therefore, developed countries may grant preferences without violating the MFN rule and without the need for a waiver.<sup>38</sup> The Enabling Clause, as a voluntary regime, has subsequently been construed as providing for generalized, nonreciprocal, and nondiscriminatory preferences.<sup>39</sup>

---

133 (“If the request did not appear to contain truly urgent policy objectives or sought objectives that could have been achieved through other methods consistent with the GATT obligations, even though posing increased difficulties to the requesting party, the waiver was not likely to be granted.”); *id.* at 143 (classifying exceptional circumstances into eight factors: hardship, harm that is not only economic, single or very limited group of affected nations, prolonged arrangement or restrictions, serious injury to an entire domestic industry, absence of alternatives, possibility of eliminating GATT-inconsistent measures, and lack of precedent). Note that most current waivers deal with attempts to conform with the Harmonized System, thus limiting any precedential comparison. *See id.* at 146.

35. *See* Marrakesh Agreement, *supra* note 29, art. IX.

36. *See* Moss, *supra* note 9, at 670.

37. *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter Enabling Clause], available at [http://www.wto.org/english/docs\\_e/legal\\_e/tokyo\\_enabling\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf) (“[C]ontracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties . . . [where] [p]referential tariff treatment [is] accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences . . . .”); *see also* Bartels, *supra* note 15, at 513 (noting that the Enabling Clause has been construed to allow developed countries to give differential treatment on a voluntary basis); Moss, *supra* note 9, at 670 (“The Enabling Clause also goes beyond the limits of the 1971 Waiver Decision, permitting preferential treatment for developing countries . . . .”).

38. *See also* Huhs, *supra* note 30, at 1162 (finding additional support that the Enabling Clause was legal via Article XXIV’s grant of permission for the creation of custom unions and free trade agreements, which shows that sometimes increasing trade with specific countries improves the overall welfare without hurting other WTO members).

39. *See* Bartels, *supra* note 15, at 522 (explaining that the GSP scheme is “an autonomous regime granted on a non-reciprocal, generalized and non-discriminatory basis” (internal quotation marks omitted)); *see also* Moss, *supra* note 9, at 670 (explaining the principle of graduation where “developing countries accept greater obligations under the GATT as their economic situations improve and are graduated from a country’s GSP regime once they reach a specified level of economic development”).



Countries' understanding of the Enabling Clause's provisions, however, remains incomplete. The meaning of "generalized," for instance, swings between two extremes: a broad scope of product coverage or a narrow application to countries.<sup>40</sup> In contrast, the WTO has interpreted "non-reciprocal" more concretely, providing that developed countries should not expect mutual benefits for their trade preferences.<sup>41</sup> Moreover, the WTO has understood "non-discriminatory" to mean that developed countries should not discriminate between the developing countries when granting preferences.<sup>42</sup> In 2002, India challenged the European Communities' (EC) preferential programs by claiming that the EC violated the nondiscriminatory requirement and the MFN rule.<sup>43</sup> The WTO Appellate Body, however, found that the least-developed countries (LDCs) could be differentiated based on "development, financial or trade need[s]."<sup>44</sup> These "needs" must meet three criteria: they must be objective, they must be effectively addressed through trade preferences, and the treatment must be sufficiently connected to the need.<sup>45</sup> As a result of the Enabling Clause, developed countries have another route through which they may provide duty-free treatment on products to help developing countries enter their markets.<sup>46</sup>

Thus, due to the WTO consensus in response to developing countries and the MFN rule, WTO member countries no longer violate the MFN rule if they provide trade preferences to developing countries, provided they acquire the WTO waiver or adhere to the Enabling Clause.<sup>47</sup>

---

40. See Shaffer & Apea, *supra* note 10, at 994.

41. See Bartels, *supra* note 15, at 528.

42. *Id.* at 524.

43. See Lorand Bartels, *The WTO Legality of the EU's GSP+ Arrangement*, 10 J. INT'L ECON. L. 869, 873 (2007); Moss, *supra* note 9, at 665.

44. Bartels, *supra* note 43, at 873 (footnote omitted); see also Moss, *supra* note 9, at 666 (stating that the WTO held that "the Enabling Clause requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation except in the cases of least-developed countries (LDCs)" (internal quotation marks omitted)).

45. See Bartels, *supra* note 43, at 873. For countries not considered to be LDCs, the WTO Appellate Body decision in response to India's 2002 challenge only resulted in minor modifications for trade programs. See Moss, *supra* note 9, at 667.

46. See Enabling Clause, *supra* note 37, at 203.

47. See *id.*; Marrakesh Agreement, *supra* note 29, art. IX.

## B. ENACTMENT AND STATUS OF TRADE PREFERENCE PROGRAMS

After the principle of granting trade preferences no longer conflicted with existing trade law, many developed countries formed programs to help industrialize developing countries.<sup>48</sup> The United States, for example, created the GSP program that provides duty-free treatment for about 4800 products from 131 countries.<sup>49</sup> The program allows qualified countries to send their GSP-eligible products to the developed country without paying the customary duty.<sup>50</sup>

All countries model their trade preference programs on either positive or negative conditionality, though negative modeling is more predominant than positive.<sup>51</sup> The United States, for instance, engages in negative conditionality, which takes preferences away if a developing country engages in undesirable behavior, such as human rights violations.<sup>52</sup> Many European nations engage in positive conditionality, such as the GSP Plus program, where certain products get an additional reduction in duty rates if an LDC complies with certain standards.<sup>53</sup> The GSP Plus program requires that the country ratify and implement sixteen human rights conventions and at least seven of eleven good governance conventions.<sup>54</sup> The country also must be a vulnerable country based on poverty, nondiversification of exports, and its share of EU GSP-covered imports.<sup>55</sup>

---

48. See, e.g., Authority to Extend Preferences, 19 U.S.C. § 2461 (2006); see also Caribbean Basin Economic Recovery Act, *id.* §§ 2701–2707; Andean Trade Preferences Act, *id.* §§ 3201–3206; African Growth and Opportunity Act, *id.* §§ 3701–3741; *Generalised System of Preferences (GSP)*, EUR. COMMISSION, <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/> (last visited Mar. 4, 2011).

49. See *Generalized System of Preferences (GSP)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Mar. 4, 2011).

50. See *U.S. Generalized System of Preferences (GSP) Guidebook*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 2010), [http://www.ustr.gov/webfm\\_send/1578](http://www.ustr.gov/webfm_send/1578).

51. See Bartels, *supra* note 15, at 508 n.5.

52. See *id.* at 508; Telephone Interview with Marideth Sandler, *supra* note 5.

53. See Council Regulation (EC) 732/2008, arts. 8–9, 2008 O.J. (L 211/1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF> (providing a list of criteria); Bartels, *supra* note 15, at 510 (noting that only Moldova received special preferences through labor rights).

54. See Bartels, *supra* note 43, at 871 (stating that the country must be vulnerable, and ratify and implement conventions on human and labor rights, environmental protection, and governance).

55. See *id.* at 871; see also *id.* at 880 (“One situation in which preferential treatment would clearly not be permitted is when a beneficiary country does not, in fact, have the need at issue.”); EUR. COMMISSION, *supra* note 48.

Productivity assessments of trade preference programs are conflicting. On the one hand, global GSP programs noticeably increased the number of exports from developing countries between 1976 and 1980, as GSP-related imports reportedly grew by twenty-seven percent each year.<sup>56</sup> Further, after GSP was instituted, developing countries increased their share in the world merchandise trade from twenty percent in 1973 to twenty-eight percent in 1998.<sup>57</sup> On the other hand, in 1982, exports through GSP were only one percent of total developing country exports.<sup>58</sup> Many argue, therefore, that trade preferences have done little to accomplish the stated goal in an efficient manner.<sup>59</sup> The United States, however, considers its trade preference program based on the African Growth and Opportunity Act (AGOA) to be its most successful trade preference program because it has aided economic growth in sub-Saharan Africa.<sup>60</sup> Thus, while many programs have lackluster results, AGOA, at the least, is considered a success.

Commentators offer no shortage of explanations as to why trade preference programs only marginally help developing countries grow. One reason is that reductions in MFN tariff rates reduce the small margin of comparative advantage that GSP duty-free treatment is meant to provide.<sup>61</sup> Also, short-term

---

56. See SECY-GEN., *supra* note 3, at 12.

57. See Moss, *supra* note 9, at 671.

58. See SECY-GEN., *supra* note 3, at 92 tbl.IV.

59. See Moon, *supra* note 24, at 619 (opining on the “relative failure of [special and differential treatment]”); Moss, *supra* note 9, at 670 (“[T]hey have done little to accelerate the economic growth rates of most developing countries.”). *But see* Ochieng, *supra* note 11, at 378–79 (arguing that it “would be erroneous to claim that all preferential schemes have failed” based on the graduation of South Korea, Singapore, Malaysia, and Hong Kong from United States and European Union GSP programs and that “[e]ven among the ACP group, countries such as Mauritius and Botswana made significant gains”).

60. See *Preference Programs*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs> (last visited Mar. 4, 2011) (“Another highly successful program is the African Growth and Opportunity Act (AGOA), which was enacted in 2000 and also allows duty-free entry of goods from 40 countries in Sub-Saharan Africa.”); *see also* Moss, *supra* note 9, at 668 (“AGOA is a unique and meaningful vehicle for economic growth in [sub-Saharan Africa].”). AGOA beneficiaries must meet specific requirements such as complying with intellectual property rights and engaging in liberal economies. *See* Lenaghan, *supra* note 30, at 123.

61. *See* GALLAGHER, *supra* note 31, at 15; George A. Bermann & Petros C. Mavroidis, *Developing Countries in the WTO System*, in *WTO LAW AND DEVELOPING COUNTRIES* 1, 1 (George A. Bermann & Petros C. Mavroidis eds., 2007) (suggesting that preference erosions weakened the effectiveness of trade preference programs); *see also* Harry G. Johnson, *Trade Preferences for Manu-*

annual renewals and waivers<sup>62</sup> and the disputed legality of trade preferences creates unreliability since developing countries cannot indefinitely count on utilizing the benefits of trade preference programs.<sup>63</sup> Another criticism is that developed countries limit or revoke their preferences based on political pressures.<sup>64</sup> In response to this problem, some developing countries advocate that the Enabling Clause should be mandatory to prevent political abuse.<sup>65</sup> A further alleged problem is that the mismatched product coverage limits the potential for effective benefits.<sup>66</sup> While some claim that the AGOA program is more successful because it offers more product coverage (in certain apparel articles) than the regular GSP,<sup>67</sup> approximately twenty-seven percent of developing countries' GDP and fifty percent of their employment derives from agricultural products,<sup>68</sup> which the programs typically exclude.<sup>69</sup> Additionally, high production costs, poor and unreliable infrastructure, and less effective marketing hinders manufacturers in developing

---

*factured Goods*, in *ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES* (1967), reprinted in *TRADE PREFERENCES AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES* 33, 69 (Bernard Hoekman & Çağlar Özden eds., 2006).

62. See Pablo M. Bentes et al., *International Trade*, 44 INT'L LAW. 93, 110 (2010) (stating that ATPA and U.S. GSP were extended through December 31, 2010, "just as they were about to expire" (citing Act to Extend the Generalized System of Preferences and the Andean Trade Preference Act, Pub. L. No. 111-124, § 2, 123 Stat. 3484, 3484 (2009))); Marinberg, *supra* note 32, at 134 (arguing that the indefinite nature of waivers "indirectly limits each waiver[s]" effectiveness); Moss, *supra* note 9, at 672.

63. See Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context*, 32 HASTINGS INT'L & COMP. L. REV. 379, 396-97 (2009) (citing the possibility of revocation of trade benefits for human rights violations).

64. See SEC'Y-GEN., *supra* note 3, at 11 (stating that there are political pressures against giving benefits); Moon, *supra* note 24, at 633 ("The USA, for example, has used its GSP scheme as 'a tool to penalize and pressure . . . those developing countries whose domestic, trade or international policies conflict with the policies or interests of the USA.'" (footnote omitted)).

65. See Moon, *supra* note 24, at 635 ("[T]oo few of the provisions impose binding obligations on the industrialized countries, with the result that the assistance described generally does not eventuate.").

66. See Robert Z. Lawrence, *Futures for the World Trading System and Their Implications for Developing Countries*, in *TRADE AND GROWTH* 43, 57 (Manuel R. Agosin & Diana Tussie eds., 1993) (noting that the Lomé Convention and Caribbean Basin Initiative limited product scope); Moss, *supra* note 9, at 671-72 (arguing that preference programs fail to give meaningful benefits in important production areas).

67. See Moss, *supra* note 9, at 676-77.

68. See *id.* at 673.

69. See Ochieng, *supra* note 11, at 381.

countries.<sup>70</sup> Lastly, eligibility requirements to qualify for special preferences, such as complying with rules of origin and phytosanitary standards,<sup>71</sup> may pose unsurpassable barriers.<sup>72</sup> In short, there are numerous identified problems with trade preference programs.

Though trade preference programs occasionally produce results, the overall consensus is that they do not accomplish enough.<sup>73</sup> Amidst the many problems that plague these programs, the key issues seem to be mismatched product coverage, the unreliability of the programs' existence, and the developed countries' unawareness of the barriers facing developing countries that want to use the trade preference programs.<sup>74</sup>

## II. A CLOSER LOOK: SIGNIFICANT PROBLEMS WITH CURRENT TRADE PREFERENCE PROGRAMS

The ineffectiveness of trade preference programs signifies the existence of a problem with the current approach to providing trade preferences. While the programs rest on solid conceptual foundations, many issues impede their successful implementation. A closer analysis of the programs reveals potential areas for improvement. If countries acknowledge and remedy these problems, the programs would likely maximize aid for developing countries, increase international trade, and, in effect, foster global economic growth.

---

70. See MURRAY, *supra* note 13, at 147; Ochieng, *supra* note 11, at 381 (finding that product coverage "typically excludes 'import-sensitive' and 'competitive-need' products from beneficiary countries").

71. See Anastasios Tomazos, *The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds*, in WTO LAW AND DEVELOPING COUNTRIES, *supra* note 61, at 306, 318; see also *Agreement on the Application of Sanitary and Phytosanitary Measures*, WORLD TRADE ORG. (Apr. 15, 1994), [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) (WTO agreement stating that Sanitary and Phytosanitary are standards related to human, animal, plant life, or health).

72. See Ochieng, *supra* note 11, at 381 (finding that eligibility criteria can be costly and possibly infringe on the nonreciprocity element of the Enabling Clause).

73. See Mohammedi, *supra* note 30, at 396 (stating that Algeria and many other countries in the Middle East and North Africa fail to take advantage of the program despite the fact that they import GSP-eligible products to countries other than the United States); Moss, *supra* note 9, at 671.

74. See MURRAY, *supra* note 13, at 147; Moss, *supra* note 9, at 676-77 (listing barriers).

## A. THE ELIGIBLE PRODUCTS LIST IS INSUFFICIENT

A significant problem with trade preference programs is that the scope of product coverage conflicts with market-based considerations.<sup>75</sup>

Participating developed countries provide duty-free treatment to only a limited amount of specific products, irrespective of the market.<sup>76</sup> Those products are rarely the most beneficial or useful for the program participants.<sup>77</sup> As a result, trade preference programs become empty gestures of assistance with developed countries expending little actual effort.

Developed countries often restrict their product coverage in order to protect domestic industries.<sup>78</sup> The concern is that if a country is granted duty-free treatment for a product that domestic suppliers produce, the foreign supplier will gain a competitive advantage over the domestic supplier, which could shut out domestic suppliers from the market and cause domestic job loss.<sup>79</sup> Two contrasting points arise from this concern. First, trade preference programs inherently protect against the concern that developing countries may unnecessarily take advantage of the trade preferences.<sup>80</sup> Once a country exports a quota amount of product, the country no longer receives duty-free treatment for the remainder of that year.<sup>81</sup> For example, the U.S. GSP program revokes duty-free treatment if the imports account for fifty percent or more of the value of total U.S. imports of that product, or exceed a certain dollar value, which in 2011 is \$145 million.<sup>82</sup> The purpose of trade preference programs is to aid struggling developing countries just enough so

---

75. See Moss, *supra* note 9, at 676–77 (outlining steps necessary to qualify for preferential treatment).

76. E.g., *GSP-Eligible Products*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-i-0> (last visited Mar. 4, 2011).

77. See Moss, *supra* note 9, at 671–72.

78. See Ochieng, *supra* note 11, at 381 (finding that product coverage excludes sensitive industries).

79. See Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b)(10)(A), 98 Stat. 3018, 3018 (stating that the purpose of the Act is to promote trade in a manner that “does not adversely affect United States producers and workers”).

80. See Leal-Arcas, *supra* note 1, at 359 (stating that there is “graduation for product groups where competitiveness has increased”); Moss, *supra* note 9, at 670.

81. See *supra* note 80.

82. See *U.S. Generalized System of Preferences (GSP) Guidebook*, *supra* note 50, at 11.

that they can enter foreign markets and grow their economies.<sup>83</sup> Thus, the concern that the domestic supplier will be unfairly disadvantaged is unfounded: the developing country stops receiving benefits when they become truly competitive with domestic suppliers.<sup>84</sup> Further, the benefits of efficient international trade outweigh the short-term need to protect domestic suppliers.<sup>85</sup> A larger and more efficient global economy helps all countries trade more and improves their relations.<sup>86</sup>

Second, free market and free trade principles propose that a country should manufacture products for which it has a comparative advantage.<sup>87</sup> If the domestic supplier cannot compete with a foreign producer, then its failure likely suggests it should enter a different industry. The domestic supplier should focus on skills or resources in which foreign countries are less strong, in order to gain the comparative advantage.<sup>88</sup> The concepts of “supply and demand” and comparative advantage suggest that consumers will seek the best deal, and that countries should not prevent parties from selling goods at more competitive prices.<sup>89</sup> Tariffs on developing countries’ products cut into

---

83. See SEC’Y-GEN., *supra* note 3, at 9.

84. See *id.* at 20, 23.

85. See MURRAY, *supra* note 13, at 21.

86. See Leal-Arcas, *supra* note 1, at 346.

87. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1821), *reprinted in* 1 THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 373–78 (Piero Sraffa ed., Cambridge Univ. Press 1951); see also Paul Krugman, Ricardo’s Difficult Idea (Mar. 1996) (unpublished manuscript), available at <http://web.mit.edu/krugman/www/ricardo.htm> (“According to Ricardo, each nation should specialize in those activities in which it excels, so that it can have the greatest advantage relative to other countries. Thus, a nation should narrow its focus of activity, abandoning certain industries and developing those in which it has the largest comparative advantage. As a result, international trade would grow as nations export their surpluses and import the products that they no longer manufacture, efficiency and productivity would increase in line with economies of scale and prosperity would be enhanced.” (quoting JAMES GOLDSMITH, THE TRAP 1 (1994))); Bureau of Labor Statistics, *Glossary*, U.S. DEPARTMENT LABOR, <http://www.bls.gov/bls/glossary.htm> (last visited Mar. 4, 2011) (defining comparative advantage as: “When one nation’s opportunity cost of producing an item is less than another nation’s opportunity cost of producing that item. A good or service with which a nation has the largest absolute advantage (or smallest absolute disadvantage) is the item for which they have a comparative advantage.”).

88. See Krugman, *supra* note 87 (discussing the economic gains that result when workers move into industries in which the nation has a comparative advantage).

89. Wentong Zheng, *The Pitfalls of the (Perfect) Market Benchmark: The Case of Countervailing Duty Law*, 19 MINN. J. INT’L L. 1, 13 (2010) (stating that “resources flow to their most profitable and efficient uses” (citing Carbon

any advantage from low-input costs the producer may have and thus make their potentially more efficient product less desirable.<sup>90</sup> Therefore, developed countries should not try to prevent competition.

The main problem regarding product scope is that the omission of sensitive products excludes key industries that could significantly benefit developing countries and fuel economic growth.<sup>91</sup> Primarily, preference programs exclude textiles, apparel, and agriculture from duty-free treatment.<sup>92</sup> These fields tend to be very important areas for the economic development of many countries, especially low-income developing countries.<sup>93</sup> Developing countries would have more opportunities to use trade preferences if they received duty-free treatment for these types of products.<sup>94</sup> However, sensitive domestic industries bar these items to protect themselves.<sup>95</sup> For example, the United States protects the textile and agricultural industries to ensure their survival against potentially cheaper foreign products.<sup>96</sup> As a result, there is a gap between the developing countries' exports of beneficiaries and the product coverage in trade preference programs.<sup>97</sup> If developed countries opened up product coverage to include more items in textiles,

---

Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374, 19,375 (May 7, 1984)).

90. See Whitney J. Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative to Import Restrictions*, 56 ALB. L. REV. 943, 943 n.3 (1993) (describing the negative impact of tariffs on a domestic economy).

91. See Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions Under the WTO Agreements*, in WTO LAW AND DEVELOPING COUNTRIES, *supra* note 61, at 12, 13–14.

92. See Moss, *supra* note 9, at 671–72; see also GALLAGHER, *supra* note 31, at 31; Kessie, *supra* note 91, at 14 (highlighting a weakness due to “exclusion of sensitive products which are of export interest to developing countries” (quoting Bonapas F. Onguglo, *Developing Countries and Trade Preferences*, in TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS 119 (Miguel R. Mendoza et al. eds., 1999))).

93. See Lawrence, *supra* note 66, at 57–58 (“[T]he full array of GATT rules has not been extended to sectors such as agriculture which are vital to many developing countries . . .”).

94. See Kessie, *supra* note 91, at 14.

95. Shellyn G. McCaffrey, *North American Free Trade and Labor Issues: Accomplishments and Challenges*, 10 HOFSTRA LAB. L.J. 449, 462 (1993) (stating that sensitive industries in the United States are “manufacturers of footwear, ceramic tile, and glassware and growers of fruits and vegetables” and that a flood of imports would hurt those domestic producers). For an argument against needing to protect domestic industries, see *infra* Part III.B.3.

96. McCaffrey, *supra* note 95, at 462.

97. See Kessie, *supra* note 91, at 14.



apparel, and agriculture, trade preference programs may become more utilized and thus more effective.

In contrast, current product coverage focuses too much on useless products.<sup>98</sup> The developing country may not even produce the covered products, or such products may comprise only a tiny part of their market where utilization of duty-free treatment will not help the developing country grow economically.<sup>99</sup> Providing preferences for impractical products is an empty gesture that illuminates the lack of effectiveness of trade preference programs. The key is to expand product coverage to products that the developing countries show strength in producing. Though that may make it more difficult for domestic suppliers, in the long term an efficient international economy will produce justifiable benefits.<sup>100</sup> Hence, developing countries' potential in an industry coupled with their inability to infiltrate foreign markets,<sup>101</sup> which they would be able to do if not for the government-imposed trade barriers, implies that such countries need help to gain access to foreign markets. The duty-free treatment may provide enough assistance so they can enter foreign markets and grow economically while helping the international economy reach maximum productivity.

The success of AGOA in relation to the other programs demonstrates the importance of product coverage to the success of trade preference programs.<sup>102</sup> While most programs limit coverage and consequently their success,<sup>103</sup> AGOA has more coverage and is reputed to be more successful than other trade preference programs.<sup>104</sup> Specifically, AGOA allows eligible ap-

---

98. See, e.g., *id.*

99. See Johnson, *supra* note 61, at 72 (arguing that it would be beneficial to give "priority to products that the less developed countries have already shown a capacity to export competitively (in contrast to the infant-industry arguments for confining preferences to products they cannot export competitively at present)").

100. See Bureau of Labor Statistics, *supra* note 87.

101. See, e.g., SECY-GEN., *supra* note 3, at 9.

102. See Moss, *supra* note 9, at 668.

103. Cf. Lawrence, *supra* note 66, at 57 (discussing proposals to broaden the scope of GATT).

104. See Moss, *supra* note 9, at 676, 680–81; see also *African Growth and Opportunity Act*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa> (last visited Mar. 4, 2011).

parel articles and most agricultural goods.<sup>105</sup> AGOA country participants likely utilize the program more than other developing countries because of the more expansive coverage.<sup>106</sup> For instance, from 1999 to 2003, apparel exports increased 176 percent while vehicles and parts exports increased by 424 percent.<sup>107</sup> Thus, if other trade preference programs expand their coverage, it seems likely that they will be more successful.

In short, product coverage is a significant problem for trade preference programs. Developed countries do not provide duty-free treatment for products that may actually assist developing countries. Reviewing the eligible products list and including more appropriate products would help promote economic growth in developing countries.

#### B. THE SHORT-TERM NATURE OF THE PROGRAMS

Another weakness related to the implementation and structure of current trade preference programs that likely impacts such programs' potential is that they typically receive only short-term renewals.<sup>108</sup> Because even a WTO waiver is not indefinite,<sup>109</sup> countries cannot establish permanent programs that are effective. The reasoning behind annual renewals is that trade preference programs facilitate economic growth until countries can fairly compete under the MFN rule, so the programs do not need to exist beyond their utility and must be reviewed regularly.<sup>110</sup> This short-term characteristic, however, weakens the programs and possibly infringes on its effectiveness.

Developed countries may not allocate as much funding to the programs as they would if the programs were more permanent.<sup>111</sup> For example, the U.S. GSP program is extremely un-

---

105. See Moss, *supra* note 9, at 677–78; *Fact Sheet on AGOA*, OFF. U.S. TRADE REPRESENTATIVE (2009), <http://www.ustr.gov/sites/default/files/AGOA%20Fact%20Sheet%2003.09.pdf>.

106. See *Fact Sheet on AGOA*, *supra* note 105 (stating that non-oil AGOA imports increased by fifty-one percent in 2008).

107. See Moss, *supra* note 9, at 680.

108. See *id.* at 671–72; see also, e.g., Kelly Chen et al., *Customs Law*, 43 INT'L LAW. 289, 303–04 (2009) (stating that Congress passed a one-year renewal of the GSP program in 2008).

109. See, e.g., Marinberg, *supra* note 32, at 134.

110. See Moss, *supra* note 9, at 670 (discussing graduation).

111. See Telephone Interview with Marideth Sandler, *supra* note 5 (noting that the unknown future of the program makes it hard to request more funding).

derstaffed and overworked.<sup>112</sup> If a developed country believes the program may not be renewed, it likely will not continue to put effort and time into something that soon will not exist. Further, frequent renewals may prevent developing countries from engaging in long-term planning because the program's future existence is uncertain.<sup>113</sup> This uncertainty undermines the programs since countries may not believe they are a usable tool.<sup>114</sup> Allocation of resources limits developing countries.<sup>115</sup> Even if they know about the potential benefits of a trade preference program with a developed country, and even if their exports are covered under the eligibility list, they may not want to expend the time and energy to learn about and utilize trade preference programs if they are unsure that they will be around for much longer. It may not be profitable and worthwhile to begin the process of preparing the product for export if there is a chance that by the time they are able to begin profitably exporting, the trade preference may no longer be usable.<sup>116</sup> AGOA provides an interesting contrast: Congress renewed the program through September 2015 in the AGOA Acceleration Act of 2004.<sup>117</sup> AGOA may be more successful because it is long term, and is thus a reliable undertaking to provide trade preferences.<sup>118</sup> Governments should similarly enact other GSP programs for a longer period of time.

Another problematic aspect for trade programs is that they are not concretely accepted under WTO law.<sup>119</sup> A "cloud of uncertainty" regarding the legality surrounds the programs, such as the EU's GSP Plus arrangement.<sup>120</sup> Accordingly, even if a country enacts a program with a sufficient period of existence, there are always the foundational questions about whether the program is legal under WTO law and, if not, whether it will ex-

---

112. *See id.*

113. *See* Marinberg, *supra* note 32, at 134.

114. *See* Moss, *supra* note 9, at 671–72.

115. *Cf.* Alexandros Zervos, *Linking Natural Resource Exploitation and Primary Health Care in Developing Countries*, 11 UCLA J. INT'L L. & FOREIGN AFF. 227, 228 (2006) (showing how developing countries have problems with health care resulting from issues with resource allocation because of limited funds and occasional corruption).

116. *See* Hunter R. Clark, *African "Renaissance" and U.S. Trade Policy*, 27 GA. J. INT'L & COMP. L. 265, 269 n.22 (1999) (contrasting export industries' high start-up costs with the short-term nature of trade preference programs).

117. *See* Moss, *supra* note 9, at 678.

118. *See, e.g., id.*

119. *See* Amao, *supra* note 63, at 396.

120. *Id.*

ist for much longer. It seems likely that this issue also weakens the reliability and effectiveness of trade preference programs. Even if short-term approval for the program does not deter developing countries from using trade preference programs, the uncertainty may prevent the program employees from engaging in long-term and possibly beneficial planning or ideas.<sup>121</sup>

If the enacted programs do not present a reliable option, people in both developed and developing countries will not take the preferences seriously. They may not utilize the preferences, which may explain the current lack of observed achievement. In order to provide lasting economic growth, trade programs must last beyond a couple of years.

### C. INITIAL AND OVERLOOKED HURDLES FOR EXPORTERS

Even if developed countries present a perfectly created trade preference program that deals with optimal products and contains a long mandate, exporters in developing countries face significant domestic hurdles they must overcome before they can profitably export. If they want to sincerely assist with economic growth, trade preference programs need to address the foundational problems facing developing country exporters by providing crucial and profit-maximizing information.

In order to participate in trade preference programs, developing countries must meet varied requirements that pose significant obstacles.<sup>122</sup> For instance, if such country's product is a food item, it must meet stringent sanitary and phytosanitary standards, which can take years to accomplish.<sup>123</sup> Additionally, complying with the standards can be costly, which further impinges on the program's realistic and perceived utility.<sup>124</sup> Even though the standards are necessary for health concerns, trade preference programs should take the related expenses into account and adjust benefits accordingly, or even provide relevant information and tips to help exporters begin to efficiently plan

---

121. Cf. Moss, *supra* note 9, at 671–72.

122. See Kessie, *supra* note 91, at 14 (listing obstacles such as rules of origins, quotas, designation criteria, and noneconomic conditions); Tomazos, *supra* note 71, at 318 (suggesting other reasons for lack of success).

123. See J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 23 *WORLD ECON.* 511, 517–19 (2000) (discussing the multiyear process required to comply with international sanitation standards for exports).

124. See *id.* at 518–19, 525 (discussing Argentina's \$80 million program to comply with export sanitation standards and the potential cost of similar projects).

their future.<sup>125</sup> Thus, more information or increased GSP benefits would help override government-imposed costs, those that would not be present in a free market, so that the global economy reaches maximum efficiency. Developing countries often claim that preferences would be helpful if they were more attainable.<sup>126</sup>

Further, even if exporters meet the requirements, they must deal with internal obstacles that add to the high cost of exporting. For example, exporters in developing countries typically have less effective distribution channels.<sup>127</sup> In order to efficiently export their products, they should have reliable infrastructure and find ways to distribute their goods in the most profitable way.<sup>128</sup> A related point is that they also face problems with effective marketing.<sup>129</sup> Even if they successfully export their products, there may not be any consumer demand in the developed country because of lack of marketing and effective distributors. This negates both their and the trade preference program's goal. It may cost too much for the venture to be profitable if the exporter hires an effective marketer or distributor.<sup>130</sup> Developing countries also face a problem with infrequent domestic transportation.<sup>131</sup> The effort to find reliable ground transportation to lessen shipping expenses may not even make the endeavor to utilize the program worthwhile.<sup>132</sup> These factors all produce a very high production cost that cuts into the profitability and, thus, the desire to utilize trade preference programs.

Given all of the initial costs to export and market, the small margin of benefits from using the programs further hinders its profitability.<sup>133</sup> If the regular tariff reductions that all

---

125. See *id.* at 524 (discussing the role the WTO can play in investment-development standards needed to comply with trade standards).

126. See Kessie, *supra* note 91, at 14.

127. Cf. Ari Bessendorf, Note, *Games in the Hothouse: Theoretical Dimensions in Climate Change*, 28 SUFFOLK TRANSNAT'L L. REV. 325, 328 (2005) (stating that developing countries have underdeveloped infrastructure and lack of resources).

128. See MURRAY, *supra* note 13, at 147.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See UNCTAD, *Industrial Exports from the Developing Countries and Preferences*, in TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT: REPORT BY THE SECRETARY-GENERAL OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (1964), reprinted in TRADE PREFERENCES AND

countries receive come close to the duty-free treatment of trade preference products,<sup>134</sup> potential exporters may not even attempt to take advantage of the program. For example, the duty rate for dried apricots is merely 1.8 cents per kilogram.<sup>135</sup> As a result, the benefit of using GSP may not be worth the effort if the exporter saves very little in the transaction. In that situation, the potential exporters will not expand their market and their country will not have the desired economic growth.

Trade preference programs also need to take into account the initial hurdles exporters must face. For example, the programs can provide information on the most cost-effective means of transportation and other pertinent information. If the country in question does not change the legislation behind trade preference programs, exporters may rarely use trade preferences in the way intended, and economic development will take longer. In sum, developed countries are not fulfilling their obligations to help developing countries since they basically provide ineffective and impractical benefits through the current trade preference programs. Product coverage is not specific enough to provide meaningful aid to the developing countries. Further, the programs' unreliability weakens their usefulness and makes them an impractical resource. Lastly, the exporters themselves face significant hurdles that trade preference programs overlook.

### III. ACTIVE REPRESENTATION OF EXPORTERS FROM DEVELOPING COUNTRIES

While there may be other solutions to help developing countries secure economic growth, this Note focuses solely on how to improve the existing trade preference programs. In order to improve the effectiveness of GSP, lawmakers, through legislation, need to change the structure and role of trade preference programs to act as exporters' agents. Though it would be best if the changes were widespread throughout international

---

DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES, *supra* note 61, at 3, 13 ("A small margin of preference is not likely to provide adequate incentives for establishing new export industries in developing countries. If a new system of preferences is worth introducing at all, the margins of preference should provide incentives that are clearly adequate in relation to the magnitude of the problem.").

134. *Id.*

135. U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES ch. 8 (2010), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1000C08.pdf>.

policy, the United States at the very least should enforce them. The program's change in role would more effectively assist exporters and, consequently, benefit international trade. Further, a developed country would reap benefits beyond the altruistic desire to aid developing countries and alleviate global poverty. The greater spread of industrialization means that world trade would be closer to reaching an efficient market with the lowest consumer prices.<sup>136</sup> Lower prices may induce countries to not engage in protectionism.<sup>137</sup> Also, there would be more opportunities for developed countries to create and support more specialized jobs.<sup>138</sup> Lastly, though there may be the concern about the unfairness of one's country helping foreign, but not domestic, producers, the program is only for qualified developing countries that need the benefits to overcome trade barriers (which domestic suppliers do not face) to maximize efficiency.

#### A. BENEFITS OF IMPLEMENTING THE PROPOSED SOLUTION

If trade preference programs shift their role so their employees more actively represent and assist developing country exporters within the developed country, numerous benefits would arise. First, if the role of trade preference programs is to represent exporters, like an agent, the program should provide more individual attention regarding product coverage. Currently, trade preference programs, such as the U.S. GSP, already give some specialized attention to countries regarding products and new profitable areas for exporters.<sup>139</sup> In meetings and presentations, the program employees highlight products that countries specialize in that can be exported under duty-free treatment.<sup>140</sup> Thus, they inform the developing countries of opportunities to take complete advantage of every product under

---

136. See Bureau of Labor Statistics, *supra* note 87.

137. Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U CHI. L. REV. 1, 5 (1999) ("Protectionism draws high cost domestic firms into the market while excluding low cost foreign firms, and it prices out of the market some consumers who would be willing to purchase goods at a price exceeding the marginal cost of production of efficient suppliers.").

138. See Bureau of Labor Statistics, *supra* note 87.

139. See Telephone Interview with Marideth Sandler, *supra* note 5; *GSP in Use—Country Specific Information*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-use-%E2%80%93-coun> (last visited Mar. 4, 2011) (listing links to country-specific PowerPoint presentations showing the program's country-specific efforts).

140. Telephone Interview with Marideth Sandler, *supra* note 5.

the current products list.<sup>141</sup> However, the U.S. GSP is understaffed so it can only sincerely focus on a few countries at a time.<sup>142</sup> Hence, legislation needs to set aside more funding and resources to increase the staff so that there will be more directed attention to the participating developing countries.<sup>143</sup> Another benefit from directed attention is that the employees may discover, through detailed economic analysis and discussion with exporters, new and useful areas that are not included in the product coverage.<sup>144</sup> Then, programs can attempt, as advocates for the developing country, to get the new product or industry onto the GSP-eligible products list. If the programs have more resources and employees, they would deal with more countries, exporters, and their products to get more results for developing countries.

Second, an increase in resources to allow the program to effectively represent developing countries would signal the developed countries' determined and sincere effort to help developing countries industrialize and grow. It would make the program reliable and would help make international trade efficient. Increased funding may also present the idea that the developed country supports the program and would attempt to keep the program running. Therefore, it would be a stable and responsible route for exporters to take since the increased funding lessens the gamble of depending on the continuation of trade preference benefits.

Third, the program's employees should encourage "export-mindedness,"<sup>145</sup> which means that the developing-country producers would want to send their products to other countries despite the difficulties and high costs.<sup>146</sup> The program representative would provide exporters, and even locals for posterity, with relevant information to make the exporting process easier.<sup>147</sup>

---

141. *Id.*

142. *Id.*

143. See *infra* Part III.B.3 for a discussion of why Congress should increase funding for GSP.

144. See *GSP in Use—Country Specific Information*, *supra* note 139 (showing the country-specific efforts that point out possible products).

145. See UNCTAD, *supra* note 133, at 3, 20 ("[I]t is necessary to induce export-mindedness.").

146. See *id.*; Christian Wilhelms, *Export Drive by a Developing Country*, 2 INTERECONOMICS 209, 211 (1967) (discussing Brazil's (then) new export-oriented trade policy).

147. Exporters may not be aware they are missing out on other export opportunities. CHRISTOPHER STEVENS & JANE KENNAN, MAKING TRADE



The programs' employees should first find "clients" in developing countries. Though the U.S. GSP already meets with ambassadors and diplomats, travels to foreign countries to give informational presentations, and attends trade fairs, the lack of resources limits their ability to consistently and ardently engage in thorough maximizing efforts.<sup>148</sup> More resources would lead to more exposure, allowing GSP to provide exporters with useful information to make sure they claim every possible benefit. The information should range from product coverage, to how best to deal with eligibility and rule of origin requirements, to the best methods of transportation. This would facilitate the process of encouraging producers to export their products.<sup>149</sup> Further, the programs should advocate that it is worth using them, even if there is just a small margin of benefits. They should assuage any fears and concerns that the exporters may have and provide them with the information that would maximize their exports.

Lastly, the programs need to represent the developing countries by acting as their marketers. Even if a producer exports its product to a developed country, if there is no demand, then there will be no profit and the producer will no longer export the product and use the trade preference benefit.<sup>150</sup> Preference program employees should work within their developed country to market the product and find profitable distribution centers. If they succeed, they would help the exporter maximize their profitability. Further, the assistance would merely act as a way to lessen trade barriers to maximize market efficiency, rather than unfairly provide an advantage.<sup>151</sup>

The United States currently has regional programs that show it recognizes the benefit in giving more specific attention to developing countries.<sup>152</sup> However, those programs are not accomplishing enough.<sup>153</sup> The proposed changes differ from the

---

PREFERENCES MORE EFFECTIVE 6 (2004) ("Everyone knows about AGOA but hardly anyone who is not already exporting to Europe knows about Cotonou.").

148. Telephone Interview with Marideth Sandler, *supra* note 5 (discussing the staffing and budget problems encountered by GSP).

149. *See id.* (discussing what GSP would do to promote trade).

150. *See* RICARDO, *supra* note 87, at 374–75.

151. *See, e.g.*, Steven L. Snell, *The Development of Competition Policy in the People's Republic of China*, 28 N.Y.U. J. INT'L L. & POL. 575, 584 n.30 (1996) (explaining that barriers to entry can artificially inflate prices compared to a competitive market).

152. *See, e.g.*, Andean Trade Preferences Act, 19 U.S.C. § 3201 (2006); Trade Policy for Sub-Saharan Africa, *id.* § 3701.

153. *See* Moss, *supra* note 9, at 671.

regional trade preference programs because the shift in roles is more proactive and responsive to initial hurdles. A representative role ensures focused attention for developing countries so that they maximize their benefits from trade preference programs.<sup>154</sup> A shift in roles would make trade preference programs useful and help the developing countries grow economically and industrialize, whether by providing information on the existence of trade preference programs, encouraging “export-mindedness,” or by helping to market the product.<sup>155</sup> The proposed changes, however, likely face a few significant hurdles.

#### B. POSSIBLE ISSUES WITH EXPANDING THE ROLE OF TRADE PREFERENCE PROGRAMS

There are a few important issues with the recommended changes. Such issues challenge the possibility and legality of making trade preference programs act as the exporters’ representatives. The first concern is that the additional resources required by an expanded GSP program expand the degree of departure from the MFN rule. Second, increased involvement by the programs may interfere with the free market. Third, the public may perceive developed country governments as putting the interests of foreigners before their own citizens. Nonetheless, each concern lacks sufficient weight to prevent the implementation of this Note’s solution.

##### 1. The Proposed Solution Approaches Violation of the MFN Rule

A realistic concern is that the proposed changes to trade preference programs create too much differential treatment between countries.<sup>156</sup> Developed countries provide a sizable advantage to developing countries if the wealthy countries devote more resources to programs to help a select few enter domestic developed country markets to profitably sell the developing

---

154. See Telephone Interview with Marideth Sandler, *supra* note 5 (discussing difficulties in making opportunities known to LDCs).

155. See *id.*

156. If S&DT goes too far beyond the Enabling Clause, it would violate the MFN rule of equal treatment. Compare Enabling Clause, *supra* note 37, at 203 (authorizing differential treatment), with GATT, *supra* note 22, art. I (stipulating the MFN rule).

country's merchandise.<sup>157</sup> The advantage very well might cross the line between what the Enabling Clause allows and the MFN rule requires.<sup>158</sup> Thus, some may argue that the proposed changes violate WTO principles and are illegal.

These concerns, however, are not different from those present even before the inception of S&DT.<sup>159</sup> The S&DT principle acknowledges that WTO members are not yet all at the same level of development to fairly be subjected to the MFN rule.<sup>160</sup> Developed countries should engage in behavior, such as trade preferences, that aids developing countries to grow economically so that the MFN rule can fairly be applicable to all countries.<sup>161</sup> Further, international trade will be more efficient and all countries will benefit.<sup>162</sup> Expanding the role of trade programs to become representatives of developing countries should not be considered a significant change in policy that justifies declaring a violation of the MFN rule. Further, the Enabling Clause only requires that preferences are generalized, non-reciprocal, and nondiscriminatory, characteristics that still exist with the proposed changes.<sup>163</sup> Thus, the alterations would not be illegal under the MFN rule.

## 2. Increased Government Involvement May Interfere with the Free Market

The demand for increased governmental involvement in the free market is another concern. A principle of the free market system is that the government should not excessively regulate so that the market can reach a natural balance.<sup>164</sup> If the

---

157. *But see* sources cited *supra* note 30. These authors emphasize the need for differential treatment until countries are at a more equal stage of development.

158. *See* Enabling Clause, *supra* note 37, at 203–04.

159. *See* Moon, *supra* note 24, at 620 (discussing the motivations behind the MFN rule).

160. *See* GALLAGHER, *supra* note 31, at 22 (discussing some WTO agreements that favor LDCs); sources cited *supra* note 30.

161. *See* Ochieng, *supra* note 11, at 374–75.

162. *See generally* Krugman, *supra* note 87 (explaining how even trade between countries with disparate levels of value is efficient and can benefit both countries).

163. *See* Bartels, *supra* note 15, at 522; *see also* Moss, *supra* note 9, at 670 (explaining the principle of graduation).

164. *See, e.g.*, sources cited *supra* note 87 (discussing comparative advantage); *cf.* Hearing Designation Order, Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors & EchoStar Communications Corporation, Transferee, 17 FCC Rcd. 20,559, 20,629 n.184 (2002) (rejecting the applicants' national

government enacts a program that aggressively brings new actors into the market that may not otherwise enter, the government skews the free market and competition.<sup>165</sup> Only the best products at the cheapest prices should thrive in the marketplace, so a program that advocates the purchase of a certain item may squeeze out of the market more efficiently produced products.<sup>166</sup> If the market seeks to maximize everyone's comparative advantage, the program possibly provides a false advantage that may hurt the consumer market if prices drastically increase once the developing country graduates from duty-free treatment.<sup>167</sup>

Nonetheless, the increased role of government would only benefit products that have a viable future, based on economic analysis, and that would otherwise be successful products in the market if not for initial barriers such as the tariff rates and lack of resources to find potential buyers.<sup>168</sup> Trade preferences are meant only to assist countries, not force wealth onto them.<sup>169</sup> Further, the proposed changes are meant to provide a comparative advantage only for the countries that most need it in order to industrialize. The changes only provide an initial advantage which should not significantly affect free market principles.<sup>170</sup> More importantly, the changes lessen government-imposed barriers that hinder the free market. Therefore, the concern of excessive interference is unfounded.

---

pricing plan, which would replace competition with regulatory oversight, conflicting "with the goal of allowing competition to replace regulation, that both Congress and this Commission have long sought to achieve"); Leigh M. Murray, Comment, *Sirius Mistake: The FCC's Failure to Stop a Merger to Monopoly in Satellite Radio*, 59 AM. U. L. REV. 83, 109 (2009) (highlighting the FCC's "stated preference for free market competition" (citing 17 FCC Rcd. at 20,629)).

165. Cf. 17 FCC Rcd. at 20,629 (explaining how price controls might counterintuitively lead to collusion and higher prices).

166. See Krugman, *supra* note 87 (discussing, in part, how market distortions can undermine efficiencies from specialization).

167. See Bureau of Labor Statistics, *supra* note 87 (defining comparative advantage).

168. See Clark, *supra* note 116, at 269 n.22.

169. See Ochieng, *supra* note 11, at 374-75 (noting that LDCs can modify certain GATT provisions if they feel it is in their interests).

170. The domestic railroad system in the United States grew to maturity under industrial policies that favored railroad growth—akin to an initial comparative advantage for an infant industry. Lane Kirkland, *Industrial Policy: An Answer to Economic Chaos*, 5 STAN. L. & POL'Y REV. 23, 73-74 (1993).

### 3. The Conflicting Duty Toward Domestic Constituency and Global Trade

Lastly, this strategy requires the program to prioritize the exporter's interest over a domestic producer's success. Domestic producers and taxpayers may disagree with the use of their tax payments to help foreigners compete and sell products.<sup>171</sup> The developed country's government may face loyalty questions on whether it should change the program to benefit global trade or follow the short-term desires of its domestic constituency.

Taxpayers may even feel that the government uses the country's wealth to unfairly aid strong nations, such as China,<sup>172</sup> in selling its products. Trade preference programs, however, only help developing countries that qualify based on economic development, which should diminish this concern since well-off countries like China do not qualify.<sup>173</sup> Further, the programs have a safety trigger whereby countries that successfully export a product past a certain quota no longer qualify for duty-free treatment.<sup>174</sup> Consequently, taxpayers' concern that proposed changes would assist developing countries dominate domestic markets is unfounded, since the programs only help countries that have difficulty exporting their goods and are unable to enter the international market.

Additionally, the concern mirrors the idea of the MFN rule: one should not provide special treatment.<sup>175</sup> However, the WTO recognized that S&DT is understandable in certain situations, one of which is providing trade preferences.<sup>176</sup> This Note's proposed expansion does not mean that developed countries will not protect their own producers. The program would only act as a local representative, and domestic producers would compete

---

171. Domestic producers may disagree when it hurts their own industries. However, protectionism is inefficient for international trade and should be avoided. See Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 539 (1993).

172. See Mark S. Blodgett, *Foreign Direct Investment, Trade, and China's Competition Laws*, 37 DENV. J. INT'L L. & POL'Y 201, 201 (2009) (commenting on the strength of China); *Markets for Referrals*, 28 LEGAL MGMT., no. 3, April 2009 at 1, 8 (noting China's strong presence in the global economy).

173. See *Information on Countries Eligible for GSP*, *supra* note 3.

174. See Moss, *supra* note 9, at 670 (explaining that developing countries no longer qualify for GSP once they graduate).

175. See GATT, *supra* note 22, art. I, para. 1.

176. See Enabling Clause, *supra* note 37, at 203 ("Notwithstanding the provision of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries . . .").

with foreigners as they compete with the domestic competition. Furthermore, the long-term benefits for all parties involved—such as more jobs, higher GDPs, and increased global trade—maximize as developing countries industrialize.<sup>177</sup> Moreover, duty-free treatment benefits only a few countries.<sup>178</sup> Taxpayers should not be concerned that their government's actions work against what is best for them. The preference program merely serves as a way to make it easier to help developing countries export more so they can grow economically, which eventually benefits everyone.<sup>179</sup>

### C. THE LEGALITY OF THE PROPOSED SOLUTION

The proposed expansion of the program's role that calls for more active representation may face opposition for stepping beyond the boundaries that the WTO permits under the Enabling Clause and MFN rule.<sup>180</sup> Nonetheless, the need to assist developing countries with industrialization outweighs the potential problems. Also, the proposed changes are very similar to the GSP Plus programs and the current failure of those programs may even qualify as an "exceptional circumstance."

#### 1. The View that Trade Preference Programs Should Be Mandatory Suggests Support for an Increased Role

The current ineffectiveness of trade preference programs implies that developed countries are not taking their goals seriously.<sup>181</sup> If they were, they would likely have attempted to change their programs to find a more productive strategy. A minority view is that all developed countries should grant trade preferences.<sup>182</sup> A possible reason for trade preference programs' modest results is that few provide duty-free treatment; trade preferences would work better for economic growth if every able

---

177. Cf. Krugman, *supra* note 87 (describing Ricardo's thesis that industrialization and specialization in developing nations increases global GDP).

178. E.g., *Generalized System of Preferences (GSP)*, *supra* note 49 (showing that only 131 countries benefit from the U.S. GSP program).

179. See generally Krugman, *supra* note 87 (explaining the concepts of comparative advantage and absolute growth).

180. See Moss, *supra* note 9, at 670 (briefly describing the scope of the S&DT and MFN doctrines).

181. See Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b)(10)(A), 98 Stat. 3018, 3018 (lacking clear language that would give the statute real power to affect change); SEC'Y-GEN., *supra* note 3, at 12-13.

182. See Bartels, *supra* note 15, at 513.

country provided them.<sup>183</sup> More developing countries would export to more countries which should lead to quicker results.<sup>184</sup> Even if every country does not provide them, the countries that currently offer benefits should change their structure to make their programs more efficient.

A mandatory program is based on the belief that economic growth for developing countries is a vital interest.<sup>185</sup> However, WTO members created the Enabling Clause to allow countries to engage in differential treatment, despite the MFN rule.<sup>186</sup> They likely made the Enabling Clause optional to allow for political considerations when granting trade preferences.<sup>187</sup> To make trade programs mandatory would require an amendment to the WTO Agreement.<sup>188</sup>

If the WTO refuses to make trade preference programs mandatory, the next best step, if the WTO is serious about helping developing countries, is to expand the program's role to make the voluntary programs capable of accomplishing something more through increased authority and direction. Those who support a mandatory program likely support an expansion of the program, such as this Note's proposed changes, since both recognize the importance of aiding developing countries and seek to make that happen.<sup>189</sup> Thus, the solution achieves legitimacy in that it presents an option that is in the middle of two extremes—demanding mandatory trade preferences or settling for the current ineffective programs.

---

183. See Moon, *supra* note 24, at 635 (“[T]oo few of the provisions impose binding obligations on the industrialized countries, with the result that the assistance described generally does not eventuate.”).

184. The purpose of GSP is to help developing countries overcome barriers that keep developing countries out of developed markets. See EUR. COMMISSION, *supra* note 48.

185. Moon, *supra* note 24, at 619; see also Bartels, *supra* note 15, at 511.

186. See *supra* Part I.A.

187. See Shun-yong Yeh, *Dragging Out of or Deeper into Another Impasse of the Political Economy of the World Trade Organization? A Critic of the Findings of the Dispute Settlement Body in European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 465, 471 (2006) (“Due to the voluntary nature of GSP schemes, political considerations most obviously dominate any donor's willingness in granting such preferences.”).

188. See *id.* at 470–71 (“[T]he granting of such system is essentially a ‘gift’ from developed countries with the consequence that any tight limitation on them will most likely put an end to the system altogether.”).

189. See, e.g., Moon, *supra* note 24, at 617 (“S&DT may be made stronger, more effective and more operational.”).

## 2. Comparison to GSP Plus Arrangements and Limiting the Solution to LDCs

Despite potential concerns that the suggested modification is too expansive and violates the MFN rule, the proposal is very similar to GSP Plus, which lends legality to its enactment. GSP Plus grants additional preferences on items not included in the standard product coverage.<sup>190</sup> It recognizes that the benefits from standard trade preference programs are insufficient to provide meaningful results, and hence attempts to improve them by expanding product coverage.<sup>191</sup> The proposed changes similarly recognize flaws in the preference programs and attempt to expand the programs' utilization. However, instead of having broader product coverage, the proposed changes increase the personnel that focus on developing countries, which can potentially expand product coverage as well as accomplish other utilization-increasing measures.<sup>192</sup> The changes increase the attention paid to finding exporters and providing them with valuable information and encouraging them through the exportation process.

While the proposed changes are not entirely comparable to GSP Plus<sup>193</sup> and, as a result, may conflict with the MFN rule, the proposed solution should only be applied to LDCs. GSP should offer heightened representation only to countries that meet certain standards, such as those offered under GSP Plus<sup>194</sup> or LDCs. A more expansive coverage that extends to countries beyond LDCs may violate the MFN rule.<sup>195</sup> Regardless, the proposed changes recognize the need to take extra measures for countries that need the most economic growth.<sup>196</sup>

Applying the proposed solution solely to LDCs strengthens the legality of the program under international trade law.<sup>197</sup>

---

190. See Bartels, *supra* note 43, at 873–74 (discussing prescription drugs as an exception to the standard product coverage).

191. See, e.g., *id.*

192. See Telephone Interview with Marideth Sandler, *supra* note 5.

193. GSP primarily provides economic incentives to LDCs in the form of reduced tariffs. EUR. COMMISSION, *supra* note 48.

194. Bartels, *supra* note 43, at 871 (listing standards for countries seeking to qualify for GSP Plus benefits).

195. See *supra* Part I.A (discussing the MFN rule that initially precluded the possibility of giving trade benefits to developing countries until the global community gradually accepted the idea).

196. See EUR. COMMISSION, *supra* note 48.

197. Cf. Marinberg, *supra* note 32, at 130, 143 (explaining that exceptional circumstances including economic development may support S&DT).



The suggested alterations expand the level of focus and attention to specific countries that the WTO deems truly in need of aid to encourage utilization and profitability of the program.

### 3. The Lack of Results May Qualify as an Exceptional Circumstance

The current failure of trade preference programs supports the necessity of instituting the proposed changes because it exemplifies the programs' incompetency to carry out its goals.<sup>198</sup> Not only should something be done to help developing countries industrialize, but open markets and global industrialization promote key national interests.<sup>199</sup> Increased competition means U.S. consumers can purchase products at the best price.<sup>200</sup> The failure to industrialize developing countries, even after decades of trade preferences,<sup>201</sup> suggests that the goal is complex and may qualify as an "exceptional circumstance" that requires a new form of solution to produce results.<sup>202</sup> If the situation is an exceptional circumstance, developed countries may have a greater chance at receiving a WTO waiver and getting programs with a different focus and strategy.<sup>203</sup>

The WTO grants waivers if there are exceptional circumstances.<sup>204</sup> Despite the lack of concrete criteria, there are some factors that likely weigh toward getting a waiver.<sup>205</sup> One consideration is WTO precedent.<sup>206</sup> If the United States received a waiver solely because "the Andean nations need[ed] to expand their trade and economies," then the WTO should grant similar waivers for all trade programs that want to "expand their trade and economies."<sup>207</sup>

---

198. See Leal-Arcas, *supra* note 1, at 346 (arguing that trade policies promoting greater economic integration would promote greater economic development and peace for all countries involved).

199. *Id.*

200. See Krugman, *supra* note 87.

201. Differential treatment was approved by the GATT in 1979. Enabling Clause, *supra* note 37, at 203.

202. See Marinberg, *supra* note 32, at 143 (stating that the absence of alternatives, hardship, and lack of precedent are factors for determining "exceptional circumstances").

203. See *id.*

204. *Id.* at 130, 133; Marrakesh Agreement, *supra* note 29, art. IX.

205. See generally Marinberg, *supra* note 32 (discussing what constitutes "exceptional circumstances").

206. See *id.* at 143.

207. See *id.* at 151 (explaining the reasoning behind creating ATPA).

Another consideration is whether the proposal is an “urgent policy objective” that cannot be accomplished through other means.<sup>208</sup> The idea of helping developing countries, the subsequent acceptance of S&DT within WTO principles, and the program’s enactment all show that the world considers assistance urgent.<sup>209</sup> Further, the developed countries’ strategy seems incomplete since it has not met the objective.<sup>210</sup> At the very least, the ineffectiveness of the current programs shows that the issue is complex and not easily solved, especially with the current methods. The WTO must encourage a new strategy, such as the proposed solution, in order to achieve results. The WTO should grant a waiver to establish the proposed changes because the established trade preference programs are not feasibly productive.

The current situation needs change to become a more effective trade preference program. This Note advocates changing the role of the program to become the representative for exporters, which would make it more efficient and helpful to developing countries. A program that focuses more attention on the specific needs of beneficiary countries by providing more information and marketing products may encourage more program usage. Further, the proposed changes are compatible with existing trade law since they only provide S&DT to qualified developing countries. They are necessary because the current programs attempting to help developing countries industrialize are not efficient, and it is vital for international economic growth to achieve that goal.

### CONCLUSION

Trade preferences help developing countries industrialize quicker by providing easier access to foreign markets. The enacted programs, however, fall short of success. The flaws in the current programs range from inadequate product coverage to indifference toward burdensome initial costs. This Note sug-

---

208. *Id.* at 133 (suggesting that policy concerns are not “exceptional circumstances”). *But see id.* at 143 (suggesting that the unavailability of other methods consistent with GATT principles may make something an “exceptional circumstance”).

209. *See* Leal-Arcas, *supra* note 1, at 346; Ochieng, *supra* note 11, at 374.

210. *See* GALLAGHER, *supra* note 31, at 15 (noting that trade preferences have eroded over time); Bermann & Mavroidis, *supra* note 61, at 1 (explaining that LDCs have seen their portion of world trade decline over time); Ochieng, *supra* note 11, at 375–76 (discussing the fact that many LDCs are seeking more S&DT provisions in global trade agreements).

gests that trade preference programs should change their role so the employees act as representatives for the exporters. Not only should the employees actively seek out and encourage foreign exporters, but they should provide them with needed information and help them profit in the domestic marketplace. At the least, the changes can be limited to LDCs, or even a narrower subset, so as to not violate the MFN rule. Overall, for these programs to fruitfully exist, the solution demands more resources. The need to produce results that assist developing countries should outweigh any expense concern. If developed countries enact the proposed solution, international trade will be closer to reaching an efficiency that benefits all nations through cheaper products, increased jobs, higher GDPs, and less economic disparity.