

THE GENERALIZED SYSTEM OF PREFERENCES
AFTER FOUR DECADES:
CONDITIONALITY AND THE SHRINKING MARGIN
OF PREFERENCE

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The legal cornerstone of special and differential treatment in favor of developing countries is the Generalized System of Preferences. Since 1971—the year in which the Generalized System of Preferences (GSP) was first authorized under GATT auspices—GSP has become a fixture in the trade policies of developed countries. The GSP marked its 40th anniversary in 2011, an appropriate occasion to ask whether or not GSP remains relevant. This article examines two sets of questions. First, are the conditions that are an intrinsic part of the U.S. and EU GSP programs WTO-legal? Do the preconditions and conditions to being designated as a GSP beneficiary under both the U.S. and EU trade preference programs bear a rational relationship to the overarching goal of economic development within beneficiary countries? Besides examining the conditionality that is an inherent feature of the U.S. and EU GSP programs, the second overarching question that this article addresses is whether GSP remains economically relevant or whether instead the shrinking margin of preference between the most-favored-nation (MFN) duty rate and the preferential duty rate has reduced the efficacy of national GSP programs to the vanishing point.

Assuming that these programs remain economically relevant, do the conditions and limitations that are an integral part of them suffer from a lack of coherency? Is it time to overhaul trade and development policy, at least with respect to GSP programs? The author's answers to the first set of questions on the legality of conditionality is a qualified "no" and to the second set of questions on whether the GSP remains economically relevant is a qualified "yes." The author recommends reforming the GSP program and moving beyond the GSP as a key piece of preference-granting countries' trade and development policy for developing countries. His prescription is fourfold: (1) integrate and expand the four U.S. trade preference programs, (2) revisit and substantially revise conditionality, (3)

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harmonize preferential rules of origin at the international level, and (4) provide better focused and coordinated aid for trade.

Differential treatment should not be looked upon as immutable. If it were, the results of the efforts made through national and international policies to promote development would amount to little.

Olivier Long, former Director-General of GATT (1985)

Le mieux est l'ennemi du bien. (The best is the enemy of the good.)

Voltaire, La Bégueule (1772)

The best time to plant a tree is twenty years ago. The next best time is now.

African proverb

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INTRODUCTION

The intellectual keystone of the multilateral trade system is that economic development is best achieved through non-discriminatory trade patterns, the progressive reduction of tariffs, and the elimination of nontariff barriers that impede trade flows.¹ Still, the principle of non-discrimination at the World Trade Organization (WTO) is far from dogma. The two most significant exceptions to the non-discrimination principle that honor the most-favored-nation (MFN) obligation in the breach are (1) the hundreds of regional trade arrangements that have proliferated over the past two decades and that continue to increase,² and (2) the numerous provisions found in the General Agreement on Tariffs and Trade (GATT) and in the WTO multilateral trade agreements (MTAs) that extend preferential treatment to developing countries (“special and differential treatment” in WTO parlance).³

The legal cornerstone of special and differential treatment in favor of developing countries is the Generalized System of Preferences. Since 1971—the year in which the Generalized System of Preferences (GSP) was first authorized under GATT auspices—GSP has become a fixture in the trade policies of developed countries.⁴ The GSP marked its 40th anniversary in 2011, an appropriate occasion to ask whether or not GSP remains relevant. In a 2008 report the Congressional Research Service gave the following less than sanguine appraisal:

Scholarly studies have . . . come to conflicting conclusions of the impact of the GSP program on international trade flows. Depending on the methodology used and the assumptions made, the studies have estimated

1. See, e.g., General Agreement on Tariffs and Trade, arts. I:1 (unconditional, most-favored nation obligation), II (tariff bindings), III (the national treatment obligation), and XI:1 (the prohibition on quotas and other border measures affecting imported and exported goods), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194., arts. I:1 (unconditional, most-favored nation obligation), II (tariff bindings), III (the national treatment obligation), and XI:1 (the prohibition on quotas and other border measures affecting imported and exported goods). See generally JUAN C. SÁNCHEZ ARNAU, *THE GENERALIZED SYSTEM OF PREFERENCES AND THE WORLD TRADE ORGANIZATION* 51-84 (2002).

2. As of May 2011, 210 regional trade agreements (RTAs) were in force and had been notified to the World Trade Organization (WTO), with approximately an additional 40 either in negotiation or signed and awaiting approval. See *Regional Trade Agreements Information System*, WTO, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited May 31, 2011). There is some double counting, however, because the WTO credits as two notifications an RTA that covers both goods and services (one for goods and one for services), even though a single legal instrument establishes the legal regime for both under the RTA.

3. See *infra* notes 44-70 and accompanying text. For an analysis of the pre-WTO years of special and differential treatment, see generally ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (Trade Policy Research Ctr. ed., 1987).

4. See *infra* notes 71-83 and accompanying text.

the trade effect for GSP-eligible products as ranging from being negligible to increasing by over 60%. For example, a 2006 study of EU trade preference programs estimated that the EU GSP program “does not significantly increase exports” for beneficiary countries. Most of the studies calculated a less than 20% increase in GSP-eligible product exports.⁵

In a 2006 report the Congressional Research Service noted studies from the 1970s and 1980s which concluded that GSP has had a stimulative effect on developing countries’ exports.⁶ That same report observed, however, that GSP benefits are limited by several features of the U.S. program. In 2005, for example, less than 10 percent of U.S. imports from GSP beneficiary countries took advantage of GSP duty-free treatment. The majority of products that were GSP eligible were excluded, most often because they either exceeded the competitive need limit for a specific product or because they did not satisfy the GSP rule of origin.⁷ Exacerbating the situation is that any given preference-granting countries’ list of GSP-eligible products can change over time and not all donor countries make the same products GSP-eligible.⁸ In other words, donor countries do not coordinate their respective GSP programs with other donor countries.

Presenting a detailed description of all national GSP schemes is not only beyond the scope of this work, but it also would duplicate the fine work of others on the subject.⁹ At least as importantly, national GSP schemes present somewhat of a moving target in that national legislatures from time to time revise and amend their GSP schemes, thus rendering an analytical description of such schemes often out of date by the time such an analysis is published.¹⁰ Indeed, special and differential treatment with regard to tariff

5. MICHAEL F. MARTIN & VIVIAN C. JONES, CONG. RESEARCH SERV., RL 34702, POTENTIAL TRADE EFFECTS OF ADDING VIETNAM TO THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM 11 (2008) (footnotes omitted) (quoting Maria Persson & Fredrik Wilhelmsson, *Assessing the Effects of EU Trade Preferences for Developing Countries* 16 (Lund Univ. Dep’t of Economics Working Papers, Paper No. 2006:4, 2006)).

6. See WILLIAM H. COOPER, CONG. RESEARCH SERV., 97-389, GENERALIZED SYSTEM OF PREFERENCES 4 (2006).

7. See *id.* For an explanation of competitive need limits, see *infra* notes 74, 138, 156, 207, 275, 286 and accompanying text.

8. See COOPER, *supra* note 6, at 4.

9. The highlights of a handful of national GSP schemes are noted below. See *infra* notes 71-83 and accompanying text.

10. To cite two examples, Congress conducts a periodic renewal ritual for three of the four U.S. trade preference programs for developing countries, having most recently done so at the end of 2008 and again at the end of 2010. Congress created a new trade preference program in 2000 (the African Growth and Opportunity Act) and amended two others (the Caribbean Basin Economic Recovery Act and the Andean Trade Preference Act). In 2008, the European Union (EU) overhauled its GSP scheme in response to the WTO Appellate Body’s report striking down the EU’s earlier GSP scheme, which the Appellate Body found to be inconsistent with the Enabling Clause. See *infra* notes 215-227 and accompanying text. With the growing popularity of e-government, not only in the United States but globally,

preferences has become both multilayered and multifaceted. First, developing countries receive differential tariff treatment *inter se* under the various trade preference schemes of the EU and the United States, that is, more favorable tariff treatment is extended to certain beneficiary developing countries compared to other developing countries.¹¹ In other words, a second layer of discrimination exists within the already discriminatory tariff treatment in favor of developing countries in general that is authorized under the Generalized System of Preferences and its successor legal instrument, the Enabling Clause.¹² Second, least-developed countries (LDCs) receive additional preferential tariff treatment on top of that extended to non-LDC developing countries in general pursuant to a 1999 WTO waiver, thus creating a third layer of special and differential tariff treatment by developed countries in favor of developing countries.¹³ Consequently, rather than attempt an in-depth survey of all national GSP programs, this article's specific focus is instead on the nonreciprocal, unilateral trade preference programs for developing countries that the United States and the EU have established.

In a carrot-and-stick approach to trade and development policy for developing countries, both the U.S. and EU preferential tariff programs are riddled with limitations and conditions intended both to deter and to reward certain conduct. Most conditions are intended to discourage developing countries from engaging in certain practices at the risk of not being designated GSP eligible. Other conditions are designed to encourage countries to assume and effectively implement additional legal obligations in exchange for extended GSP eligibility for products that are otherwise ineligible for preferential duty treatment.¹⁴ Following the WTO Appellate

most GSP donor countries have built websites where they post practical information regarding their respective GSP schemes that is up-to-date and of assistance to practitioners and beneficiaries alike.

11. See *infra* notes 122-139, 215-227, and accompanying text.

12. General Agreement on Tariffs and Trade, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203-05 (1980).

13. A ten-year waiver of the most-favored-nation obligation of GATT Article I:1 was granted in favor of the least-developed countries (LDCs) in 1999 with regard to tariffs on their imported goods. See Decision on Waiver, *Preferential Tariff Treatment for Least-Developed Countries*, WT/L/304 (June 17, 1999). The 1999 waiver was extended for an additional ten years in May 2009. See Decision on Extension of Waiver, *Preferential Tariff Treatment for Least-Developed Countries*, WT/L/759 (May 29, 2009).

14. See generally Diego J. Linan Nogueras & Luis M. Hinojosa Martinez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 307, 309 (2001); Amy M. Mason, *The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP*, 54 DUKE L.J. 513, 524-25 (2004) ("All GSP schemes condition preferences to some degree in the form of either "'positive' or 'negative' conditionality. Positive conditionality is the practice of granting additional concessions to developing countries that fulfill prescribed

Body's 2004 report in *EC—Tariff Preferences*,¹⁵ donor countries may lawfully impose conditions on beneficiary countries in order for the latter to qualify for GSP benefits above and beyond those generally granted to GSP-eligible beneficiaries, provided such conditions have a nexus with the trade, financial, and development needs of the beneficiary countries.¹⁶ As will be explored more fully below, the Appellate Body was characteristically Delphic regarding the conditions that a preference-granting country may permissibly impose in the first instance to become GSP eligible. The panel report in *EC—Tariff Preferences* discusses “*a priori* limitations” that donor countries may permissibly establish as part of their GSP programs, citing limitations on product eligibility and safeguards actions to shield domestic producers in the country of importation from injurious GSP imports.¹⁷ Once these two threshold questions are answered, what other permissible *a priori* limitations may a donor country impose that are consistent with the Enabling Clause? Import ceilings and whether or not a country is a “developing” country might be two additional “*a priori* limitations.” What about other conditions? The Appellate Body limited itself to ruling on the WTO-consistency of what could be termed “positive conditionality,”¹⁸ i.e., in exchange for satisfying additional conditions, a beneficiary receives additional GSP benefits beyond those made generally available to other GSP-eligible countries. What is the difference, if any, between a “condition” and an “*a priori* limitation”? Is the difference merely a semantic one? These are questions that the Appellate Body left unanswered.¹⁹

While the EU vigorously defended its GSP program in the *EC—Tariff Preferences* dispute in the face of India's claim that it violated the terms of the Enabling Clause, the United States has pursued a different legal course. Rather than argue that its three trade preference programs that single out blocs of countries for preferential tariff treatment are consistent with the Enabling Clause—the countries of the Caribbean Basin region under the

criteria; positive conditionality affects preferences offered to countries that are already GSP beneficiaries.”) (footnotes omitted).

15. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (2004) [hereinafter *EC—Tariff Preferences*]. For a critique of the Appellate Body's report, see Mason, *supra* note 14; Maureen Irish, *GSP Tariffs and Conditionality: A Comment on EC—Preferences*, 41 J. WORLD TRADE 683 (2007).

16. *EC—Tariff Preferences*, *supra* note 15, ¶ 147.

17. Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, at 125-26 (Dec. 1, 2003).

18. See generally Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507 (2003); Mason, *supra* note 14, at 531.

19. The Appellate Body also did not address GSP graduation criteria, noting that it was not ruling on the legitimacy of “the EC's mechanisms for the graduation of developing countries.” *EC—Tariff Preferences*, *supra* note 15, paras. 128-29.

Caribbean Basin Economic Recovery Act (CBERA),²⁰ the four Andean countries of Bolivia, Colombia, Ecuador, and Peru under the Andean Trade Preference Act (ATPA),²¹ and the 48 countries of sub-Saharan Africa under the African Growth and Opportunity Act (AGOA)²²—the United States has instead obtained waivers at the WTO for each of these regional tariff preference programs.²³ However, the United States has not sought a waiver for the U.S. GSP program, but rather only for its three GSP sister programs.

This article examines two sets of questions. First, are the conditions that are an intrinsic part of the U.S. and EU GSP programs WTO-legal? Are they rationally related to the goal of promoting trade and economic development within beneficiary countries? At the outset, this article does not accept the legitimacy of conditionality when such conditions have as their focus non-trade concerns. The premise that conditions have the potential to be an effective tool in causing positive change by influencing beneficiary country domestic policies is not adopted as being *a priori* valid.²⁴ At least this is the case for the conditions that the United States and

20. See Caribbean Basin Economic Recovery Act (CBERA), 19 U.S.C. §§ 2701-2707 (1983). For the current list of CBERA-eligible countries, see *Harmonized Tariff Schedule of the United States (HTSUS)*, General Note 7(a), *Products of Countries Designated as Beneficiary Countries for Purposes of the Caribbean Basin Economic Recovery Act*, U.S. INT'L TRADE COMMISSION, <http://hts.usitc.gov> (last visited June 5, 2011).

21. See Andean Trade Preference Act (ATPA), 19 U.S.C. §§ 3201-3206 (1991). Bolivia was removed from ATPA and ATPDEA eligibility in 2008. As of 2011 its eligibility status had not been restored. See *HTSUS*, *supra* note 20, General Note 11, *Products of Countries Designated as Beneficiary Countries for Purposes of the Andean Trade Preference Act*.

22. See African Growth and Opportunity Act (AGOA), 19 U.S.C. § 2466, §§ 3701-3706, §2466, §§3721-3724, §§3731-3741 (2000). The 48 countries that are eligible for designation as a beneficiary country under the African Growth and Opportunity Act (AGOA) are Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. As of 2011, 37 of the 48 potential beneficiary countries were designated as AGOA-eligible. For the current list of AGOA-eligible countries, see *HTSUS*, *supra* note 20, General Note 16(a), *Products of Countries Designated as Beneficiary Countries for Purposes of the African Growth and Opportunity Act*.

23. In 2009 the WTO General Council granted the U.S. request for extensions of the waivers previously granted for CBERA and the ATPA, and for the first time granted a waiver for AGOA. The extensions of the waivers granted for CBERA and the ATPA expire at the end of 2014. The waiver granted for AGOA expires September 30, 2015, which coincides with the congressional sunset date for the program. See Decision of the General Council, *United States—African Growth and Opportunity Act*, WT/L/754 (May 29, 2009); Decision of the General Council, *United States—Caribbean Basin Economic Recovery Act*, WT/L/753 (May 29, 2009); Decision of the General Council, *United States—Andean Trade Preference Act*, WT/L/755 (May 29, 2009).

24. GSP conditionality is not without its staunch critics. See, e.g., FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 156-68 (Raj

the EU have established in their respective GSP schemes.²⁵ They are both overbroad and under inclusive, assuming that trade and development concerns are the litmus test of the validity of GSP conditionality. For example, linking the benefits to non-trade issues, such as environmental and labor standards, as well as intellectual property rights and the fight against illicit drugs, curtail the benefits under the scheme and introduce elements of discrimination and reciprocity into the GSP scheme.²⁶ Such conditions cut against the fundamental principles of the GSP. Developing countries have complained that withdrawal, or the threat of withdrawal, of preferences is used as leverage to obtain non-trade objectives.²⁷ As beneficiary countries cannot count on availability of preferences, the consequent uncertainty of market access is a major concern to the countries affected. Turning to political considerations, what does a developing countries' political status as a Communist country have to do with its trade and development concerns? Instead, why aren't developing countries that are battling an AIDS epidemic or that are the chronic victims of natural disasters singled out for special GSP treatment in either the U.S. or EU GSP scheme?²⁸ Why aren't anti-corruption campaigns one of the conditions of national GSP programs? Just

Bhala et al. eds., 2003) (concluding that egalitarian fairness principles, such as Rawls's "justice as fairness," oblige developed countries to provide unconditional and nonexclusive trade preferences to developing countries); Çağlar Özden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000* 21 (World Bank Policy Research, Working Paper No. 2955, 2003) available at <http://ideas.repec.org/p/wbk/wbrwps/2955.html> (noting that the "political process leading to GSP decisions" prevents developing countries from building their export sectors for fear that preferences will be removed), <http://ideas.repec.org/p/wbk/wbrwps/2955.html>; Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 1033 (2000) (contending that it is morally unjustifiable for developed countries to terminate GSP preferences for political reasons); Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4 CHI. J. INT'L L. 385, 395 (2003) (noting "persistent concern by developing countries about conditionality and selectivity in GSP schemes"); Peter Lichtenbaum, "Special Treatment" vs. "Equal Participation": *Striking a Balance in the Doha Negotiations*, 17 AM. U. INT'L L. REV. 1003, 1015-16 (2002) (highlighting the detrimental effects of conditionality in the U.S. GSP).

25. Initially, the U.S. GSP program was a "no strings attached" scheme. The program was non-contractual and autonomous, with the United States reserving the right to withdraw or modify benefits at any time. However, the Trade and Tariff Act of 1984 expanded the number of criteria which beneficiaries had to meet, so that the U.S. Trade Representative (USTR) was able to use these provisions as a non-reciprocal tool. As noted below, the main conditions relate to protection of intellectual property, the respect of labor rights, and the resolution of investment disputes. See *infra* notes 162-171 and accompanying text. See also WTO Secretariat, *The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad 13*, WT/COMTD/W/93 (Oct. 2001) [hereinafter *Note by the Secretariat*].

26. See *Note by the Secretariat*, *supra* note 25, at 13.

27. See *id.* at 5.

28. See Howse, *supra* note 24, at 400.

who are the intended beneficiaries of the GSP programs? The overarching focus of some of the U.S. and EU GSP conditions appears to be more on the welfare of U.S. and EU nationals than it is on the economic welfare of persons living in the developing world.

As a policy matter, conditionality is not unique to developed countries' international trade and finance programs. On the contrary, conditionality has become a well-recognized fixture that has acquired a decades-long patina of legitimacy within intergovernmental organizations. Take, for example, conditionality at the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank).²⁹ The overarching purpose of the IMF is to stabilize the international monetary system,³⁰ but IMF conditionality is one of the most notorious examples of conditionality in the arena of international finance.³¹ Conditionality is viewed as indispensable to ensure that IMF financing goes hand-in-hand with appropriate policy action by the country receiving that financing. According to the IMF, "The key purpose of conditionality is to ensure that Fund resources are used to assist a member in solving its balance of payments problem, thus providing adequate safeguards for the temporary use of these resources, and to provide assurances to the member of access to Fund resources."³² Pledges to combat official corruption may be among the conditions that the IMF imposes.³³ While requiring steps to combat corruption may be more insulting than it is controversial, other IMF conditions may be highly contentious, such as austerity programs to eliminate or pare back domestic food subsidies or the privatization of key

29. For a defense of International Monetary Fund (IMF) and World Bank conditionality, see JOHN W. HEAD, *LOSING THE GLOBAL DEVELOPMENT WAR: A CONTEMPORARY CRITIQUE OF THE IMF, THE WORLD BANK, AND THE WTO* 218-25 (2008).

30. See Articles of Agreement of the International Monetary Fund art. I, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, 40 (current version at 15 I.L.M. 546, 547, Apr. 30, 1976).

31. See generally Int'l Monetary Fund, *Guidelines on Conditionality*, Decision No. 12864-(02/102) (Sep. 25, 2002), www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf. The IMF maintains a web-based factsheet on conditionality at www.imf.org/external/np/ext/facts/conditio.htm.

32. IMF, *Review of the 2002 Guidelines on Conditionality*, ¶ 9 (March 3, 2005), www.imf.org/external/np/pp/eng/2005/030305.pdf.

33. See also David Fuhr & Zachary Klughaupt, *The IMF and AGOA: A Comparative Analysis of Conditionality*, 14 DUKE J. INT'L & COMP. L. 125, 128-129 (2004), where the authors support the imposition of anti-corruption conditions by the IMF because "[c]orruption . . . wastes the resources of borrower countries, thereby endangering their fiscal position and decreasing their ability to repay their external debts. The IMF is required to conserve its resources responsibly, and therefore can only extend funding to countries that are reasonably likely to service their loans. When a substantial portion of revenue is wasted on graft, it becomes more difficult for a government to fulfill all of its domestic obligations while simultaneously keeping the deficit under control. In addition, when corruption is uncontrolled, government officials will steal money that had been destined for development, thus hampering a country's growth and reducing the future revenue available to service its loans." [Footnote omitted.]

public services. Such conditions—often grouped under the rubric of “structural adjustment”—may trigger a strong political backlash within the recipient country.³⁴

The other major international financial institution, the World Bank, likewise imposes conditions on its loans and development assistance.³⁵ Broadly speaking, the World Bank makes its resources available if the borrower “(a) maintains an adequate macroeconomic framework, (b) implements its overall program in a manner satisfactory to the Bank, and (c) complies with the policy and institutional actions that are deemed critical for the implementation and expected results of the supported program.”³⁶ Despite the criticism that has been directed at the IMF and World Bank for their conditions on finance and development assistance, in favor of IMF and World Bank conditionality—in contrast to U.S. and EU GSP conditionality—is that the IMF and World Bank conditions have a clear finance and development nexus.³⁷

34. See *Guidelines on Conditionality*, *supra* note 31, at 2 (“Conditions will normally consist of macroeconomic variables and structural measures that are within the Fund’s core areas of responsibility. Variables and measures that are outside the Fund’s core areas of responsibility may also be established as conditions but may require more detailed explanation of their critical importance. The Fund’s core areas of responsibility in this context comprise: macroeconomic stabilization; monetary, fiscal, and exchange rate policies, including the underlying institutional arrangements and closely related structural measures; and financial system issues related to the functioning of both domestic and international financial markets.”).

35. See *generally Review of World Bank Conditionality*, WORLD BANK, (Sep 9, 2005), <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/ConditionalityFinalDCpaperDC9-9-05.pdf>; EMMANUEL TUMUSIIME-MUTEBILE ET AL., *CONDITIONALITY REVISITED: CONCEPTS, EXPERIENCES, AND LESSONS* (Stefan Koeberle, Harold Bedoya, Peter Silarsky, & Gero Verheyen eds. 2005); Axel Dreher, *The Development and Implementation of IMF and World Bank Conditionality* (Hamburg Inst. of Int’l Econ., Discussion Paper No. 165, 2002), available at <http://ageconsearch.umn.edu/bitstream/26352/1/dp020165.pdf>.

36. *Review of World Bank Conditionality*, *supra* note 35, at 4. See also World Bank, *Review of World Bank Conditionality*, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited June 13, 2011).

37. Another type of conditionality is associated with official development assistance (ODA) that is conditioned in a specific way. For example, many donor countries tie foreign aid to the purchase of goods and services that are produced in the donor country, although this practice has drastically decreased globally during the 15-year period 1990-2005. See UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 2005*, at 102 (2005), available at <http://hdr.undp.org/en/reports/global/hdr2005> (last visited June 15, 2011) [hereinafter HUMAN DEVELOPMENT REPORT]. The 2005 United Nations Human Development Report estimated that only about 8 percent of bilateral aid is tied, down from 27 percent in 1990. However, the degree to which strings are attached to bilateral aid varies from country to country with the United Kingdom, Ireland, and Norway giving 100 percent of their ODA untied; Canada, Austria, and Spain giving less than 60 percent of their ODA untied; and the United States giving less than 20 percent its ODA untied. *Id.*

Besides examining the conditionality that is an inherent feature of the U.S. and EU GSP programs, the second overarching question that this article addresses is whether GSP remains economically relevant or whether instead the shrinking margin of preference between the most-favored-nation (MFN) duty rate and the preferential duty rate has reduced the efficacy of national GSP programs to the vanishing point. Pre-Uruguay Round assessments of the GSP program were mixed. In a 1983 OECD report on the first ten years of the GSP, the GSP was seen as playing an important role in opening developed countries' markets and expanding developing countries' trade.³⁸ Other assessments were less sanguine, concluding that GSP benefits had not been distributed evenly among the beneficiary developing countries.³⁹ A 1986 study estimated that 44 percent of total GSP benefits went to three countries: Hong Kong, Taiwan, and Korea (each received three times the benefits of the next largest beneficiary, Brazil).⁴⁰ The entire program of differential and more favorable treatment of developing countries received a thorough reexamination in the Uruguay Round. Although GSP was not abandoned, developed countries applied greater pressure on many newly industrialized countries to assume more WTO obligations. A similar scenario is being played out in the Doha Round negotiations, with the United States and the EU pressuring the BRIC nations of Brazil, Russia (currently engaged in the WTO accession process), India, and China to make deeper tariff cuts on imported industrial goods.

Although the country names have changed, the phenomenon of GSP benefits being distributed in a top heavy fashion persists under the U.S. GSP program. In fact, this phenomenon is observed in all of the Quad countries, with China being the prohibitive top GSP beneficiary in the EU, Japan,⁴¹ and Canada. (China has not been designated as a beneficiary under the U.S. GSP program.) Under the EU GSP scheme, 60 percent of the benefits accrue to five countries, in the United States the top five beneficiaries

38. See VIVIAN C. JONES, CONG. RESEARCH SERV., RL 33663, GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 2-3 (2008).

39. See, e.g., Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291 (1987-88); Nina J. Lahoud, *The "Non-Discriminatory" United States Generalized System of Preferences: De Facto Discrimination Against the Least Developing Countries*, 23 HARV. INT'L L.J. 1 (1982).

40. See Brian Hindley, *Different and More Favorable Treatment—And Graduation*, in WORLD BANK, THE URUGUAY ROUND HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 69 (J. Michael Finger & Andrzej Olechowski eds., 1987).

41. See Norio Komuro, *Japan's Generalized System of Preferences*, in TRADE PREFERENCE EROSION: MEASUREMENT AND POLICY RESPONSE 113 (B. Hoekman, W. Martin & C.A. Primo Braga eds. 2009) (where the author notes that for the period 2000-2005 Japan's imports from China accounted for nearly 60 percent of all imports receiving GSP treatment, with five ASEAN countries (Thailand, Malaysia, Indonesia, the Philippines, and Vietnam) accounting for roughly 30 percent of the balance) [hereinafter *Japan's Generalized System of Preferences*].

account for almost 75 percent of the value of preferences, and in Japan the top five beneficiary countries are responsible for nearly 90 percent of the preferences.⁴² In the case of LDCs, under the Japanese and the U.S. programs for LDCs, the top 10 beneficiaries—out of a pool of 48 potential beneficiaries—account for 100 percent of the benefits, and in the EU that same number account for more than 90 percent of the benefits.⁴³

Two methods have been adopted to address the uneven distribution of GSP benefits: (1) graduate a beneficiary country entirely from a GSP program, or (2) remove a product from GSP eligibility when a beneficiary country achieves a certain level of global competitiveness in that product. As is explored more fully below, neither option has worked.

Has the GSP run its course as a matter of economics? It has been 40 years since the GATT Contracting Parties initially authorized preferential tariff treatment of imported goods from developing countries. Over that forty-year period MFN tariff rates in the EU and the United States have plummeted. The gap between the MFN duty rate applicable to non-preferential trade and the rate applicable to preferential trade under the GSP has substantially narrowed, except in the case of a few sectors of strong export interest to developing countries, namely, textiles, clothing, footwear and leather goods, and agricultural products. Has the shrinking margin of preference—the difference between the MFN duty rate and lower duty rate accorded to GSP-eligible imports—rendered donor countries' GSP programs economically irrelevant? Assuming that these programs are still economically relevant, do the conditions and limitations that are an integral part of them suffer from a lack of coherency? Do the preconditions and conditions to being designated as a GSP beneficiary under both the U.S. and EU trade preference programs bear a rational relationship to the overarching goal of economic development within beneficiary countries? Is it time to overhaul trade and development policy, at least with respect to GSP programs? My answer to the first set of questions on the legality of conditionality is a qualified “no” and to the second set of questions on whether the GSP remains economically relevant is a qualified “yes.” As developed more fully in Part V, I recommend reforming the GSP program and moving beyond the GSP as a key piece of preference-granting countries' trade and development policy for developing countries. My prescription is fourfold: (1) integrate and expand the four U.S. trade preference programs, (2) revisit and substantially revise conditionality, (3) harmonize preferential rules of origin at the international level, and (4) provide better focused and coordinated aid for trade.

42. See Paul Brenton & Çağlar Özden, *Trade Preferences for Apparel and the Role of Rules of Origin: The Case of Africa*, in TRADE PREFERENCE EROSION, *supra* note 41, at 416-17.

43. See *id.* at 417.

Before examining these questions and proposals in greater detail, the next Part provides a brief history of special and differential treatment in the multilateral trading system.

I. A BRIEF HISTORY OF S&D TREATMENT AT GATT AND THE WTO

During the initial negotiations in 1947 to establish international rules on the conduct of global trade in goods, the view was ultimately accepted that the principle of equality of treatment among countries is inappropriate when countries are not economic equals.⁴⁴ Within the multilateral trading system, the concept of special and differential (S&D) treatment found its way into the permanent legal structure of GATT. In a nutshell, the rules requiring MFN treatment of imported goods regardless of origin were altered in the early years of the multilateral trading system in the case of imports from developing countries.⁴⁵

Over the history of GATT, but prior to the establishment of the WTO in 1994, developing countries showed little enthusiasm for participating in GATT-sponsored multilateral trade negotiation (MTN) rounds because of their perception of GATT as an economic club of rich countries dominated by what was eventually to become known as the “Quad Members” or

44. For summaries of the treatment of developing countries under the rules of the WTO's predecessor organization, the General Agreement on Tariffs and Trade (GATT), see VIVIAN C. JONES, CONG. RESEARCH SERV. RL 33663, *GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 4-7* (2008); WTO, *HIGH LEVEL SYMPOSIUM ON TRADE AND DEVELOPMENT, BACKGROUND DOCUMENT* (1999); HUDEC, *supra* note 3; DIANA TUSSIE, *THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT* (1987); ABDULQAWI YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW* (1982); F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* (1990); WORLD BANK, *THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES* (Will Martin & L. Alan Winters eds., 1995); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* §25.1-25.7 (1969); KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 376-85 (1970); Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U.L. REV. 347 (1994); Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV. 1715 (1995); Robert E. Hudec, *GATT and the Developing Countries*, 1 COLUM. BUS. L. REV. 67 (1992).

45. The concept of special and differential treatment of developing countries met with resistance from the United States. In the negotiations leading up to the Havana Charter (the organic document of the stillborn International Trade Organization), the United States proposed that developing countries join the ITO on terms equal to those of all other countries, regardless of their stage of economic development. See DAM, *supra* note 44, at 225; JACKSON, *supra* note 44, at 628-40. The principle of equality of treatment was totally unacceptable to the developing countries. Consequently, Articles 8 through 15 of the Havana Charter were drafted to take into account the concerns of developing countries with respect to economic development and reconstruction. These Articles covered access to capital and other financing arrangements, international investment, preferential arrangements among developing countries, and commodity agreements.

“Quad” of Canada, the EU, Japan, and the United States. The Quad was not forthcoming in meeting the demands of developing countries to lower their tariffs and other trade barriers to goods of export interest to developing countries. The concept of “free trade” was a hollow promise to developing countries which for them seemed like a one-way street. A major failure of the MTN rounds prior to the 1986-1993 Uruguay Round, at least from a developing-country perspective, was a lack of progress in liberalizing trade in two sectors of export interest to developing countries, namely, textiles and agriculture.

Regardless of the merits of the economic argument for and against special and differential treatment of developing countries in the multilateral trading system, the fact is that they do receive such treatment. The view that developing countries should receive S&D treatment has found concrete expression in several GATT articles and in many of the WTO MTAs. Briefly, special and differential treatment is reflected in two amendments to GATT;⁴⁶ in the 1971 GATT waiver for GSP, codified in the 1979 Tokyo

46. In a prelude to the 1958 Haberler Report and the addition of Part IV to GATT 1947 (mentioned below), the Contracting Parties took steps in 1955 to assist developing countries in integrating into the world trading system by substantially redrafting Article XVIII, *Governmental Assistance to Economic Development*. The current text of Article XVIII, which took effect in 1957, is derived from two 1955 GATT Working Party reports, the Report of the Review Working Party on Quantitative Restrictions, GATT B.I.S.D. (3rd Supp.) at 170 (1955), and the Report of the Review Working Party on Schedules and Customs Administration. See Report of the Review Working Party, *Schedules and Customs Administration*, GATT B.I.S.D. (3rd Supp.) at 205 (1955). With the stillbirth of the ITO and the Havana Charter, it fell to GATT Article XVIII to accommodate the demands of developing countries for S&D treatment within the GATT legal and institutional framework. Article XVIII, as substantially amended in 1955, gives developing countries that meet the criteria of having a low standard of living and of being in the early stages of development virtual *carte blanche* to adopt trade protectionist measures in the name of economic development.

Part IV of GATT, added in 1965, expands on Article XVIII. In 1957, the GATT Contracting Parties appointed a panel of experts to report on trends in international trade, “in particular the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection.” GATT B.I.S.D. (6th Supp.) at 18 (1957). The Report, *Trends in International Trade* (also known as the “Haberler Report” after Gottfried Haberler, the panel’s chairman), galvanized the Contracting Parties to examine ways in which developing countries could achieve greater access for their exports in world markets. See WTO, *ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE*, vol. 2, at 1040-41 (1995). The end product of the 1958 Haberler Report was Part IV of GATT, *Trade and Development*, which was added to GATT 1947 by the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, done at Geneva, Feb. 8, 1965, 572 U.N.T.S. 320, GATT B.I.S.D. (13th Supp.) at 1 (1965). Although Part IV is an integral part of a binding legal instrument, *i.e.*, GATT 1994, it is drafted in language that is hortatory, not mandatory. In other words, developed countries apparently made few, if any, binding legal commitments to developing countries in Part IV. Part IV is comprised of three Articles, Articles XXXVI through XXXVIII. In brief, Article XXXVI is a statement of principles and objectives whose thrust is greater market access for the products of developing countries. Article XXXVII states the commitments the Members agree to

Round Enabling Clause (discussed more fully below);⁴⁷ in a small handful of Decisions reached during the Uruguay Round;⁴⁸ and in several articles in the WTO MTAs.⁴⁹ In addition, the MTAs in a number of instances accord special treatment that is reserved exclusively for LDCs.⁵⁰

The 1955 amendment to GATT Article XVIII and the addition of Part IV to GATT in 1966 did not alter the fact that GATT still required nondiscriminatory MFN treatment in trade between and among GATT contracting parties. With the exception of validating historical preferences in existence at the time GATT entered into effect or when a country acceded to GATT,⁵¹ any preferential tariff treatment that a developed country extended to a developing country had to be generalized and accorded to all other GATT contracting parties.⁵² With the amendments to GATT Article XVIII, the addition of Part IV to GATT, and the work of United Nations Conference on Trade and Development (UNCTAD) on behalf of developing

make to ensure developing countries do in fact attain increased access to world markets. Article XXXVIII provides for joint action by the WTO Members.

47. *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 18, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1979) [hereinafter Enabling Clause].

48. For a survey and analysis of the S&D provisions in GATT and the WTO MTAs, see RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* 406-39 (1998); Kevin Kennedy, *Special and Differential Treatment of Developing Countries*, in *THE WORLD TRADE ORGANISATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 1526 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds. 2005); Peter Lichtenbaum, “*Special Treatment*” vs. “*Equal Participation*:” *Striking a Balance in the Doha Negotiations*, 17 AM. U. INT’L L. REV. 1003, 1007-21 (2002).

49. See BHALA & KENNEDY, *supra* note 48, at 431-39.

50. See *id.* at 431-43.

51. GATT Art. I:2; Annexes A-F. A number of countries’ protocols of accession to the General Agreement that were not original GATT contracting parties include preferences between the acceding country and other countries listed in the protocol of accession. For example, when Argentina joined GATT, it included preferences in existence at the time of its accession with several border countries in South America. For a list of such protocols of accession, see *GUIDE TO GATT LAW AND PRACTICE*, *supra* note 46, vol. 1, at 48-49.

52. To be sure, in exceptional circumstances, a Member may be granted a waiver of its GATT obligations pursuant to GATT Article XXV, para. 5, but such waivers may be granted only in “exceptional circumstances,” and must be approved by a three-fourths absolute majority of WTO Members. What constitutes “exceptional circumstances” warranting an Article XXV, para. 5 waiver has been the subject of some controversy within GATT. There is no generally accepted definition or standard criteria to identify what circumstances are deemed “exceptional.” See, e.g., Report of the GATT Working Party, United States-Caribbean Basin Economic Recovery Act, GATT B.I.S.D. (31st Supp.) at 180 (1980). In that Report, the Working Party recognized that there are a number of different approaches within the GATT framework to the establishment of preferential schemes and that each case must be analyzed on the basis of all the circumstances peculiar to it. “Having considered these alternative approaches,” the Working Party noted, “a number of the members of the Working Party concluded that the waiver procedure under paragraph 5 of Article XXV was the most appropriate alternative with respect to the CBERA.” *Id.* at 198, ¶ 62. For an analysis of the art. XXV, para. 5 waiver procedure, see *GUIDE TO GATT LAW AND PRACTICE*, *supra* note 46, vol. 2, at 882-88.

countries, momentum was building for more changes within the multilateral trading system to assist developing countries in their economic development. The notion of unilaterally extending tariff preferences to developing countries was gaining ground. Developing countries argued that GATT Part IV was itself authorization to developed countries to grant tariff preferences to developing-country imports that would otherwise derogate from the MFN clause, but developed countries disagreed.⁵³ What was needed was some legal device by which developed countries could give preferential tariff treatment to developing countries without simultaneously violating the MFN commitment. To that end the Generalized System of Preferences was born.

The Generalized System of Preferences (GSP) was launched by UNCTAD at its inaugural conference in 1964.⁵⁴ The GSP's *raison d'être* was threefold: (1) developing countries would increase their exports to developed countries; (2) they would export higher value-added goods, thereby reducing their dependency on commodities as their main source of exports; and (3) GSP would reduce dependence on foreign aid.⁵⁵ In

53. See EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* § 9.222 (1996).

54. See PROCEEDINGS OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT U.N. CONFERENCE ON TRADE & DEV. [hereinafter UNCTAD], *General Principle Eight & Annex A.III.5, vol. 1* in PROCEEDINGS OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, at 10-11, 39 (1964); DAM, *supra* note 44, at 249.

55. See Kennedy, *supra* note 48, at 1539. In its 2008 report the Congressional Research Service offers the following version of GSP's purposes:

The GSP was established based on an economic theory that preferential tariff rates in developed country markets could promote export-driven industry growth in developing countries. It was believed that this, in turn, would help to free beneficiaries from heavy dependence on trade in primary products, whose slow long-term growth and price instability contributed to chronic trade deficits. It was thought that only the larger markets of industrialized trading partners were large enough to provide enough economic stimulus to attain these goals.

Some economists also mention that the Generalized System of Preferences was established, in part, as a means of reconciling two widely divergent economic perspectives of trade equity that arose during early negotiations on the General Agreement on Tariffs and Trade (GATT). Industrialized, developed nations argued that the most-favored-nation principle should be the fundamental principle governing multilateral trade, while lesser-developed countries believed that equal treatment of unequal trading partners did not constitute equity and called for "special and differential treatment" for developing countries. GSP schemes thus became one of the means of offering a form of special treatment that developing nations sought while allaying the fears of developed countries that tariff "disarmament" might create serious disruptions in their domestic markets.

reaction to the perceived intransigence of the developed countries to move on liberalizing trade in textiles, clothing, footwear, and agriculture, developing countries pursued a two-track approach at the international level, one within GATT and the other within UNCTAD. Within GATT, developing countries pressed for special and differential treatment in connection with tariffs, subsidies, and import quotas. The track pursued by developing countries outside of GATT was initiated in the 1960s under the auspices of UNCTAD.⁵⁶ Established in 1964, UNCTAD as supposed to serve as a counterweight to GATT.⁵⁷ UNCTAD's first Secretary-General, Raúl Prebisch, advocated an overhaul of the world trading system in order to level the uneven playing field which favored developed countries.⁵⁸ The reforms that UNCTAD championed included commodity price stabilization schemes,⁵⁹ import substitution policies in order to promote domestic

JONES, *supra* note 38, at 2-3 (footnotes omitted).

56. For a background discussion of UNCTAD in the context of GATT, see DAM, *supra* note 44, at 376-85. *See also* UNCTAD, *THE HISTORY OF UNCTAD 1964-1984* (1985); BRANISLAV GOSOVIC, *UNCTAD: CONFLICT AND COMPROMISE* (1972). As a United Nations organ, membership in UNCTAD includes all UN members, as well as Monaco and Vatican City.

57. *See* OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 90 (1985).

58. UNCTAD, *TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT*, U.N. Doc. (E/CONF.46/1964).

59. For an overview of international commodity agreements, see generally KABIR-UR-UAHMAN KAHN, *THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS* (1982). UNCTAD's influence in the world trading system has been dwarfed by the WTO. UNCTAD maintains oversight responsibility for several international commodity agreements, including the International Cocoa Agreement, the International Coffee Agreement, the International Sugar Agreement, the International Wheat Agreement, the International Tropical Timber Agreement, the International Jute Agreement, the International Rubber Agreement, the International Cotton Agreement, the International Grains Agreement, the International Olive Oil Agreement, the International Sugar Agreement, and the International Tropical Timber Agreement. *UNCTAD's Work with the International Commodity Bodies (ICBs)*, UNCTAD.ORG, <http://www.unctad.org/templates/WebFlyer.asp?intItemID=5391&lang=1> (June 21-25, 2010). Perhaps most importantly, UNCTAD provides a forum for advancing the economic development of LDCs, having held three decennial conferences that focus on this subject. In May 2001, UNCTAD held its Third United Nations Conference on the Least Developed Countries in Belgium. Under the program of action, participants commit to good governance, to building human and institutional capacities, to enhancing the role of trade in economic development, and to mobilizing financial resources. *See* UNCTAD, *Draft Program of Action for the Least-Developed Countries for the Decade 2001-2010*, A/CONF.191/L.18 (2001). In May 2011, the Fourth United Nations Conference on Least Developed Countries initiated the new Istanbul Programme of Action, which gives particular priority to science, technology and innovation as an important additional element. *See Statement at the Fourth United Nations Conference on Least Developed Countries*, UNCTAD (May 13, 2011), http://www.unctad.org/sections/ldc_dir/docs/aldc2011_12_stat_final_en.pdf.

manufacturing, and improved global market access for developing-country goods.⁶⁰

At UNCTAD's First Session in 1964, developed countries, including the United States, opposed developing-country initiatives in support of such preferences.⁶¹ By UNCTAD's Second Session in 1968 (UNCTAD II), however, developed countries, including the United States, came to support the general principle of a system of trade preferences, although they could not reach agreement on the details.⁶² With the support of the United States and other developed countries, at UNCTAD's second quadrennial conference held in 1968 the GSP concept was formally adopted. The UNCTAD II participants adopted what was called "Resolution 21(II)," a document recognizing "unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries."⁶³ Resolution 21(II) also established a Special Committee on Preferences to work out the details of this proposed system.⁶⁴

In 1970 the Special Committee adopted the following "Agreed Conclusions" that put some flesh on the bare bones of Resolution 21(II): (1) all developing countries should participate as beneficiaries from the outset, with beneficiary status determined according to the principle of self-selection; (2) *a priori* limitations on the quantity of goods that could be imported through the GSP are permitted; and (3) the tariff preferences will be temporary, nonbinding, and subject to obtaining the necessary GATT

60. See Thomas R. Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513, 514-15 (1978) (describing the first proposal for such preferences from Raúl Prebisch, Secretary General of UNCTAD).

61. See Kelé Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 ST. MARY'S L.J. 425, 448 (1994) (describing developed-country opposition to the developing world's arguments for the establishment of preferential tariffs); Graham, *supra* note 60, at 516 (highlighting the United States' role in this opposition).

62. See Onyejekwe, *supra* note 61, at 449. Two factors prompted the United States to support the concept of the GSP: (1) it was facing increasing pressure from Latin American countries to implement a preferential system similar to that of the Europeans; and (2) it "saw in the GSP an opportunity to halt the trend towards cartelization of world trade through exclusive preferential arrangements." Graham, *supra* note 60, at 516-17.

63. See Report of the United Nations Conference on Trade and Development on Its Second Session, U.N. TDBOR, 2d Sess., Annex 1, Agenda Item 11, at 38, U.N. Doc. TD/97/Annexes (1968) [hereinafter Resolution 21(II)], reprinted in Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

64. See Resolution 21(II), *supra* note 63, at 2. For an overview of the content of the initial submissions, see generally R. Krishnamurti, *Tariff Preferences in Favour of Developing Countries*, 4 J. WORLD TRADE L. 447 (1970).

waiver.⁶⁵ UNCTAD's Trade and Development Board took note of these Agreed Conclusions in October 1970. In accordance with the Agreed Conclusions, certain developed GATT contracting parties sought a waiver for the GSP from the GATT Council. The call for the establishment of a mutually acceptable system of generalized, non-reciprocal, and non-discriminatory preferences was finally realized three years later in 1971 in the Generalized System of Preferences⁶⁶ when the necessary GATT waiver was secured.⁶⁷

The Decision on a Generalized System of Preferences of June 25, 1971⁶⁸ was a ten-year waiver of the MFN obligation of GATT Article I:1 with respect to preferential duty rates that developed countries applied to imported from developing countries. The GSP system as originally conceived had three features: (1) developed countries would grant temporary, unilateral tariff preferences to developing countries; (2) tariff preferences would be on goods of export interest to developing countries in which they were not competitive internationally; and (3) tariff preferences would not be extended to goods produced by an industry in the importing country if that industry was vulnerable to import competition.⁶⁹ The 1971 waiver in no way mandated developed countries to offer tariff preferences to developing countries. Any preference-granting country was free to terminate its GSP program at any time.⁷⁰

65. Agreed Conclusions of the Special Comm. on Preferences, U.N. TDBOR, 4th Sess., 267th mtg., Annex 1, paras. I.9, II.1, III.1-4, IV.1, & IX.2, U.N. Doc. TD/B/330 (1970) [hereinafter *Agreed Conclusions*], reprinted in 10 I.L.M. 1083, 1084 (1971).

66. For additional background on the origins of GSP, see generally WTO Comm. on Trade & Dev., *The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad*, WT/COMTD/W/93, at 2-4 (Oct. 5, 2001) [hereinafter *The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad*]; REPORT OF THE SECRETARY-GENERAL OF THE OECD, *THE GENERALIZED SYSTEM OF PREFERENCES: THE REVIEW OF THE FIRST DECADE 9-12* (1983). On the economic theory of nonreciprocal trade preferences, see SÁNCHEZ ARNAU, *supra* note 1, at 17-45.

67. *Waiver Decision on the Generalized System of Preferences*, (June 25, 1971), GATT B.I.S.D. (18th Supp.) at 24 (1972). Even though the GSP Decision itself did not refer to GATT Article XXV:5, the waiver is generally understood to rest on GATT Art. XXV, para. 5. See Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507, 512 (2003) (discussing the adoption of the 1971 waiver).

68. *Waiver Decision on a Generalized System of Preferences*, *supra* note 67. The Contracting Parties settled on a waiver, as opposed to a decision or amendment, largely because of the time and political will the latter two options required but which were absent at the time. See LONG, *supra* note 57, at 100.

69. See STAFF OF H. COMM. ON WAYS & MEANS, 104TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 13 (Comm. Print 1995).

70. As noted by the WTO Secretariat in a 2001 paper on the GSP:

In the earliest discussions, some flexibilities were discussed and these have become *de facto* part of operational schemes. For example, it was noted that “. . . the industrial countries could establish a quota for admitting manufactured goods from developing

The Generalized System of Preferences has been described as a non-homogeneous set of national schemes sharing certain common characteristics.⁷¹ Due to differences in developed countries' economic structures and tariff rates — as well as the existence of a non-homogenous set of domestic industries, some of which were more internationally competitive than others — it proved impossible from the outset to create one harmonized system of identical tariff concessions. Therefore, the GSP became a set of individual national schemes based on common goals and principles — each with a view toward providing developing countries with generally equivalent opportunities for export growth.⁷² Certain elements bind them all, however.

As a condition for providing such tariff preferences, GSP preference-granting countries reserved the right to (1) exclude certain countries, (2) determine product coverage, (3) determine rules of origin governing the preference, (4) determine the duration of the scheme, (5) reduce any preferential tariff margins by continuing to lower or eliminate tariffs on an MFN basis during multilateral trade negotiations, (6) prevent the concentration of benefits among a few countries, and (7) include safeguard mechanisms to counter injurious import surges.⁷³ Generally speaking, each

countries *free of duty*, but they could *exclude from these preferences* a schedule of items constituting a reasonable percentage of the total goods they import.” And “*all the developing countries*, irrespective of their level of development, would be eligible to avail themselves of the *preferential system* up to the amount of the relevant quota. But there would have to be a periodic review of the flow of exports; and if the exports from one or more countries increased so much that they did not leave sufficient room for those from others, equitable solutions should be sought.” “Special preferences should be granted to the less advanced developing countries.” It was also accepted that, after preferences had helped the developing countries “to prevent or rectify the structural imbalance in their trade”, they “will gradually have to disappear.” That was the concept of “graduation”: that developing countries becoming advanced would no longer benefit from the GSP. Finally, it was recognized that, while developing countries would not offer “conventional reciprocity,” as a result of preferences they would be able to import more than if the preferences had not been granted. Thus, irrespective of the subsequent legal texts, the early discussion already envisaged quota limits, graduation, special preferences for LDCs, and the eventual phasing out of preferences.

The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad, *supra* note 66, at 3, (quoting TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT, *supra* note 59 (emphasis in original, footnote omitted)).

71. See SÁNCHEZ ARNAU, *supra* note 1, at 185.

72. See JONES, *supra* note 38, at 3.

73. See *id.* Each preference-granting country has safeguards in place to ensure that any significant increases in imports of a certain product do not adversely affect the receiving country's domestic market. Generally, these restrictions take the form of quantitative limits

preference-granting country extends to qualifying beneficiary developing countries (as determined by each donor country) an exemption from duties (either reduced tariffs or duty-free access) on most manufactured products and certain “non-sensitive” agricultural products, although product coverage and preferential treatment vary widely.⁷⁴ While most GSP schemes (including the U.S. GSP program) admit eligible products duty-free, some countries provide tariff reductions, rather than complete exemption from duties (this is true, for example, in Australia, Japan, and the EU).⁷⁵

on goods entering under GSP. Under Japan’s system, for example, imports of certain products under the preference are limited by quantity or value (whichever is applicable) on a first-come, first-served basis as administered on a monthly (or daily, as indicated) basis. For other products, import ceilings and maximum country amounts are set by prior allocation. *See* WTO Comm. on Trade & Dev., *Notification by Japan*, WT/COMTD/N/2/Add.9 (June 21, 2000). Nevertheless, even with such statutory safeguard mechanisms in place, the manner in which they are administered is critical. For example, even though most U.S. producers are shielded by the automatic safeguards triggered under the competitive need limits (CNL) of the GSP program, some U.S. manufacturers and workers might be adversely affected by the program due to CNL waivers. *See* 19 U.S.C. § 2463(c). In 2004, three U.S. producers of titanium complained that the Bush Administration refused to terminate duty-free market access for wrought titanium (subject to an MFN duty rate of 15 percent), despite a petition asking the government not to waive the import limits. Russian imports of titanium were allowed to continue to enter duty-free under the Presidential waiver even though its sales made up more than 60 percent of U.S. imports. *See* GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 27.

74. *See generally* Note by the Secretariat, *supra* note 25.

75. The Australian system, for example, is based on a five percentage point margin of preference. When the Australian General Tariff (GT) is 5% or higher, the amount of the tariff is reduced by five percentage points for products of beneficiary countries. When the GT rate is 5% or less, the preferential rate is zero. *See* UNCTAD, *Generalized System of Preferences: Handbook on the Scheme of Australia 5* (June 2000), www.unctad.org/en/docs/itcdtsbmisc56_en.pdf [hereinafter *Handbook on the Scheme of Australia*].

Under the EU GSP scheme, imports from beneficiaries under the EU’s general arrangement receive duty-free treatment on their imports. However, if products are deemed import sensitive, then the duty reduction is either 3.5 percentage points or 20 percent of the MFN duty rate, depending upon how the import-sensitive product has been scheduled (the 20% reduction applies to textile and clothing imports). *See* Council Regulation. No. 980/2005, art. 7(2), *Applying a Scheme of Generalized Tariff Preferences*, 2005 O.J. (L 169) 1 (EC); WTO, Trade Policy Review Body, *Note Report by the Secretariat: Trade Policy Review for the European Communities*, 35 n.93, WT/TPR/S/177/Rev.1 (May 15, 2007).

Under Japan’s GSP program, the depth of tariff cuts varies according to the product. Tariffs on industrial products are zero except for sensitive industrial products (1,192 items at the HS nine-digit level in 78 product groups) to which various preferential rates (0%, 20%, 40%, 60%, or 80% of MFN rates) apply up to specified ceilings. The ceilings are open for utilization by all beneficiaries. However, preferential treatment is suspended on a monthly basis when ceilings are reached. If preferential imports from one beneficiary exceed one-fifth of the total value or volume of the overall ceiling, the preferential treatment for that beneficiary is suspended. Preferential treatment under the GSP scheme is granted on the condition that goods meet Japan’s GSP rules of origin. The administration of ceilings and maximum country volumes are managed on a first-come, first-served basis. *See* WTO, Trade

In 1971 the original six members of the European Economic Community implemented the world's first GSP program pursuant to the 1971 GATT GSP waiver. During the 1970's several OECD member countries—Australia,⁷⁶ Canada,⁷⁷ Hungary, Japan,⁷⁸ New Zealand, Norway,⁷⁹

Policy Review Body, *Report by the Secretariat, Trade Policy Review for Japan*, WT/TPR/S/175/Rev.1, at 25-26 (2007).

76. For an overview of Australia's GSP program, see Douglas Lippoldt, *The Australian Preferential Tariff Regime*, in TRADE PREFERENCE EROSION, *supra* note 41. Australia first extended unilateral trade preferences to developing countries in 1976. In 2002 LDCs were given duty-free, quota-free access to the Australian market. See *id.* at 204. Australia's rule of origin for developing-country imports claiming preferential tariff treatment is either the goods wholly obtained test or the substantial transformation test. In the case of substantial transformation, the test is a 50-percent value-added test, with cumulation up to half of the 50-percent from other developing countries. In the case of LDCs inputs from all developing countries and Australia may count toward the 50-percent value-added test. See *id.* Lippoldt, *supra*, at 187. For additional information on Australia's GSP program, see *id.*; Douglas Lippoldt, *The Australian Preferential Tariff Regime* (OECD 2008); Generalized System of Preferences: Handbook on the Scheme of Australia, *supra*.

77. For an overview of Canada's nonreciprocal preferential tariff programs, see DANIEL ANTHONY, UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA: A COMPARISON (2008), [hereinafter UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA: A COMPARISON], available at http://tradepartnership.com/pdf_files/GSP_Comparison.pdf; Przemyslaw Kowalski, *The Canadian Preferential Tariff Regime and Potential Economic Impacts of Its Erosion*, in TRADE PREFERENCE EROSION, *supra* note 41, at 131-39. Canada has three GSP programs, one for developing countries in general (the General Preferential Tariff or GPT), a second for LDCs (the Least Developed Country Tariff or LDCT), and a third for the Caribbean region (the Caribbean-Canada Trade Agreement or CARIBCAN). The Canadian GPT was first introduced for an initial period of 10 years in 1974, and was subsequently renewed in 1984, 1994, and 2004. In 1995 there was an expansion of the product coverage and reductions in the preferential duty under the current scheme to counter the erosion of the margins of preference resulting from the Uruguay Round. The scheme was again modified in 2000 to improve market access for LDCs by extending the product coverage and liberalizing the rules of origin. The GPT duty preference is either a reduction in the MFN duty rate or a zero duty rate on eligible products (certain agricultural products, textiles, clothing, and footwear are excluded). In 2003 Canada removed all duties and quotas on imports from LDCs, with the exception of certain supply-managed agricultural products (dairy, poultry, and egg products) and products from Myanmar. The GPT rule of origin is 60-percent local content with cumulation being permitted from any other GPT beneficiary country or Canada. The rule of origin under the LDCT is 40 percent with cumulation of up to half of the 40 percent being permitted from any other developing country. In addition, Canadian content may be counted towards the qualifying limit. See *id.* Kowalski, *supra*, at 134-39; Note by the Secretariat, *supra* note 25, at 6-7; UNCTAD, Generalized System of Preferences: Handbook on the Scheme of Canada (Dec. 2001), www.unctad.org/en/docs/itcdtsbmisc66_en.pdf.

Unlike the United States and the EU, Canada has no specific eligibility criteria for beneficiary countries under its GPT and LDCT programs. Nevertheless, it has removed countries for various reasons. For example, in July 2007, Canada removed Belarus from the GPT over concerns about its undemocratic regime and abuses of human rights. Canadian Dep't of Fin., *General Preferential Tariff Withdrawal Order (Republic of Belarus)*, 141 C. Gaz. No. 17 (Aug. 22, 2007), available at <http://gazette.gc.ca/archives/p2/2007/2007-08-22/html/sor-dors174-eng.html>. Similarly, Canada has no formal graduation criterion

comparable to that of the United States or the EU that graduate beneficiaries once they become “high income” per the World Bank’s country classification scheme (in the case of the EU high-income status must be for three consecutive years). However, Canada does terminate GPT eligibility for countries that join the EU. *See, e.g.*, Canadian Dep’t of Fin., *General Preferential Tariff Withdrawal Order (Bulgaria and Romania)*, 141 C. Gaz. No. 17 (Aug. 22, 2007), available at <http://gazette.gc.ca/archives/p2/2007/2007-08-22/html/sor-dors173-eng.html>. (“On January 1, 2007, Romania and Bulgaria acceded to the European Union (EU). Over the years, it has been the practice in Canada to withdraw entitlement to the GPT from countries acceding to the EU. Such accession constitutes membership in a highly developed and integrated economic entity whose members are not entitled to GPT treatment in Canada. Entitlement to the GPT was most recently withdrawn from 10 countries, including Poland and the Czech Republic, upon their accession to the EU in 2004.”), <http://gazette.gc.ca/archives/p2/2007/2007-08-22/html/sor-dors173-eng.html>.

78. For an overview of Japan’s GSP scheme, see UNCTAD, *GENERALIZED SYSTEM OF PREFERENCES: HANDBOOK ON THE SCHEME OF JAPAN* (2006), available at http://www.unctad.org/en/docs/itcdtsbmisc42rev3_en.pdf. Japan’s Ministry of Foreign Affairs maintains an English language website for its GSP program, available at www.mofa.go.jp/policy/economy/gsp. Japan established its GSP program in 1971. Japan’s program is bifurcated into a general preferential regime for developing countries and a special preferential regime for LDCs. Most agricultural and fishery products (80 percent) are excluded from coverage for non-LDCs. In the case of industrial goods, coverage is 74 percent for non-LDCs. A country graduates from Japan’s GSP program once it has been designated by the World Bank as a high-income country for three consecutive years. *See* WTO, Trade Policy Review Body, *Note Report by the Secretariat: Trade Policy Review for Japan*, WT/TPR/S/175/Rev.1, at 26 (Apr. 10, 2007); Komuro, *supra* note 41, at 103-07. In 2011 Oman, Trinidad and Tobago, and Barbados were graduated as high income countries. Japan’s list of GSP beneficiaries as of April 2011 is available at <http://www.mofa.go.jp/policy/economy/gsp/benef.pdf> (last visited June 7, 2011). In 2001, Japan extended its GSP scheme to March 31, 2011, and in March 2011 it again extended the GSP program for another ten years until March 2021. *BENEFICIARIES OF JAPAN’S GSP*, see *Explanatory Notes for Japan’s GSP Scheme*, <http://www.mofa.go.jp/policy/economy/gsp/benef.pdf> (last visited June 7, 2011). In 2007, Japan expanded the list of products from LDCs eligible for duty-free and quota-free treatment under its GSP scheme from 7,758 to 8,859, adding 1,101 products. This has increased its coverage of duty-free and quota-free treatment from 86.1 to 98 per cent in terms of tariff lines and over 99 per cent in terms of import value. Products eligible for duty-free and quota-free treatment include live animals, processed food, fish and fish products, dairy products, fruits and vegetables, tea, cereals, vegetable oils, juice, kerosene, fuel oils, gas oils, plywood, and raw silk. In addition, all textile and clothing products from LDCs enter Japan duty-free and quota-free. *See* UNCTAD GSP NEWSLETTER 92 (UNCTAD/DITC/Misc/2008/3), July 2008), available at www.unctad.org/en/docs/ditcmisc20083_en.pdf.

79. As of January 1, 2008, 140 developing countries and territories were eligible for the Norwegian GSP scheme. However, 57 of these did not meet the scheme’s requirements. Consequently, 27 developing countries, 11 low-income countries, and 45 middle-income countries were beneficiaries. On January 1, 2008, Norway’s GSP scheme was extended to give duty- and quota-free market access for all goods to LDCs and an additional 14 low-income countries. As a result, duty-free and quota-free access was granted to 64 countries. The only low-income countries not included in this extension were those with a population of 75 million or greater (as of June 2008 those countries were India, Nigeria, Pakistan, and Vietnam). In 2006, the utilization rate of the GSP scheme, as estimated by Statistics Norway, was 81% for LDCs and 77% for ordinary GSP countries. *See* WTO, Trade Policy Review Body, *Note Report by the Secretariat, Trade Policy Review of Norway*, WT/TPR/S/205/Rev.1, at 20-21 (Jan. 16, 2009); WTO Comm. on Trade & Dev., *Generalized*

Switzerland,⁸⁰ and the United States⁸¹—followed suit.⁸² What these various

System of Preferences: Notification by Norway, WT/COMTD/N/6/Add.2 (Jan. 18, 2001) and WT/COMTD/N/6/Add.4 (Apr. 10, 2008). Additional information on Norway's GSP program can be found at the Government of Norway's website, http://www.regjeringen.no/en/dep/ud/selected-topics/Trade-policy/gsp_preferences.html?id=505963 (last visited July 19, 2011); GENERALIZED SYSTEM OF PREFERENCES—GSP, TOLL CUSTOMS, http://www.toll.no/templates_TAD/Article.aspx?id=146952&epslanguage=en (last updated Feb. 5, 2008).

80. For a summary of Switzerland's GSP program, see WTO Comm. on Trade & Dev., *Generalized System of Preferences, Notification by Switzerland*, WT/COMTD/N/7/Add.3 (Oct. 9, 2009).

81. See GUIDE TO GATT LAW AND PRACTICE, *supra* note 46, vol. 2, at 50. For a brief survey of national GSP schemes, see SÁNCHEZ ARNAU, *supra* note 1, at 185-226.

82. Pursuant to the Agreement on the Global System of Trade Preferences (GSTP), developing countries that are parties to the GSTP provide preferential tariff treatment on their trade *inter se*. Forty-three developing countries are parties to the GSTP. See UNCTAD, 16 Dec. 10—Agreements on Trade Preferences Among Developing Countries (Dec. 16, 2010). Developing countries meet every three years under the auspices of UNCTAD to discuss extending and withdrawing concessions under the GSTP. The GSTP requires that trade preferences extend to all products. However, each country is free to set the level of the preference margin and the coverage of products. The GSTP rules of origin require that at least 50 percent of a qualifying product's final value to be added within a beneficiary country. See UNCTAD, *Agreement on the Global System of Trade Preferences Among Developing Countries* (April 12, 1988), available at www.unctadxi.org/Secured/GSTP/LegalInstruments/gstp_en.pdf. See also *infra* note 323 and accompanying text.

A few developing countries have their own stand-alone GSP programs. For example, as part of the 1996 customs union agreement with the EU, in 2002 Turkey established a GSP scheme that is modeled after the EU's GSP scheme. Under that agreement, Turkey was required "to align itself progressively with the preferential customs regime of the EC." UNCTAD, *Generalized System of Preferences: Handbook on the Scheme of Turkey 1* (2007) (quoting Article 16 of Decision No. 1/95 of the Turkey-EC Association Council), available at http://www.unctad.org/en/docs/itcdtsbmisc74_en.pdf. Nearly all aspects of the program—rules of origin, eligibility criteria, and graduation procedures—are identical to the EU's GSP program. Currently, Turkey grants GSP preferences to 38 countries and territories that have completed the necessary procedures to benefit from Turkey's GSP program, including China, Brazil, and the Philippines. Under Turkey's GSP regime, preferences are granted to selected non-agricultural goods, including raw materials and semi-finished goods. The goods covered by the regime are classified according to their "sensitivity." Duties on non-sensitive products are fully eliminated, while those on sensitive products are reduced. In general, the reduction is by 3.5 percentage points on the MFN duty rate. However, for HS Chapters 50-63 (textiles and clothing), the reduction is 20% of the MFN duty rate. In addition, where the EU's GSP scheme provides for preferential tariff reductions of more than 3.5 percentage points on sensitive products, these higher reductions apply. Duties are eliminated for LDCs on the basis of the EU's Everything But Arms (EBA) Initiative. In line with the EU, Turkey grants further preferences to countries selected under the Special Incentives Arrangements for Sustainable Development and Good Governance. See Trade Policy Review Body, *Report by the Secretariat, Trade Policy Review for Turkey*, WT/TPR/S/192/Rev.1, at ¶ 21 (April 3, 2008).

In late 2006, Brazil became one of the first developing countries to announce that it would implement the "duty-free quota-free" (DFQF) initiative that emerged from the 2005 WTO Ministerial Conference meeting in Hong Kong. See WTO, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC, ¶ 47 (Dec. 22, 2005) ("Building upon the commitment in the Doha Ministerial Declaration, developed-country Members, and

national schemes broadly share are rules of origin to ensure that developing countries are the true beneficiaries of the GSP programs.⁸³ However, differences among the various donor countries' rules of origin can be significant. In addition, national GSP programs often differ concerning the countries that are beneficiaries and the products that are GSP-eligible (most national schemes differentiate between agricultural and industrial products, the former being more protected).⁸⁴ Moreover, some donor countries do not attach formal preconditions to qualifying as a beneficiary country or impose formal conditions for retaining beneficiary status.⁸⁵

Preference-granting countries were expected to provide GSP benefits to all beneficiary developing countries without discrimination, i.e., no beneficiary was to receive super-preferential tariff treatment. However, discriminatory tariff preferences have become embedded in GSP programs. For example, the list of beneficiaries and exceptions may vary among preference-granting countries.⁸⁶ A country might be excluded on political grounds from GSP programs by some donor countries (such as the United

developing-country Members declaring themselves in a position to do so, agree to implement duty-free and quota-free market access for products originating from LDCs as provided for in Annex F to this document.") [hereinafter Hong Kong Ministerial Declaration]. In December 2009, Brazil announced that it would grant DFQF access for products from LDCs covering 80 percent of all tariff lines by mid-2010, which would be increased by 5 percent annually to cover all tariff lines by 2014. See UNCTAD GSP Newsletter 4 (Dec. 2009), available at www.unctad.org/en/docs/ditcmisc20092_en.pdf.

In 2008, Indian Prime Minister Manmohan Singh announced that India was implementing a Duty Free Tariff Preference (DFTP) Scheme for LDCs. The initiative grants preferential market access for exports from all LDCs, covering 94 percent of India's tariff lines. Tariff elimination will be progressive and implemented over a period of five years through five equal tariff reductions of 20 percent per year of the current applied rates. For another 9 percent of total tariff lines, or 468 tariff lines, India will provide preferential tariff reduction for LDCs through a prescribed margin of preference on the applied rates. See Gov't of India, Dep't of Commerce, Duty Free Tariff Preference Scheme (2008), available at http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=2331; UNCTAD, *GSP Newsletter 3* (UNCTAD/DITC/Misc/2008/3 July 2008), available at www.unctad.org/en/docs/ditcmisc20083_en.pdf; *India Pushing Ahead With Duty Free Market Access for Goods From LDCs*, INT'L TRADE DAILY (BNA), March 25, 2010.

China provides preferential tariff treatment on select items from select LDCs. See UNCTAD GSP Newsletter 2-3 (July 2008), available at www.unctad.org/en/docs/ditcmisc20083_en.pdf. Other developing countries, including Argentina, Chile, Egypt, Indonesia, Morocco, Mauritius, and Thailand, have also established their own non-reciprocal tariff preference programs for LDCs. See WTO Sub-Comm. on Least-Developed Countries, *Market Access Conditions for Least Developed Countries*, WT/LDC/SWG/IF/14/Rev.1 (2001).

83. See SÁNCHEZ ARNAU, *supra* note 1, at 185-86.

84. See *id.* at 187-90.

85. See, e.g., UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA, *supra* note 77 (noting that Canada, unlike the United States and the EU, does not impose preconditions for qualifying or conditions for retaining developing country beneficiary status).

86. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 8.

States) but not in others.⁸⁷ Under the first Lomé Convention in 1976,⁸⁸ the European Economic Community (the predecessor of the European Union) extended special GSP benefits to a group of 70 developing countries in Africa, the Caribbean, and the Pacific (known as the ACP countries), most of which were former European colonies.⁸⁹ The United States followed suit in 1984 with the Caribbean Basin Economic Recovery Act (CBERA).⁹⁰ CBERA provided discriminatory tariff treatment in favor of two-dozen countries in the Caribbean and Central America by offering CBERA beneficiary countries preferential duty treatment on approximately 1,700 more items than is the case under the U.S. GSP program.⁹¹ The United

87. For example, China and Vietnam are both eligible under the EU's GSP scheme, but neither is eligible under the U.S. GSP program. Compare Council Regulation 732/2008, 2008 O.J. (L 211) 1, 14, 18 (EC), with *HTSUS*, *supra* note 20, General Note 4, *Products of Countries Designated Beneficiary Developing Countries for Purposes of the Generalized System of Preferences (GSP)* 11. See MARTIN & JONES, *supra* note 5, at 1 ("In May 2008, Vietnam formally requested to be added to the U.S. Generalized System of Preferences (GSP) program as a 'developing country.' . . . Vietnam has already been accepted into several other developed-country GSP programs around the world, including Canada, the European Union (EU), and Japan."). General Note 4 of the Harmonized Tariff Schedule of the United States provides current lists of beneficiary countries for the four U.S. trade preference programs. It is available at the U.S. International Trade Commission's website, www.usitc.gov.

88. See ACP-EEC Convention of Lomé, 1976 O.J. (L 25) 2, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21975A0228\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21975A0228(01):EN:HTML) (last visited May 25, 2011).

89. See ELLEN FREY-WOUTERS, *THE EUROPEAN COMMUNITY AND THE THIRD WORLD: THE LOMÉ CONVENTION AND ITS IMPACT* (1980); Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1 (1991); Kele Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17 HAMLINE L. REV. 77 (1993). The Lomé Convention was overhauled in 2000 in the form of a 20-year agreement that focuses on regional free-trade agreements among the 71 ACP beneficiary countries. See *EU and 71 Developing Nations Agree to Overhaul of Lomé Convention*, 17 INT'L TRADE REP. (BNA) 240 (2000); *EU Requests WTO Waiver on New Pact Giving ACP Countries Preferential Access*, 17 INT'L TRADE REP. (BNA) 596 (2000). The EU received an Article I MFN waiver at the 2001 Doha Ministerial Conference for its successor agreement to the Lomé Convention, the ACP-EC Partnership Agreement, also known as the Cotonou Convention. The waiver expired on December 31, 2007. See WTO, *European Communities—the ACP-EC Partnership Agreement*, WT/MIN (01)/15 (2001). Since 2008 ACP market access to the EU has been superseded either by reciprocal economic partnership agreements or by the EU's "Everything But Arms" duty-free program for LDCs.

90. See 19 U.S.C. §§ 2701-33 (2000). Free trade agreements concluded by the United States with several CBERA beneficiaries, most notably the Dominican Republic-Central American Free Trade Agreement, has reduced the number of CBERA-eligible beneficiaries.

91. Because CBERA extends discriminatory tariff treatment to a limited number of developing countries, it does not qualify for the blanket MFN waiver available under the GSP. In September 1995, pursuant to Article IX of the WTO Agreement, the United States requested the WTO to renew the waiver previously granted CBERA for an additional ten years. The initial U.S. request was granted on November 15, 1995. See Decision of the General Council, Caribbean Basin Economic Recovery Act, WT/L/104 (Nov. 24, 1995). A follow-up waiver was granted in 2010. See *supra* note 23.

States added two more trade preference programs for select developing countries in 1991 (the Andean Trade Preference Act⁹² in favor of Ecuador, Columbia, Peru, and Bolivia) and in 2001 (the African Growth and Opportunity Act in favor of the 48 countries located in sub-Saharan Africa).⁹³ Both of these programs grant more trade benefits than does the U.S. GSP program.

II. MAKING THE 1971 GSP WAIVER PERMANENT: THE ENABLING CLAUSE

Whereas the political will did not exist in 1971 to make GSP a permanent GATT fixture, by 1979 opinion had shifted. The ten-year GSP waiver was made permanent by the Tokyo Round Decision of November 18, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries,⁹⁴ popularly known as the “Enabling Clause.”⁹⁵ The Enabling Clause permits but does not mandate that developed countries extend preferential tariff treatment to beneficiary countries.⁹⁶ Thus, paragraph 1 provides that “[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.” Paragraph 2 identifies four non-exclusive areas in which such preferential treatment may be accorded:

92. Pub. L. No. 102-182, tit. II, 105 Stat. 1236 (1991), *codified as amended at* 19 U.S.C. §§ 3201-3206 (2002). The Andean Trade Preference Act (ATPA) was enacted on December 4, 1991, to authorize preferential trade benefits for the Andean nations of Bolivia, Ecuador, Colombia, and Peru. ATPA benefits are similar but not identical to the benefits accorded beneficiary countries under CBERA.

93. African Growth and Opportunity Act (AGOA), 19 U.S.C. §§ 3701-3706, §2466, §§3721-3724, §§3731-3741 (2000).

94. Enabling Clause, *supra* note 47. The Enabling Clause gave the GSP permanent legal status at GATT and the WTO. See General Agreement on Tariffs and Trade 1994, ¶ 1(b)(4), *available at* http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf (last visited July 21, 2011); LONG, *supra* note 57, at 101; Howse, *supra* note 24, at 390 (“The Enabling Clause does not mention any exceptional circumstances, nor does it name any particular member state. It is not called a waiver on its face. It is not temporary, as the ‘exceptional circumstances’ language would imply. It is not listed among the list of Article XXV waivers in the relevant GATT/WTO instruments.”).

95. See Abdulqawi A. Yusuf, “*Differential and More Favourable Treatment*”: *The GATT Enabling Clause*, 14 J. WORLD TRADE L. 488 (1980).

96. In Report of the Panel, *United States—Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, ¶¶ 6.14-6.17, DS 18/R—39S/128 (Feb. 10, 1990), GATT B.I.S.D. (39th Supp.) 128, 152-53 (1992), at 152-53, paras. 6.14-6.17, the panel concluded that the Enabling Clause permits only preferential tariff treatment of products from developing countries without obligating the importing developed country to accord that treatment to imports of other countries, but does not permit such preferential treatment in connection with other rules and regulations (in this case, the use of an injury test in countervailing duty actions).

- (a) preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the [1971 Decision on a] Generalized System of Preferences;
- (b) differential and more favorable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT [referring to the Tokyo Round Codes, many of which contained provisions on special treatment of developing countries];
- (c) regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and . . . of non-tariff measures, on products imported from one another;^[97]
- (d) special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries.^[98]

Recognizing that preferential tariff treatment of developing countries could possibly retard trade liberalization among developed countries, paragraph 3 of the Enabling Clause underscores its purposive function, namely, “to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.”⁹⁹ Thus, from the start the Enabling Clause contemplated the eventual shrinking margin of preference for developing countries. In addition and importantly, paragraph 3(c) provides, “Any differential and more favourable treatment provided under this clause: . . . (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”¹⁰⁰

The Enabling Clause is explicit that tariff preferences are unilateral in favor of developing countries. Paragraph 5 of the Enabling Clause echoes

97. The leading regional trade arrangements among developing countries *inter se* have been notified under the Enabling Clause, including the Andean Pact, MERCOSUR, ALADI, and the ASEAN Free Trade Area. Eighteen regional trade agreements among developing countries *inter se* have been notified to the Committee on Trade and Development under the Enabling Clause. See WTO Comm. On Reg'l Trade Agreements, *Report (2000) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/9, ¶ 5 (Nov. 22, 2000).

98. Enabling Clause, *supra* note 47, ¶ 2(a)-(d).

99. *Id.* ¶ 3(a).

100. *Id.* ¶ 3(c). Paragraph 4 imposes a procedural obligation on preference-granting countries to notify and consult with GATT on their GSP programs.

the principle of GATT Article XXXVI:8 that reciprocity in tariff preferences is not expected.¹⁰¹

Paragraph 7 of the Enabling Clause memorializes the principle of graduation from GSP, although it does so in an elliptical fashion. Although it doesn't mention graduation by name, paragraph 7 incorporates graduation into GSP with the statement that as their economic condition improves, "they [developing countries] would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement."¹⁰²

Other than its allusion to graduation in paragraph 7 and that unilateral tariff preference schemes are to benefit developing countries on a nondiscriminatory basis, the Enabling Clause is silent with respect to criteria for country eligibility, graduation, and product coverage, thus leaving it to donor countries to sort out for themselves in their respective GSP programs. Thirteen national GSP schemes have been notified to the UNCTAD secretariat,¹⁰³ but in terms of volumes of trade affected the trade preference programs of the United States and the EU are the most

101. GATT Article XXXVI:8 provides as follows: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." The lack of reciprocity in the GSP program could also result in long-term costs for beneficiary countries. In multilateral trade negotiations, such as the Doha Round, countries may engage in reciprocal tariff reductions, meaning that all parties would agree to reduce their tariffs. By avoiding such reciprocal concessions, some developing countries may have tended to keep in place protectionist, import-substitution trade policies that may, in fact, impede their long-term growth. *See* COOPER, *supra* note 6, at 5. Moreover, these preferences can become an impediment to negotiations as developing countries seek ways of maintaining their preferences from eroding. For this reason, some economists prefer multilateral, nondiscriminatory tariff cuts because preferential tariff programs, such as the GSP, can lead to inefficient production and trade patterns. *See* GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 22; COOPER, *supra* note 6, at 5. When tariffs are reduced across-the-board, rather than in a preferential manner, countries tend to produce and export on the basis of their comparative advantage — thus exporting products that they produce relatively efficiently and importing products that others produce relatively efficiently. However, while some producers in developing countries (especially those whose products are not GSP eligible) may benefit from multilateral tariff reductions, other industries may be hurt because their margin of preference under GSP is reduced. *See* Cooper, *supra* note 6, at 5. Multilateral tariff reductions redistribute the benefits of trade liberalization among developing countries. Some exporters benefit because they face reduced tariffs in the industrial countries, while others are hurt because the margin of preference under GSP is reduced. *See id.*

102. Enabling Clause, *supra* note 47, ¶ 7.

103. The following countries grant non-reciprocal tariff preferences to developing countries in general: Australia, Belarus, Canada, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, and the United States. *See* About GSP, UNCTAD, www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1 (last visited March 30, 2012).

significant.¹⁰⁴ Although the U.S. and EU GSP programs differ with respect to preferential duty rates, eligible products, and eligible countries, what the U.S. and EU trade preference programs share in common is a set of preconditions that developing countries must meet in order to be designated as program beneficiaries. Both the U.S. and EU trade preference programs also establish a number of conditions that must be met in order to retain beneficiary status. The WTO-legality of certain preconditions and conditions that the EU had established under its GSP program were challenged at the WTO by India. The next Part reviews Appellate Body report concerning India's challenge to the EU's GSP scheme and assesses the WTO-consistency of U.S. and EU GSP conditionality in light of that Appellate Body report.

III. GSP CONDITIONALITY

An issue that the Enabling Clause does not explicitly address and that remained unresolved was whether preference-granting countries might discriminate among beneficiary countries by conditioning GSP eligibility. The consistency of GSP conditionality and the resulting tariff discrimination with the Enabling Clause has been questioned by some WTO members.¹⁰⁵ Matters came to a head in 2002 when India brought a complaint at the WTO challenging certain features of the EU's GSP scheme, specifically, the special arrangements to combat drug production and trafficking (the so-called "Drug Arrangements"), as provided in EC Council Regulation No. 2501/2001 of December 10, 2001 (the EC Regulation or Regulation).¹⁰⁶ The EC Regulation provided for five different tariff preference arrangements,

104. See Bernard Hoekman et al., Will Martin & Carlos A. Promo Braga, *Quantifying the Value of Preferences and Potential Erosion Losses*, in *TRADE PREFERENCE EROSION*, *supra* note 41, at 3, 13.

105. See, e.g., Special Session of WTO Comm. on Trade & Dev., Special Session, *Application of the Special and Differential Treatment Provisions Contained in the Agreements and Decisions of the WTO*, Communication from Paraguay, TN/CTD/W/5 (May 24, 2002).

106. See *EC-Tariff Preferences*, *supra* note 15, ¶¶ 151-53. For additional analyses of the Appellate Body's report, see generally Lorand Bartels, *The WTO Ruling on EC-Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programs*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 463 (Thomas Cottier, Elisabeth Bürgi & Joost Pauwelyn eds., 2005); Kevin Moss, *The Consequences of the WTO Appellate Body Decision in EC—Tariff Preferences for the African Growth and Opportunity Act and Sub-Saharan Africa*, 38 *N.Y.U. J. INT'L L. & POL.* 665 (2006); 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 (2006); Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 *ARIZ. J. INT'L & COMP. L.* 99, 142-78 (2005); Julia Ya Qin, *Defining Nondiscrimination under the Law of the World Trade Organization*, 23 *B.U. INT'L L.J.* 215, 281-95 (2005).

including the Drug Arrangements. Under the General Arrangements, all countries and territories listed in Annex I to the Regulation were eligible to receive tariff preferences. The products covered were listed in Annex IV, and were divided into two categories: non-sensitive and sensitive. Article 7 of the Regulation specified that non-sensitive products would enjoy duty-free access while sensitive products were subject to reduced tariffs. The benefits under the Drug Arrangements were made available to a closed list of twelve countries, all but one from Latin America: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela. Through the Drug Arrangements, the tariff reductions accorded to the 12 beneficiary countries were greater than the tariff reductions granted to other developing countries under the General Arrangements. For example, in respect of products that were included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries were granted duty free access to the EU market, while all other developing countries had to pay the MFN duty rate. As to products that were included in both the Drug Arrangements and the General Arrangements and that were deemed “sensitive,” the 12 beneficiary countries were granted duty free access to the EU market, while all other developing countries only received duty reductions.

India claimed that the Drug Arrangements were inconsistent with the MFN obligation and were not justified by the Enabling Clause.

The crux of the dispute centered on whether the term “non-discriminatory” in footnote 3 of the Enabling Clause requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations, such as quotas on duty-free treatment of certain imported goods or exclusions of certain trade-sensitive products. According to the Appellate Body, whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of the term “discriminate” converge in one important respect: “they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory.”¹⁰⁷ Thus, the Appellate Body observed that the EU and India agreed that similarly situated GSP beneficiaries should not

107. *EC—Tariff Preferences*, *supra* note 15, ¶ 151. *But see* Robert Howse, *Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India’s Short Lived Challenge to Labor and Environmental Exceptions in the European Union’s Generalized System of Preferences*, 18 AM. U. INT’L L. REV. 1333, 1352-53 (2003) (based on the history of the Enabling Clause, the description of GSP preferences as “generalized, non-discriminatory and non-reciprocal” was always meant to be aspirational; this is reflected in the 2001 Doha Decision on Implementation Related Concerns, which states in similarly hortatory language that GSP preferences should be generalized, non-reciprocal, and non-discriminatory) [hereinafter Howse II].

be treated differently, but disagreed as to the basis for determining whether beneficiaries are similarly situated.¹⁰⁸

The Appellate Body next examined paragraph 3(c) of the Enabling Clause which provides that differential and more favorable treatment provided under the Enabling Clause “shall . . . be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.” The Appellate Body found significant the absence of any explicit requirement in the text of paragraph 3(c) that donor countries respond to the needs of “all” developing countries or to the needs of “each and every” developing country.¹⁰⁹ The Appellate Body added that “the participants in this case agree that developing countries may have “development, financial and trade needs” that are subject to change and that certain development needs may be common to only a certain number of developing countries.”¹¹⁰ It continued that a “need” cannot be characterized as one of the specified needs of developing countries based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, “the existence of a ‘development, financial [or] trade need’ must be assessed according to an *objective* standard.”¹¹¹ The Appellate Body elaborated that “[b]road-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.”¹¹² In addition, paragraph 3(c) “mandates that the response provided to the needs of developing countries be ‘positive.’” This suggests, according to the Appellate Body, “the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue.”¹¹³ Thus, in the Appellate Body’s view, “a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant ‘development, financial [or] trade need.’”¹¹⁴ In the context of a GSP scheme, the Appellate Body explained, “the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.”¹¹⁵ Importantly, the Appellate Body held that “by requiring developed countries to ‘respond positively’ to the ‘needs of developing countries,’ which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be ‘non-discriminatory’ *even if*

108. *EC—Tariff Preferences*, *supra* note 15, ¶ 153.

109. *Id.* ¶ 158.

110. *Id.* ¶ 159.

111. *Id.* ¶ 162 (alteration in original).

112. *Id.*

113. *Id.* ¶ 163.

114. *EC—Tariff Preferences*, *supra* note 15, ¶ 164 (alteration in original).

115. *Id.* ¶ 164.

‘identical’ tariff treatment is not accorded to ‘all’ GSP beneficiaries.”¹¹⁶ Moreover, “paragraph 3(c) suggests that tariff preferences under GSP schemes may be ‘nondiscriminatory’ when the relevant tariff preferences are addressed to a particular ‘development, financial [or] trade need’ and are made available to all beneficiaries that share that need.”¹¹⁷ Because the Drug Arrangements comprised a closed list of twelve countries, with no transparent or objective criteria for initially listing a country, for delisting a country, or for adding a country not initially listed, the Appellate Body was drawn to the conclusion that there was no basis to determine whether or not impermissibly discriminatory criteria or standards were in play.¹¹⁸ The Appellate Body ultimately concluded that “the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be ‘non-discriminatory,’”¹¹⁹ i.e., that all similarly-situated developing countries be treated in a similar manner.¹²⁰

116. *Id.* ¶ 165 (emphasis added).

117. *Id.*

118. *See id.* ¶ 187.

119. *Id.* ¶ 188.

120. Although not addressed in *EC—Tariff Preferences*, when is a country a “developing country” *vel non* for GSP purposes? By its express terms the Enabling Clause restricts GSP eligibility to developing countries. When does a country not qualify for GSP because it is not a “developing country,” and when does an existing GSP beneficiary no longer qualify for GSP treatment because it has “graduated”? The WTO divides its membership into three groups—developed countries, developing countries, and least developed countries—that are differentiated *inter se* by the legal commitments each group agrees to undertake. The WTO does not provide a quantitative definition of the term “developing country” by using per capita gross domestic product or gross national income benchmarks. Although no quantitative definition of the term “developing country” has ever been adopted by the GATT Contracting Parties or the WTO Ministerial Conference, GATT Article XVIII:1 contains a qualitative definition of “developing country” as a country whose economy “can only support low standards of living and [is] in the early stages of development.” Regarding the phrase “can only support low standards of living,” Interpretative Note *Ad* Article XVIII:1 provides that the determination whether a country can only support low standards of living is not to be based on a temporary situation where exceptionally favorable conditions exist for the export products of a developing country. Regarding the phrase “in the early stages of development,” Interpretative Note *Ad* Article XVIII:2 states that it is not limited to countries that have just started their economic development, but also covers countries that are industrializing in order to reduce their dependency on exports of primary products. The poorest of the developing countries are referred to collectively as the least-developed countries or “LDCs.” With regard to the 48 LDCs, Article XI:2 of the Marrakesh Agreement Establishing the World Trade Organization accepts the United Nations’ designation of a country as least-developed for purposes of the WTO agreements. For the current list of LDCs and the criteria used to determine LDC status, see *UN Recognition of the Least Developed Countries*, UNCTAD, <http://unctad.org/Templates/Page.asp?intItemID=3618&lang=1> (last visited July 10, 2011). With regard to graduation from GSP, the Quad graduate all high-income beneficiary countries based on the World Bank’s definition of a country as “high income.” Based on their per capita gross national income (GNI), the World Bank groups countries into four categories: low income (\$995 or less), lower middle income (\$996–\$3,945), upper middle income (\$3,946–\$12,195), and high income (\$12,196 or more). *See How We Classify*

Against the backdrop of the *EC—Tariff Preferences* report, what conditions or limitations may a donor country impose in its GSP program consistently with paragraph 3(c) of the Enabling Clause as interpreted by the Appellate Body? The next section examines that question in the context of the four U.S. trade preference programs and the EU’s revised GSP scheme.

A. Overview of U.S. Trade Preference Programs

The United States has in essence four trade preference programs in the following chronological order (effective date in parentheses): the Generalized System of Preferences (GSP 1976), with 130 beneficiaries as of 2011;¹²¹ the Caribbean Basin Economic Recovery Act (CBERA aka the Caribbean Basin Initiative or CBI, 1984), with 18 beneficiaries as of 2011;¹²² the Andean Trade Preference Act (ATPA 1991), with three

Countries, WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited July 10, 2011). The World Bank classifies several WTO developing-country members as “high income,” including Aruba, Bahrain, Barbados, Brunei, Kuwait, Oman, Qatar, Saudi Arabia, and Trinidad and Tobago. See *Income Categories*, WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Low_income (last visited July 10, 2011).

In sum, rather than representing a monolithic, homogenous group of nations that are all at the same stage of economic development, developing countries instead can be placed on a continuum that runs from the extremes of abject poverty (the 48 LDCs with annual per capita GNI of less than \$750), to comparatively greater wealth in the case of Mexico with per capita GNI of \$8,960, to significantly greater wealth in the case of Singapore with per capita GNI of \$37,220. See *Countries and Economies*, WORLD BANK, <http://data.worldbank.org/country> (last visited July 10, 2011).

121. HTSUS, *supra* note 20, General Note 4.

122. HTSUS, *supra* note 20, General Note 7. The Caribbean Basin Economic Recovery Act was enhanced and expanded in 2000 under the Caribbean Basin Trade Partnership Act (CBTPA, with eight beneficiaries as of 2011). The eight CBTPA beneficiaries are Barbados, Belize, Guyana, Haiti, Jamaica, Panama, St. Lucia, and Trinidad and Tobago. HTSUS, General Note 17 (2011), www.usitc.gov/publications/docs/tata/hts/bychapter/1100gntoc.htm (last visited May 2011). The CBTPA provides improved access for clothing and other items of export interest not otherwise eligible for duty-free entry under the other U.S. trade preference programs.

A further enhancement of the CBERA and the CBTPA that targets trade with Haiti was enacted in 2006. The Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (HOPE Act) makes Haiti eligible for new trade benefits, in addition to those it currently receives under CBI. 19 U.S.C. § 2703a. (2010). Under the CBTPA, clothing imports from Haiti qualified for duty-free treatment only if they were made from U.S. or Haitian fabric. However, the HOPE Act allows clothing imports from Haiti to enter the United States duty free if at least 50 percent of the value of inputs and/or costs of processing are from any combination of U.S., FTA partner countries, and regional preference program partner countries, with the percentage increasing to 55 percent beginning December 20, 2015, and to 60 percent beginning December 20, 2017. 19 U.S.C. § 2703a(b)(1)(B)(v). The quantity of clothing eligible for duty-free treatment under this provision was subject to a limit in the first year equivalent to one percent of total U.S. clothing imports that increased to 1.25 percent. 19 U.S.C. § 2703a(b)(1)(C). The HOPE Act also allows automotive wire

harnesses imported from Haiti that contain at least 50 percent by value of materials produced in Haiti, U.S., FTA partner countries, or regional preference program countries to qualify for duty-free treatment. 19 U.S.C. § 2703a(c).

The HOPE Act benefits could not go into effect until certain conditions were met. Haiti was required to establish or demonstrate that it was “making continual progress toward establishing”: (1) a market-based economy, (2) the rule of law, political pluralism, and due process, (3) the elimination of barriers to U.S. trade and investment, (4) economic policies to reduced poverty, increase the availability of health care and education and promote private enterprise, (5) a system to combat corruption, and (6) protection of internationally recognized worker rights. 19 U.S.C. § 2703a(d).

The clothing provisions of the HOPE Act were expanded in 2008 through the HOPE Act II, and was expanded and renewed for ten years until September 2020 pursuant to the Haiti Economic Lift Program (HELP) Act. The HELP Act was enacted in response to the devastating 7.0 magnitude earthquake that hit Haiti on January 12, 2010. The ten-year extension is at 19 U.S.C. § 2703a(h). The HELP Act provides duty-free treatment for additional textile and apparel products wholly assembled or knit-to-shape in Haiti regardless of where the inputs originated, and increases from 70 million square meter equivalents (SMEs) to 200 million SMEs the respective tariff preference levels (TPLs) under which certain Haitian knit and woven apparel products may receive duty-free treatment regardless of where the inputs originated. In any given year, the TPL increase is triggered if 52 million SMEs of Haitian apparel enter the United States under the existing knit or woven TPL. After the increase is triggered, certain knit apparel products entering duty-free under the knit TPL will be subject to an 85 million SME sublimit, and certain woven apparel products entering duty-free under the woven TPL will be subject to a 70 million SME sublimit. 19 U.S.C. § 2703a(b)(2A). For a comparison of the rules of origin for clothing under the CBTPA and the HOPE Act, see U.S. INT’L TRADE COMM’N, Nineteenth, *The Impact of the Caribbean Basin Economic Recovery Act, 19TH REPORT, 2007-2008*, at 1-11 U.S. INT’L TRADE COMM’N (Pub. 4102 2009). Inv. No. 332-227, USITC Pub. 4102 (Sept. 2009) (Final), *available at* <http://www.usitc.gov/publications/332/pub4102.pdf>.

The HOPE Act has been rated as a disappointment by the U.S. International Trade Commission:

Haiti is a relatively small supplier of textile and apparel articles to the U.S. market, even though it ranked as the largest CBERA textile and apparel supplier in 2008. Moreover, despite implementation of HOPE I and HOPE II, textile and apparel imports from Haiti under CBERA declined from \$420.8 million in 2007 to \$394.4 million in 2008. . . .

The limited amount of trade and new investment under the HOPE Acts to date can be partly attributed to the brief time the provisions have been in effect. However, Haiti’s apparel sector also faces considerable challenges that remain disincentives for investors. For example, Haiti’s underdeveloped infrastructure slows transport and delivery times and makes Haiti’s shipping costs the highest in the region. Insufficient access to water and electricity also prevent Haiti’s apparel sector from increasing production. Despite competitive labor rates that average \$2.50–\$3.75 per day, bank interest rates ranging as high as 30 percent reportedly discourage Haitian apparel producers from taking out loans to expand production.⁶⁵ Haiti has no weaving facilities; middle management and technical personnel are in short supply; and its workers have limited training. Such constraints likely outweigh the benefits that the HOPE Acts offer, and prevent Haiti’s textile and apparel sector from taking full advantage of the programs.

beneficiaries as of 2011;¹²³ and the African Growth and Opportunity Act (AGO 2000), with 37 beneficiaries as of 2011.¹²⁴ In general, the goal of all four programs is to promote economic development in poorer nations by supporting increased and diversified exports. GSP establishes a basic level of product coverage common to all the preference programs, with added products for least-developed beneficiaries. The three regional programs cover additional products and generally have more liberal conditions for product entry than GSP, but regional beneficiaries are subject to more extensive conditions for participation. Furthermore, the regional programs serve specific foreign policy interests — for example, the ATPA has an additional goal of countering illicit drug production and trafficking. Chart 1 below shows the growth in U.S. trade preference programs over the three decades from 1975 to 2006.

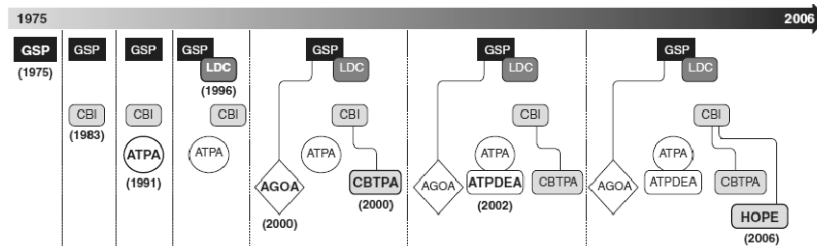
THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT, 19TH REPORT, *supra* note 122, at 3-19 (footnotes omitted).

123. HTSUS, *supra* note 20, General Note 11.

124. HTSUS, *supra* note 20, General Note 16. In 2002 the Andean Trade Preference Act was enhanced and expanded under the Andean Trade Promotion and Drug Eradication Act (ATPDEA, with Colombia, Ecuador, and Peru designated as beneficiaries as of 2011). *Id.* at General Note 11. The ATPDEA provides improved access for clothing and other items of export interest not otherwise eligible for duty-free entry under the other U.S. trade preference programs.

A 2008 offshoot of the ATPA is the Dominican Republic 2:1 Earned Import Allowance Program (EIAP), which creates a benefit for eligible apparel articles wholly assembled in the Dominican Republic that meet the requirements for a “2 for 1” earned import allowance. It was created as part of the Andean Trade Preference Extension Act of 2008, Pub. L. No. 110-436, 122 Stat. 4976 (2008). The EIAP allows apparel manufacturers in the Dominican Republic who use U.S. fabric to produce certain apparel to earn a credit that can be used to ship eligible apparel made with non-U.S.-produced fabric into the United States duty free. The USITC is required to evaluate the effectiveness of the EIAP and make recommendations for improvements annually under the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act. In its 2011 report the ITC found that the program as currently structured does not provide sufficient benefits to make the apparel industry in the Dominican Republic competitive *vis-à-vis* other suppliers of cotton bottoms to the U.S. market. Earned Import Allowance Program: Evaluation of the Effectiveness of the Program for Certain Apparel from the Dominican Republic, Inv. No. 332-503, USITC Pub. 4246 (July 2010) (Final), *available at* <http://www.usitc.gov/publications/332/pub4175.pdf>. U.S. INT’L TRADE COMM’N, EARNED IMPORT ALLOWANCE PROGRAM: EVALUATION OF THE EFFECTIVENESS OF THE PROGRAM FOR CERTAIN APPAREL FROM THE DOMINICAN REPUBLIC (Pub. No. 4246 2011), <http://www.usitc.gov/publications/332/pub4246.pdf>. *See also* *Commerce to Maintain DREIAP Requirement That Textiles Must Be Finished, Dyed in U.S.*, INT’L TRADE DAILY (BNA), (Aug. 4, 2010).

Chart 1. Growth in U.S. Trade Programs over Time



Source: U.S. Government Accountability Office

In a nutshell each regional program is more liberal in its preference scheme than is GSP. Countries that are GSP-eligible only are accorded duty-free access to 69 percent of the total number of tariff lines in the U.S. tariff schedule (7,285 lines), consisting of 3,879 MFN duty-free lines and 3,406 additional lines that are GSP duty-free.¹²⁵ As indicated in Chart 2 below, all three of the post-GSP regional programs and their respective enhancements improve upon GSP to varying degrees. CBERA beneficiaries are accorded duty-free treatment on approximately 9,200 tariff line items;¹²⁶ ATPA beneficiaries are accorded duty-free treatment on approximately 9,000 tariff line items;¹²⁷ and AGOA beneficiaries are accorded duty-free access to approximately 9,100 items, including many textile and clothing products.¹²⁸

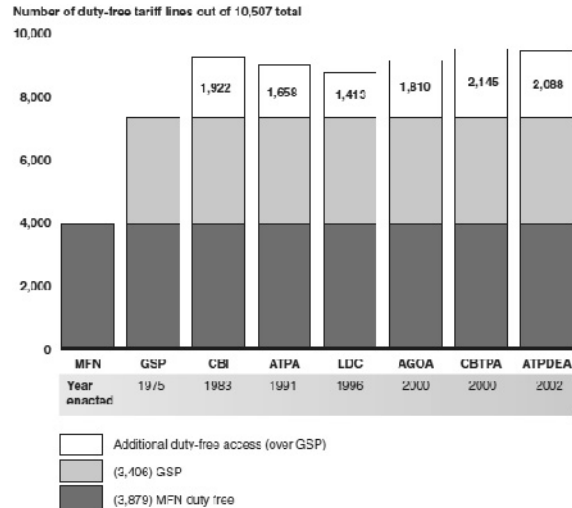
125. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-443, U.S. TRADE PREFERENCE PROGRAMS PROVIDE IMPORTANT BENEFITS, BUT A MORE INTEGRATED APPROACH WOULD BETTER ENSURE PROGRAMS MEET SHARED GOALS 70 (2008) [hereinafter GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS]. The expansion of GSP for LDCs in 1996 also increased the number of duty-free lines for LDC beneficiaries.

126. See *id.* at 71. With the enhancements to CBI that were made in 2000 by the CBTPA, the number of tariff-lines eligible for duty-free treatment is approximately 9,400. See *id.*

127. See *id.* With the enhancements to the ATPA that were made in 2002 by the ATPDEA, the number of tariff-lines eligible for duty-free treatment is approximately 9,400. See *id.*

128. See *id.*; U.S. INT'L TRADE COMM'N, The Year in Trade 2008: Operation of the Trade Agreements Program, at 2-13, 2-14 (USITC Pub. No. 4091 (July 2009), at 2-13, 214, available at <http://www.usitc.gov/publications/332/pub4091.pdf>).

Chart 2. Duty-Free Tariff Lines under U.S. Trade Preference Programs



Source: U.S. Government Accountability Office

The number of tariff lines that receive duty-free treatment is, of course, only part the picture. The distribution of duty-free treatment across product groups is not even among the various programs.¹²⁹ By statute certain products are ineligible for preferential tariff treatment under GSP (textiles, clothing, watches, footwear, certain leather goods, and agricultural products subject to a tariff-rate quota on any quantities that exceed the quota).¹³⁰ In addition to the less favorable tariff treatment that certain product groups receive under the GSP program compared to the three regional trade preference programs, GSP is subject to periodic renewal (as are the ATPA and AGOA but not the CBERA), automatic graduation applies once a country becomes a high-income country (applicable in the ATPA and AGOA but not CBERA), and loss of product eligibility is triggered once

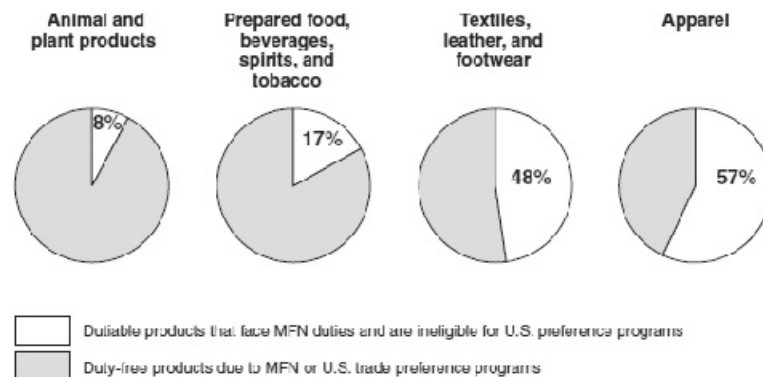
129. The countries that have the highest share of their exports to the United States benefiting from preferences tend to be lower income countries. For higher income developing countries, the share of their exports to the United States benefiting from preferences varies, but tends to be less. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1209, AN OVERVIEW OF USE OF U.S. TRADE PREFERENCE PROGRAMS BY BENEFICIARIES AND U.S. ADMINISTRATIVE REVIEWS 3-4 (2007) [hereinafter GAO OVERVIEW OF U.S. TRADE PREFERENCE PROGRAMS].

130. *See* 19 U.S.C. § 2463(b).

competitive needs limits are reached (inapplicable in ATPA, AGOA, and CBERA).¹³¹

While textile and clothing products are ineligible for preferential tariff treatment under the U.S. GSP program, under amendments to both CBERA and ATPA that were made in 2000 and 2002—the Caribbean Basin Trade Partnership Act and the Andean Trade Promotion and Drug Eradication Act, respectively—imports of textiles and clothing made in CBERA and ATPA countries enter duty-free, provided such imports use yarn or fabric that is wholly made in the United States. Both program expansions also permit some preferential access for clothing made from regional fabric, but unlike AGOA, neither program has a third-country fabric provision. Under AGOA's so-called Special Rule for Apparel, LDCs receive duty-free treatment on clothing made from third-country fabric (i.e., non-U.S., non-African fabric), subject to an annual cap. Nevertheless, as Chart 3 indicates, despite the expanded coverage of the regional trade preference programs, several important product groups with greater than zero MFN duty rates are not eligible for preferential tariff treatment.

Chart 3. Product Groups with Most Dutiable Product Lines in U.S. Tariff Schedule, Taking Into Account All U.S. Preference Programs



Source: U.S. Government Accountability Office

These product exclusions are manifested in the relative lack of diversification of products exported by beneficiary countries to the United States. As analyzed by the GAO, exports under AGOA, the ATPA, and GSP are concentrated in fuels and clothing.¹³² What about the economic

131. See 19 U.S.C. § 2462(e).

132. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 125, at 28-29. U.S. Trade Representative Ron Kirk flagged the lack of export diversification among AGOA beneficiaries with their high dependency upon textiles and

impact on the U.S. economy? Several factors suggest that the overall effects of GSP on the U.S. economy are small. First, only about 1.5 percent of total U.S. imports enter duty-free under GSP.¹³³ Second, most products that would otherwise have been GSP eligible do not come from GSP beneficiaries. Rather, they are imported from non-beneficiary countries (principally China) at MFN duty rates. Third, many imports that enter duty-free under GSP would probably be competitive without preferential rates in any event because for many products U.S. MFN duty rates are the same as (i.e., zero) or only marginally higher than GSP duty-free rates. Consequently, the effects of paying the higher MFN duty rates would be small.¹³⁴ In short, U.S. domestic producers of most products are unlikely to be adversely affected by import competition from GSP imports. At the same time, some domestic producers and consumers benefit significantly from GSP. For some companies that use parts, components, or materials that are imported under GSP, the reduced tariffs can mean lower costs. Consumers who buy products imported under GSP or products that are produced with GSP inputs may benefit from significantly lower prices.¹³⁵ Domestic producers who compete with imports that enter duty free under GSP, however, can bear significant adjustment costs. Adjustment costs include the costs to workers for retraining and finding new employment and the costs to firms for retooling to become more competitive or to shift capital to other uses.¹³⁶ Such costs are ameliorated by the exclusion of import-sensitive products and by the competitive need limits of the program.¹³⁷

When taking into account all U.S. trade preference programs, combined they represent less than a five-percent share of total U.S. imports (see Chart 4 below). Nevertheless, imports under U.S. preference programs constitute a significant share of many beneficiary countries' exports to the United States. In other words, the programs may be economically important to certain beneficiaries, even if the programs' impact on the overall U.S. economy is marginal.¹³⁸

clothing. See Len Bracken, *Kirk Puts AGOA Extension Chances Over 50 Percent, but Not Made Permanent*, INT'L TRADE DAILY (BNA), Aug. 4, 2010. Value-added manufacturing is one alternative to textiles and clothing, but that is easier said than done.

133. See COOPER, *supra* note 6, at 5.

134. See *id.*

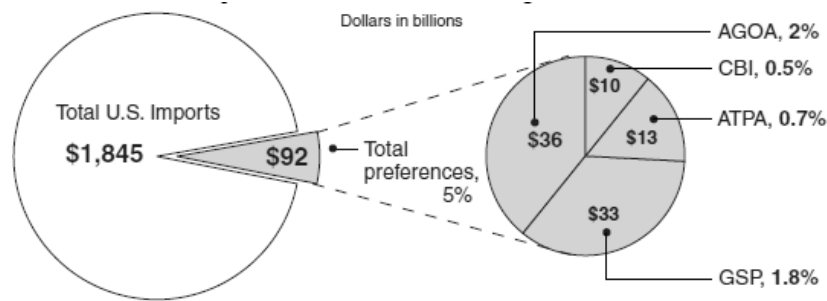
135. See *id.*

136. See *id.*

137. Nevertheless, those who compete against GSP imports complain that preferential tariff treatment generates unfair competition. See *id.*

138. See GAO OVERVIEW OF U.S. TRADE PREFERENCE PROGRAMS, *supra* note 129, at 26. Fuel imports under preference programs account for half of preference imports by value. See *id.*

Chart 4. Imports under U.S. Trade Preference Programs as a Share of Total U.S. Imports (2006)



Source: U.S. Government Accountability Office

B. The Uneven Distribution of U.S. GSP Benefits

In its first ten years of operation, the U.S. GSP program provided non-reciprocal duty-free treatment to about 3,000 articles imported from 140 developing countries.¹³⁹ In 1986, duty-free imports under the program amounted to nearly \$14 billion (up from \$3.2 billion in 1976),¹⁴⁰ or 3.8 percent of total U.S. imports.¹⁴¹ Seventy-nine percent of all U.S. imports receiving duty-free treatment under GSP in 1986 came from seven beneficiary countries: Taiwan, Korea, Hong Kong, Mexico, Brazil, Singapore, and Israel (in that order).¹⁴² Three years later, four of these seven countries—the Asian “tigers” or “dragons” of Taiwan, Hong Kong, Korea, and Singapore—were “graduated” from the GSP program based upon their general level of development.¹⁴³ Least-developed countries typically have been the beneficiaries of less than one percent of total U.S. GSP benefits.¹⁴⁴

Five years later, in 1991, the number of articles benefitting from the U.S. GSP program had increased to approximately 4,300 products, while the

139. HOUSE COMM. ON WAYS AND MEANS, GENERALIZED SYSTEM OF PREFERENCES RENEWAL ACT OF 1984, H.R. REP. NO. 98-1090, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5101. For an assessment of the U.S. GSP program after its first five years, see HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., REPORT TO THE CONGRESS ON THE FIRST FIVE YEARS' OPERATION OF THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) (Comm. Print 1980).

140. H.R. REP. NO. 98-1090, *supra* note 139, at 2.

141. See U.S. INT'L TRADE COMM'N, OPERATION OF THE TRADE AGREEMENTS PROGRAM, 38th Report REP., 5-16 (Pub. No. 1995 1987).

142. See *id.*

143. See *id.* at 5-17.

144. See H.R. REP. NO. 98-1090, *supra* note 139, at 3.

number of beneficiary countries had dropped slightly, but remained above 130 countries.¹⁴⁵ Duty-free imports under the program totaled \$13.7 billion (2.8 percent of total U.S. imports) in 1991.¹⁴⁶ Although the comparable figures for 1986 are larger, the decrease is explained in part by the fact that two other trade preference programs had been launched since 1986, the Caribbean Basin Initiative and the U.S.-Israeli Free Trade Agreement, under which articles previously entered into the United States duty free under GSP now entered under one or the other of these new preferential trade programs. The top ten GSP beneficiaries in 1991, accounting for 83 percent of total GSP duty-free imports, were Mexico, Malaysia, Thailand, Brazil, Philippines, India, Israel, Argentina, Indonesia, and Yugoslavia, with Mexico capturing 28 percent of all GSP duty-free imports to the United States that year.¹⁴⁷ In 1994, \$104 billion in imports were entered from beneficiary-developing countries (BDCs), of which \$18 billion received duty-free treatment under the GSP program, or 17 percent of total BDC imports.¹⁴⁸ The rank order of the top ten beneficiary countries remained essentially the same, with the countries on the 1991 top-ten list moving up following the removal of Mexico and Yugoslavia.¹⁴⁹ Two new names in the ranks of the top ten were Venezuela (8th) and Russia (10th). The top ten GSP beneficiaries accounted for 82 percent of total GSP duty-free imports into the United States in 1994.¹⁵⁰ In 1995, there were \$112 billion in total imports from BDCs, with the top ten GSP beneficiaries accounting for 83 percent of total GSP duty-free imports.¹⁵¹ In 1996, \$16.9 billion in duty-free imports entered under the U.S. GSP program, accounting for 2 percent of total U.S. imports.¹⁵²

145. U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1991: OPERATION OF THE TRADE AGREEMENTS PROGRAM 157 (Pub. No. 2554 1992).

146. *Id.* at 160. In 1993, almost 45 percent of total imports entered the United States duty free, but only 3.4 percent of all duty-free imports entered duty free under GSP. *See* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1993: OPERATION OF THE TRADE AGREEMENTS PROGRAM 130-32 (Pub. No. 2769 1994).

147. THE YEAR IN TRADE 1991, *supra* note 145, at 161. Mexico was removed from the GSP program with its accession to NAFTA, effective January 1, 1994, under provisions of the NAFTA Implementation Act.

148. U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1994: OPERATION OF THE TRADE AGREEMENTS PROGRAM 126-27 (Pub. No. 2894 1995).

149. *See id.* at 127.

150. *See id.*

151. *See* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1995: OPERATION OF THE TRADE AGREEMENTS PROGRAM 78-79 (Pub. 2971 1996) [hereinafter THE YEAR IN TRADE 1995]. Russia took seventh place in the GSP top ten and Turkey moved into tenth place. *See* THE YEAR IN TRADE 1995, *supra*, at 79.

152. *See* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1996: OPERATION OF THE TRADE AGREEMENTS PROGRAM 143 (Pub. 3024 1997).

The last major reform of the U.S. GSP program occurred in 1996,¹⁵³ with the goal of redistributing GSP benefits among beneficiary countries. To that end, the 1996 amendments changed the benchmark for determining when a beneficiary country would be graduated as a high income country by basing that determination on World Bank statistics. In 1996 the World Bank categorized countries with per capita income of over \$8,600 as “high income.” Under pre-1996 law, the per capita income threshold for graduation had been \$11,800.¹⁵⁴ Since the new income per capita threshold was considerably lower, more beneficiary countries would in theory graduate sooner. Another provision lowered the competitive need limit (CNL)¹⁵⁵ from \$114 million (the 1994 CNL) to \$75 million in 1996, with

153. Small Business and Job Protection Act, Pub. L. No. 104-188 (codified in scattered sections of 26 U.S.C.).

154. It would take nearly 15 years before the former \$11,800 threshold would become the World Bank “high income” threshold. See BHALA & KENNEDY, *supra* note 48, at 465.

155. GSP eligibility can be lost on a product-by-product basis once a BDC reaches the statutory competitive need limits. The purpose of the competitive need limits is twofold: (1) to establish a benchmark for determining when products from particular countries are competitive in the U.S. market and, therefore, no longer merit preferential tariff treatment, thus giving some measure of import protection to domestic producers of like or directly competitive products; and (2) to reallocate GSP benefits to less competitive BDCs. See STAFF OF HOUSE H. COMM. ON WAYS & MEANS, 104TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 17 (Comm. Print 1995) [hereinafter OVERVIEW OF U.S. TRADE STATUTES]. The competitive need limits provide that if the value of imports of a specific GSP-eligible product from a particular BDC exceed either (1) \$150 million in 2011 (with annual adjustments of \$5 million), or (2) 50 percent of total U.S. imports of the product by value in a calendar year, GSP eligibility for that product must be withdrawn for that particular BDC and the MFN rate of duty imposed the following July. GSP Renewal Act of 1996, § 503(c)(2)(A)(i)-(ii); 19 U.S.C. § 2463(c)(2)(A)(i)-(ii) & (D). The 1996 amendments repeal the competitive need ceilings of prior law by setting the annual value of imports at a fixed dollar figure. Prior law provided for a ceiling indexed to U.S. GNP, which was \$25 million in 1974, which was increased to \$122 million in 1995. GSP eligibility may be restored if in the subsequent calendar year imports of the subject product from that BDC fall below the competitive need limits in effect during the preceding calendar year. Neither of the competitive need limits applies to LDBDCs. In addition, the 50-percent import share limit does not apply if a like or directly competitive product is not produced in the United States. GSP Renewal Act of 1996, § 503(c)(2)(E); 19 U.S.C. § 2463(c)(2)(E).

The competitive need limitations may be waived in three circumstances. First, the President may waive the 50-percent import share competitive limit, but not the dollar limit, on articles for which total U.S. imports are deemed to be *de minimis*, set at \$20.5 million in 2011 and increased annually by \$500,000. *Id.* § 503(c)(2)(F), 19 U.S.C. § 2463(c)(2)(F). The 1996 amendments changed the indexing formula in the prior law that provided for an initial *de minimis* import limit of \$5 million, adjusted annually according to increases in U.S. GNP (\$13.4 million in 1994). See SMALL BUSINESS PROTECTION ACT OF 1996, S. REP. NO. 104-281, at 355 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1843 [hereinafter S. REP. NO. 281]. In 2010, *de minimis* waivers were granted to more than a dozen countries (Argentina, Brazil, Ecuador, Egypt, India, Indonesia, Kazakhstan, Lebanon, Maldives, Pakistan, the Philippines, Russia, Sri Lanka, Thailand, Turkey, Ukraine, and Uruguay) on a host of products. See Office of the U.S. Trade Representative, *Results of the 2009 GSP Review: Decisions on Products Eligible for De Minimis Waivers 2-11* (2010), www.ustr.gov/webfm_send/2016 (last visited July 21, 2011). Second, the President may

subsequent increases of \$5 million annually. The 1996 amendments also provided specific authority for the President to designate additional articles as GSP eligible if they originated from least developed beneficiary countries. Finally, the 1996 amendments barred consideration of an article for GSP treatment for three years following formal consideration and eligibility denial of that article.¹⁵⁶

Did the 1996 amendments have their intended effect? The top ten GSP beneficiaries in 1996 accounted for 85 percent of all GSP duty-free imports, led by Malaysia and followed by Thailand, Brazil, Indonesia, and the Philippines.¹⁵⁷

The top heavy distribution of GSP benefits has continued over the past decade. As shown in Tables 1 and 2 below, the top ten U.S. GSP

waive both competitive need limits on any eligible article from any BDC, provided (a) he receives advice from the ITC on the likely effect of the waiver on any U.S. industry; (b) he determines that the waiver is in the national economic interest, after considering the ITC's advice, the overall purposes of the GSP program, and the discretionary BDC-designation criteria; and (c) he publishes that determination in the Federal Register. GSP Renewal Act of 1996, § 503(d)(1); 19 U.S.C. § 2463(d)(1). In making the waiver determination, the President must give great weight to assurances from the affected BDC that it will provide equitable and reasonable market access, and the extent to which the BDC provides protection to intellectual property rights. GSP Renewal Act of 1996, § 503(d)(2), 19 U.S.C. § 2463(d)(2). Third, the President may waive the competitive need limits for a particular country based on a determination that (a) there has been an historical preferential trade relationship between the United States and that country; (b) there is a treaty or trade agreement in force covering economic relations between the United States and that country; and (c) such country does not discriminate against or impose unjustifiable or unreasonable barriers to U.S. commerce. GSP Renewal Act of 1996, § 503(d)(3), 19 U.S.C. 2463(d)(3). The Philippines was the intended beneficiary of this waiver exemption, but it has never been invoked. *See* OVERVIEW OF U.S. TRADE STATUTES, *supra*, at 18; TRADE AND TARIFF ACT OF 1984, H.R. CONF. REP. NO. 98-1156, at 162 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5279. Waivers remain in effect until the President determines that a waiver is no longer warranted due to changed circumstances. GSP Renewal Act of 1996, § 503(d)(5), 19 U.S.C. § 2463(d)(5). The President's waiver authority is further restricted by capping total waivers at 30 percent of total GSP duty-free imports. In addition, the top BDCs have their waivers capped at 15 percent of total GSP duty-free imports. Specifically, the President may not waive the competitive need limitations in the following two situations: (1) if the aggregate appraised value of articles receiving a waiver would equal or exceed 30 percent of total GSP duty-free imports during the preceding calendar year; or (2) if the aggregate appraised value of articles from BDCs (a) with per capita GNP of \$5,000, or (b) which had exported to the United States GSP articles duty-free that in the aggregate were more than 10 percent of the total value of GSP duty-free articles during that year, would exceed 15 percent of total GSP duty-free imports during the preceding calendar year, and those articles are from such BDCs. 19 U.S.C. § 2463(d)(4)(A)-(C).

156. *See* BHALA & KENNEDY, *supra* note 48, at 451 n.232.

157. *See* THE YEAR IN TRADE 1996, *supra* note 152, at 144. Malaysia was graduated from the GSP program in 1996, effective January 1, 1997, because it had become sufficiently advanced in economic development and had so improved in trade competitiveness that continued preferential treatment under the GSP was not warranted. Aruba, the Cayman Islands, Cyprus, Greenland, Macau, and the Netherlands Antilles were also graduated in 1996, effective January 1, 1998, because they had become "high income" countries. *See id.*

beneficiaries have barely changed over the past ten years and have never accounted for less than 75 percent of total duty-free imports under the U.S. GSP program.¹⁵⁸

Table 1. Top Ten U.S. GSP Beneficiaries, 2000-2010
(GSP imports in \$ millions, rank in parentheses)

Country	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Angola	2,843 (1)	2,511 (1)	2,826 (1)	3,883 (1)	3,049 (1)	4,098 (2)	6,774 (1)	6,924 (1)	7,529 (1)	4,142 (1)	3,544 (2)
India	1,138 (5)	1,334 (4)	2,041 (4)	2,646 (3)	3,270 (2)	4,179 (1)	5,678 (2)	4,735 (2)	3,965 (2)	2,848 (3)	3,482 (3)
Thailand	2,205 (2)	2,201 (2)	2,312 (2)	2,702 (2)	3,143 (4)	3,575 (4)	4,252 (3)	3,820 (3)	3,533 (3)	2,886 (2)	3,612 (1)
Brazil	2,086 (3)	1,950 (3)	2,124 (3)	2,490 (4)	3,168 (3)	3,628 (3)	3,738 (4)	3,427 (4)	2,754 (4)	1,978 (4)	2,124 (4)
Equatorial Guinea	136	91	352	670 (8)	806 (10)	1,343 (6)	1,478 (6)	1,193 (6)	2,467 (5)	1,611 (5)	1,275 (6)
Indonesia	1,369 (4)	1,322 (5)	1,513 (5)	1,347 (5)	1,290 (5)	1,594 (5)	1,946 (5)	2,243 (5)	2,161 (6)	1,455 (6)	1,856 (5)
S. Africa	583 (10)	506 (8)	553 (8)	670 (9)	949 (8)	1,017 (7)	1,066 (9)	1,190 (7)	1,457 (7)	742 (7)	1,200 (7)
Philippines	745 (6)	676 (6)	708 (6)	895 (6)	967 (7)	1,008 (9)	1,141 (7)	1,165 (8)	913 (10)	734 (8)	913 (8)
Turkey	435 (9)	437 (9)	472 (9)	723 (7)	970 (6)	1,068 (8)	1,126 (10)	1,128 (9)	917 (9)	644 (9)	793 (9)
Argentina	298	196	287	451	563	617	666	666 (10)	1,400 (8)	506 (10)	578 (10)
Russia	515 (8)	378 (10)	381 (10)	430	554	738	512	469	594	252	529
Venezuela	745 (7)	637 (7)	582 (7)	619 (10)	815 (9)	745 (10)	685	427	251	127	113

Source: International Trade Commission DataWeb, <http://dataweb.usitc.gov>

158. See Sallie James, *The U.S. Generalized System of Preferences: Helping the Poor, But At What Price?* 10 (Cato Institute Center for Trade Policy Studies, Trade Policy Analysis No. 43 Nov. 16. 2010), www.cato.org/pub_display.php?pub_id=12555.

Table 2. Top Ten U.S. Beneficiaries' GSP Imports as a Percentage of Total GSP Imports, 2000-2010

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
GSP Imports from Top Ten BDCs	12,664	11,952	13,512	16,645	18,427	22,255	27,199	26,496	27,098	17,546	19,377
GSP Imports from Top Ten BDCs	12,664	11,952	13,512	16,645	18,427	22,255	27,199	26,496	27,098	17,546	19,377

Source: International Trade Commission DataWeb, <http://dataweb.usitc.gov>

At least one self-evident fact emerges from these two Tables: The top ten GSP beneficiary countries, regardless of which countries they are, continue to capture the lion's share of U.S. GSP benefits. This remains the case even after many of their imported products are removed from the list of eligible articles under the competitive needs limits of the GSP program, and even after one of the top ten countries graduates from the GSP program.

Does the proportionately small amount of trade entering under the GSP program mean that the program is underutilized, and therefore can be easily eliminated? This may be especially true for many least-developed beneficiary developing countries (LDBDCs) that historically are not large users of GSP preferences. Some in Congress favor graduating some of the more advanced BDCs, thinking that this would leave more room for other countries, especially LDCs, to take greater advantage of the program.¹⁵⁹ However, some U.S. business interests have indicated that, absent GSP eligibility, importers are likely to seek out the best alternative source for the goods, which would probably be China.¹⁶⁰ Some observers have also

159. See *USTR Considers Withholding Trade Benefits from India, Brazil in Wake of WTO Debacle*, INT'L TRADE DAILY (BNA), (Aug. 9, 2006).

160. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE JONES, *supra* note 38, at 2225. "Although the intent of country and product graduation is to focus benefits on those countries most in need of the competitive margin that preferences provide . . . , remaining GSP beneficiaries will not necessarily profit from another country's loss of preference benefits. . . . China would be most likely to gain U.S. imports as a result of a beneficiary's loss of preferences. In 2007, the President revoked eight CNL waivers as a result of legislation passed in December 2006. Consequently, over \$3.7 billion of trade in 2006 from six GSP beneficiaries — notably Brazil, India, and Thailand — lost duty-free treatment. . . . GAO's analysis showed that China and Hong Kong were the largest suppliers of the precious metal jewelry formerly eligible under GSP for duty-free import by India and Thailand. Canada, Mexico, Japan, and China were the leading competitors to Brazil's motor parts." See U.S. GOV'T ACCOUNTABILITY OFFICE GAO-08-907T, INTERNATIONAL TRADE: THE UNITED STATES NEEDS AN INTEGRATED APPROACH TO TRADE PREFERENCE PROGRAMS 5-6 (2008).

suggested that the GSP may not be used by some countries due to (1) unfamiliarity with the program, or because some BDC governments do a poor job of promoting the existence of available opportunities under the program, (2) the lack of infrastructure (for example, undeveloped or damaged roads and ports that impede the efforts to move goods into the international market), or (3) a combination of both.¹⁶¹ Such problems could be addressed through trade capacity building efforts (see discussion below in Part V).

When the GSP program was renewed in 2006 it was amid some controversy owing, at least in part, to concerns that the more advanced BDCs (such as India and Brazil) were contributing to the impasse in the Doha Round. Compromise language worked out between the House and Senate extended the GSP for two years for all countries, while instructing the President to revoke CNL waivers for products of certain countries.¹⁶² Some in Congress continue to be concerned that certain “more advanced” developing countries (again, India and Brazil) are receiving benefits to the exclusion of comparatively lesser-developed countries.¹⁶³

C. Conditionality under U.S. Trade Preference Programs

*1. The U.S. GSP Program*¹⁶⁴

Two categories of beneficiary country exist under the U.S. GSP program: beneficiary developing countries (BDCs) and least-developed beneficiary developing countries (LDBDCs). Section 502 imposes mandatory conditions circumscribing the President’s authority to designate a country as either a BDC or LDBDC.¹⁶⁵ First, the President is prohibited from designating specific developed countries as BDCs: Australia, Canada,

161. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, JONES, *supra* note 38, at 17, 22.

162. See *id.* at 16.

163. See *id.*

164. The U.S. Trade Representative has published a GSP guide, OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK (2010), available at www.ustr.gov/webfm_send/1597. See also UNCTAD, GENERALIZED SYSTEM OF PREFERENCES: HANDBOOK ON THE SCHEME OF THE UNITED STATES OF AMERICA (2010), available at http://www.unctad.org/en/docs/itdtdsbmisc58rev2_en.pdf. For early critiques of the operation of the U.S. GSP program, see Barry H. Nemmers & Ted Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, 9 L.A.W. & POL’Y INT’L BUS. 855 (1977); Thomas R. Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT’L L. 513 (1978); Rachael McCulloch, Note, *United States Preferences: The Proposed System*, 8 J. WORLD TRADE L. 216 (1974); Leslie A. Glick, *The Generalized System of Preferences: Yesterday, Today and Tomorrow*, 30 FED. BAR NEWS & J. 284 (1983); Leslie A. Glick, *The Generalized System of Preferences Revisited*, 32 FED. BAR NEWS & J. 139 (1985).

165. 19 U.S.C. § 2462 (2002); Pub. L. No. 93-618, Title V, § 502.

EU-member countries, Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland.¹⁶⁶ Second, the President may not designate a country as a BDC that:

(1) is a Communist country, unless (a) it receives MFN treatment, (b) it is a member of both the WTO and the IMF, and (c) it is not dominated or controlled by international communism;

(2) is a party to a cartel that effect of which is (a) to withhold supplies of vital commodity resources from international trade or raise their price to an unreasonable level, and (b) to cause serious disruption of the world economy;¹⁶⁷

(3) affords preferential treatment to the products of a developed country, other than the United States, which is likely to have a significant adverse impact on U.S. commerce;

(4) has nationalized or expropriated, *de facto* or *de jure*, property owned by U.S. citizens or businesses which are 50-percent beneficially owned by U.S. citizens, unless the President determines either that prompt, adequate, and effective compensation has been paid; that good faith negotiations on compensation are in progress; or that the dispute has been submitted to binding international arbitration;

(5) fails to recognize or enforce arbitral awards in favor of U.S. citizens or businesses which are 50-percent beneficially owned by U.S. citizens;

(6) aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism; and

(7) has not taken or is not taking steps to afford internationally recognized worker rights to its workers.¹⁶⁸

166. *Id.*

167. The GSP Renewal Act of 1984 made specific reference to members of the Organization of Petroleum Exporting Countries (OPEC) as being ineligible *per se* for BDC designation. The reference to OPEC was dropped in the 1996 renewal. See SMALL BUSINESS JOB PROTECTION ACT OF 1996, S. REP. NO. 104-281, at 351 (1996), reprinted in 1996 U.S.C.C.A.N. 1474, 1843.

168. Although most of these conditions were part of the original GSP legislation contained in the Trade Act of 1974, the workers' rights exception was added in 1984. See H.R. REP. NO. 98-1090, *supra* note 140, at 4-5. The term "internationally recognized worker rights" includes "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children . . .; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." 19 U.S.C. § 2467(4). The President must submit an annual report to Congress on the status of internationally recognized workers' rights within each BDC. 19 U.S.C. § 2464. An unsuccessful court challenge to an alleged failure by the President to carry out his

Countries otherwise ineligible because they are countries which fall under the disqualifying conditions stated in paragraphs (4)-(7) may nevertheless receive BDC designation if the President determines that such designation will be in the national economic interest of the United States and reports that determination to Congress with his reasons.¹⁶⁹

In addition to the mandatory conditions that the President must take into consideration when making a GSP country-eligibility designation, the President is required to take into account a list of seven discretionary factors when making his BDC determination: (1) an expression by such country of its desire to be so designated; (2) the country's level of economic development; (3) whether other major developed countries (*e.g.*, Canada, the EU, Japan) are extending GSP treatment to the country (which is in large part an inquiry into whether U.S. major trading partners have graduated such country from their GSP program); (4) the extent to which such country has assured the United States that it will provide equitable and reasonable market access and refrain from engaging in unreasonable export practices; (5) the extent to which such country is providing adequate and effective protection of intellectual property rights;¹⁷⁰ (6) the extent to which such country has taken steps to reduce barriers to investment and trade in services; and (7) whether or not such country has taken or is taking steps to afford its workers internationally recognized worker rights.¹⁷¹

Regarding the designation of a least-developed developing country as an LDBDC, the President is authorized generally to designate any country as

responsibilities under this section was made in *Int'l Labor Rights Educ. & Research Fund v. Bush*, 752 F. Supp. 495 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992).

169. 19 U.S.C. §§ 2462(c), 2463(d).

170. For example, in 1997 Argentina lost fifty percent of its GSP benefits for its failure to provide patent protection for pharmaceutical products. See *U.S. to Cut Argentine GSP Benefits for Failure to Provide Patent Protection*, 14 INT'L TRADE REP. (BNA) 106 (1997).

171. 19 U.S.C. § 2462(c). The discretionary criteria listed in (5), (6) and (7) were added by the GSP Renewal Act of 1984. See H.R. REP. NO. 98-1090, *supra* note 140, at 12-13. For example, in 1995, Maldives was suspended as a GSP beneficiary following a determination that it had not taken and was not taking steps to afford its workers internationally recognized workers' rights. In 1996, President Clinton suspended certain GSP benefits from Pakistan for its failure to make sufficient progress in protecting worker rights. See BHALA & KENNEDY, *supra* note 48, at 464-68.

On top of the many conditions that developing countries are subject to in order to become GSP eligible, it has been suggested that other conditions be added. One such additional condition is a commitment to adopt climate change measures. See Michael McKenzie, *Climate Change and the Generalized System of Preferences*, 11 J. INT'L ECON. L. 679 (2008). As part of its GSP+ scheme, the EU requires accession to and effective implementation of the Kyoto Protocol to the Climate Change Convention. See *infra* notes 224-26 and accompanying text. As recently as 2010 one member of Congress suggested adding environmental protection to the list of conditions that a country must satisfy in order to become and remain GSP eligible. See *Rangel Sees Short Term Extensions This Year for GSP*, ATPA, INT'L TRADE DAILY (BNA), (Nov. 18, 2009) (proposal by Representative Linda Sanchez).

an LDBDC, based on the overall economic and discretionary criteria for country designations listed above.¹⁷² With the exception of statutorily exempted articles, he may designate any article from an LDBDC as GSP eligible, after receiving advice from the International Trade Commission (ITC) that such an article is not import-sensitive in the context of imports from least-developed countries.¹⁷³ The most important special preferential

172. As of 2011, 42 forty-two countries were designated as LDBDCs. *HTSUS*, *supra* note 20, at General Note 4(b)(i).

173. 19 U.S.C. § 2463(a)(1)(B). Section 503 of the Act authorizes the President to designate imports as eligible articles from all BDCs by Executive Order or presidential proclamation, after receiving advice from the ITC that the articles are not “import sensitive” and are thus eligible for GSP designation. 19 U.S.C. § 2463(a), (e). The President may also designate certain articles as GSP eligible for LDBDCs exclusively, after receiving advice from the ITC that the articles are not “import sensitive” and are thus eligible for GSP designation. The President may not designate any article as GSP eligible that is within any of the following seven categories of import-sensitive articles: (1) most textiles and clothing, (2) certain watches, (3) import-sensitive electronic articles, (4) import-sensitive steel articles, (5) most footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel, (6) import-sensitive semi-manufactured and manufactured glass products, and (7) any other articles which the President determines to be import-sensitive for GSP purposes. 19 U.S.C. § 2643(b)(1)(A)-(G). As noted by one commentator, the statutory product exclusions carry significant costs for U.S. consumers:

The United States has a generally open trade policy, with a simple average tariff (i.e., the sum of all tariffs divided by the number of tariff lines) of 3.5 percent and a trade-weighted average tariff (total tariff revenue divided by the value of imports) of 2.2 percent. Almost 50 percent of manufactured products, and just over one third of agricultural products, are imported duty-free on an MFN basis. But there are significant tariff peaks in the schedule, and a range of other trade barriers like antidumping orders that keep import prices higher than they would be in a free market. The average tariff on imported footwear and leather products is, according to the U.S. International Trade Commission, 10 percent, with some types of shoes attracting a tariff of 48 percent. Americans paid a (trade-weighted) average 11.4 percent tariff on apparel imports in 2007. That average obscures even higher taxes for individual products, such as the 28.6 percent women paid for imported woven man-made fiber pants. In theory, tariff peaks should represent valuable opportunities for exporters and importers to trade those products duty-free under the GSP program, but . . . there are important gaps in the program that prevent those opportunities from being realized.

James, *supra* note 158, at 7 (footnotes omitted). See U.S. Int’l Trade Comm’n, *The Economic Effects of Significant U.S. Import Restraints: SIXTH UPDATE 2009*, Inv. No. 332-325, USITC Pub. 4094 at 4, Table 1.1. Articles that are the subject of safeguards relief or the national security provisions of sections 232 of the Trade Expansion Act of 1962 are also ineligible for GSP designation, as are agricultural products subject to a tariff-rate quota that exceed the in-quota quantity. 19 U.S.C. §§ 2253, 1862, 2463(b)(2)-(3), 2463(d).

Members of Congress occasionally attempt to the product exclusions products that are not already statutorily excluded. For example, in 2010, the USTR denied a petition to

rule applicable to LDBDCs is the automatic waiver of the competitive need limits.

A BDC may lose GSP benefits in whole or in part in one of two ways: (1) by being declared ineligible as a beneficiary country under the discretionary or mandatory criteria of the GSP statute, or (2) on an article-by-article basis if a BDC exceeds the competitive need limits of the Act. The President has general authority to withdraw, suspend, or limit a country's BDC designation on the basis of any of the seven discretionary factors.¹⁷⁴ Graduation from the GSP program is mandatory once a BDC becomes a "high income" country under the World Bank benchmark,¹⁷⁵ or as a result of a review of the BDC's advances in economic development and trade competitiveness.¹⁷⁶

2. *The CBERA Program*

The Caribbean Basin Economic Recovery Act (CBERA) is the trade-related component of the broader program commonly referred to as the Caribbean Basin Initiative or CBI.¹⁷⁷ Enacted in 1984, CBERA was

remove certain sleeping bags from the list of GSP-eligible products. See Office of the U.S. Trade Representative, *Results of the 2009 GSP Annual Review* (2010), www.ustr.gov/webfm_send/2016. Bangladesh was the primary GSP beneficiary. *Id.* See Office of the U.S. Trade Representative, *Results of the 2009 GSP Review: Decision on Petition to Remove Certain Sleeping Bags from the List of Eligible Products for the Generalized System of Preferences, 2010, Special Review 24* (2010), www.ustr.gov/webfm_send/2016. In reaction to denial of the petition, Representative Robert Aderholt (R-AL) introduced the Save U.S. Manufacturing and Jobs Act (H.R. 5940) to remove sleeping bags from the list of eligible products on the ground that sleeping bags are textile products and, therefore, are statutorily excluded. See Office of Congressman Robert B. Aderholt, Press Release, *Aderholt Authors Bill to Protect Textile Jobs in North Alabama*, (July 30, 2010), <http://aderholt.house.gov/index.cfm?sectionid=20§iontree=6,20&itemid=1040>.

174. 19 U.S.C. § 2463(d).

175. See *EC—Tariff Preferences*, *supra* note 15, ¶ 188.

176. 19 U.S.C. § 2462(e). The GSP beneficiaries to have been graduated from the program most recently were Trinidad and Tobago, Equatorial Guinea, and Croatia because the President determined that they had become "high income" countries. See Presidential Proclamation 8272, 73 Fed. Reg. 38297, 38298 (June 30, 2008). Pres. Proc. 8467 Presidential Proclamation to Modify Duty-Free Treatment Under the Generalized System of Preferences and for other Purposes, Pres. Proc. 8467, Presidential Proclamation 8467, 74 Fed. Reg. 69221 (Dec. 23, 2009). Countries also become ineligible for GSP benefits if they formally enter into a bilateral trading relationship with the United States or other developed country. Bulgaria and Romania became ineligible for this reason when they joined the EU. Presidential Proclamation to Take Certain Actions Under the African Growth and Opportunity Act and the Generalized System of Preferences, Presidential Proclamation. 8098, 72 Fed. Reg. 459 (Dec. 29, 2006). The same is true for the six Caribbean and Central American countries that entered into DR-CAFTA free trade agreement with the United States in 2006-07.

177. CBERA, *supra* note 20. For the legislative history of CBERA, see H.R. REP. NO. 98-266. For additional background on the Caribbean Basin Economic Recovery Act, see U.S.

intended to shore up the region economically, politically, and socially.¹⁷⁸ Twenty-four countries and territories were initially designated as CBERA beneficiaries, but with the entry into force of DR-CAFTA in 2006-2009 that number has been reduced to 18.¹⁷⁹

INT'L TRADE COMM'N, CARIBBEAN BASIN ECONOMIC RECOVERY ACT: IMPACT ON U.S. INDUSTRIES AND CONSUMERS AND ON BENEFICIARY COUNTRIES (Pub. 4271 Sept. 2011). See generally OVERVIEW OF U.S. TRADE STATUTES, *supra* note 155, at 19; Francis W. Foote, *The Caribbean Basin Initiative: Development, Implementation and Application of the Rules of Origin and Related Aspects of Duty-Free Treatment*, 19 GEO. WASH. J. INT'L L. & ECON. 245 (1985); Keiron E. Hylton, *International Trade: Elimination of Tariffs on Caribbean Products — Caribbean Basin Economic Recovery Act*, 25 HARV. INT'L L.J. 245 (1984); James E. Stamps, *Caribbean Basin Initiative: Tens Years of Trade Preference*, 3 J. TRANSNAT'L L. & POL'Y 149 (1994).

178. In the 1988 CBERA amendments, Congress made the following findings regarding the CBI:

- (1) Caribbean and Central American countries historically have had close economic, political, and cultural ties to the United States;
- (2) promoting economic and political stability in the Caribbean and Central America is in the national security interests of the United States;
- (3) the economic and political stability of the nations of the Caribbean and Central America can be strengthened significantly by the attraction of foreign and domestic investment specifically devoted to employment generation; and
- (4) the diversification of the economies and expansion of exports, particularly those of a non-traditional nature, of the nations of the Caribbean and Central America is linked directly to fair access to the markets of the United States.

Act of Aug. 23, 1988, Pub. L. No. 100-418, § 1909(a), 102 Stat. 1107, 1318 (1988). Originally enacted for a 12-year period, CBERA trade benefits became permanent under the Caribbean Basin Economic Recovery Expansion Act of 1990, or CBI II, which reenacted CBERA without a statutory expiration date. CBERA-eligible countries are, for the most part, also GSP-eligible. Being a high-income country renders a beneficiary no longer GSP eligible, but GSP graduation does not result *ipso facto* in withdrawal or suspension of CBERA benefits. CBERA was significantly expanded by the Caribbean Economic Recovery Expansion Act of 1990, Pub. L. No. 101-382, tit. II, 104 Stat. 629 (1990). Minor amendments were made to CBERA by Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); and Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

179. Four other countries that Congress designated as potentially eligible for CBERA benefits, but which have not requested to be so designated, are Anguilla, the Cayman Islands, Suriname, and Turks and Caicos Islands. The current CBI-eligible countries are listed under HTSUS General Note 7.

Under CBERA, the President is prohibited from designating a country as a CBERA beneficiary for tax or trade benefits in the following seven circumstances:¹⁸⁰

- (1) the country is a Communist country;¹⁸¹
- (2) the country has nationalized or expropriated U.S. property, including intellectual property, or taken action with similar effect, without compensation or submission to arbitration;
- (3) the country fails to recognize or enforce arbitral awards in favor of U.S. citizens;¹⁸²
- (4) the country extends preferential tariff treatment (“reverse preferences”) to products of developed countries that has or is likely to have a significant adverse effect on U.S. commerce;
- (5) the country broadcasts U.S. copyrighted material without the owner’s consent;¹⁸³
- (6) the country has not signed an extradition treaty with the United States; or
- (7) the “country has not or is not taking steps to afford internationally recognized worker rights (as defined in [the GSP statute])” to its workers.¹⁸⁴

The President may waive all of these conditions, with the exception of the reverse preferences and extradition treaty disqualifications, if he determines that the designation of a particular country would “be in the national economic or security interests of the United States and so reports such determination to the Congress with his reasons therefor.”¹⁸⁵ Five of the seven mandatory grounds for disqualification have verbatim counterparts in the GSP statute. In addition, while CBERA disqualifies countries that do not have an extradition treaty with the United States, the GSP statute disqualifies countries that harbor terrorists. The GSP statute does not have a specific exception for pirate broadcasting and, conversely, CBERA does not have a disqualification for countries that belong to a commodities cartel.

Assuming that none of the mandatory factors against designating a country as a CBERA beneficiary apply, the President may still take into

180. 19 U.S.C. § 2702(b) (2005).

181. For congressional guidelines on what constitutes a “Communist country,” see H.R. REP. NO. 98-266, *supra* note 177, at 8. Cuba is one clear example of such a country. *Id.*

182. A business entity that is at least 50-percent beneficially owned by U.S. citizens is included in this subsection. See 19 U.S.C. § 2102(b)(2)(A).

183. See generally Richard V. Campagna, *Video and Satellite Transmission Piracy in Latin America: A Survey of Problems, Legal Strategies and Remedies*, 20 INT’L LAW. 961 (1986).

184. 19 U.S.C. § 2702(b)(1)-(7).

185. *Id.* § 2702(b).

account eleven discretionary factors before designating a country a CBERA beneficiary:

- (1) the country's expressed desire to be designated;
- (2) the economic conditions and living standards in the country;
- (3) "the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources";
- (4) the degree to which the country adheres to multilateral trade agreements, including the international trade rules of the World Trade Organization;
- (5) "the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements";
- (6) the degree to which the country's trade policies contribute to regional revitalization;
- (7) "the degree to which such country is undertaking self-help measures to promote its own economic development";
- (8) whether or not the country is taking or has taken steps to promote internationally-recognized worker rights for its workers;
- (9) the extent to which the country provides "adequate and effective means for foreign nationals to secure, exercise, and enforce" exclusive intellectual property rights;
- (10) the extent to which the country prohibits pirate broadcasting by its nationals; and
- (11) the extent to which the country is willing to cooperate with the United States in CBERA administration.¹⁸⁶

The first, second, third, fifth, eighth, and ninth factors have a GSP counterpart; the remaining five factors are unique to CBERA. The only discretionary factor unique to the GSP program is the extent to which other developed countries extend GSP status to that country.

Once a country has been designated a CBERA beneficiary, the President may later withdraw or suspend the designation, as well as withdraw, suspend, or limit the application of duty-free treatment of any eligible article from any CBERA country, based on changed circumstances that would bar a country from being initially designated a CBERA beneficiary under the seven mandatory conditions.¹⁸⁷

In 2000, Congress enacted enhanced tariff preferences under CBERA through the U.S.-Caribbean Basin Trade Partnership Act (CBTPA).¹⁸⁸ In an

186. *Id.* § 2702(c).

187. *Id.* § 2702(e)(2)(A)-(B).

188. United States-Caribbean Basin Trade Partnership Act, Pub. L. No. 106-200, title II, 114 Stat. 275 (codified as amended at 19 U.S.C. § 2701 (2000) [hereinafter CBTPA]). In contrast to CBERA which is permanent, CBTPA benefits periodically expire, although in 2010 the CBTPA was extended for ten years until either September 30, 2020 or the date on which the Free Trade Agreement of the Americas (FTAA) or another free trade agreement

effort to create rough, but not equal, parity among Mexico and AGOA beneficiaries on the one hand and CBERA beneficiaries on the other hand, the CBTPA expands the degree of preferential treatment of clothing made in the Caribbean region.¹⁸⁹ In addition to these clothing preferences, the CBTPA provides tariff treatment equivalent to that extended to Mexican products under NAFTA for certain items previously excluded from duty-free treatment under the CBERA program (footwear, canned tuna, petroleum products, certain watches and watch parts, certain handbags, luggage, flat goods, work gloves and leather wearing apparel).¹⁹⁰

In considering the eligibility of CBI beneficiaries that have expressed an interest in receiving the enhanced preferences of the CBTPA, the President is required to take into account the existing CBERA eligibility criteria, as well as the following:

- (1) whether the beneficiary country has demonstrated a commitment to “undertake its obligations to the WTO. . . on or ahead of schedule” and participate in the negotiations toward a free trade agreement with the United States;
- (2) “the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under” the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights;
- (3) “the extent to which the country provides internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”;

enters into force with respect to the United States and the CBTPA beneficiary country, whichever first occurs. 19 U.S.C. § 2703(b)(2), (b)(5)(D).

189. Under the CBTPA, duty-free and quota-free treatment is provided for clothing assembled in CBI countries from U.S. fabrics formed from U.S. yarns and cut in the United States. If the U.S. fabrics used in the production of such clothing are cut into parts in the CBTPA beneficiary countries rather than in the United States, the clothing must also be assembled with U.S. thread in order to qualify for preferential treatment. Duty-free and quota-free treatment is also available for certain knit clothing made in CBTPA beneficiary countries from fabrics formed in the Caribbean Basin region, provided that the fabric is formed from U.S. yarns. This “regional fabric” benefit for knit apparel is subject to an annual quantitative limit, with a separate limit provided for t-shirts. Duty-free and quota-free treatment is also available for certain brassieres, certain textile luggage, apparel made in CBI countries from fabrics determined not to be available in commercial quantities in the United States, and designated “hand-loomed, handmade, or folklore” articles. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EIGHTH REPORT TO CONGRESS ON THE OPERATION OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT 4 (2009). For a table summarizing the textile and clothing articles that are eligible for duty-free treatment under the CBTPA, *see* THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT, 19TH REPORT, *supra* note 123, at 1-10.

190. 19 U.S.C. § 2703(b).

- (4) “whether the country has implemented its commitments to eliminate the worst forms of child labor”;
- (5) the extent to which the country has met U.S. counternarcotics certification criteria under the Foreign Assistance Act of 1961;
- (6) “the extent to which the country has taken steps to become a party to and implement the Inter-American Convention Against Corruption”; and
- (7) “the extent to which the country (I) applies transparent, nondiscriminatory, and competitive procedures in government procurement and “(II) contributes to efforts in international fora to develop and implement international rules on transparency on government procurement.”¹⁹¹

3. *The ATPA Program*

The Andean Trade Preference Act (ATPA), enacted in 1991, authorizes preferential trade benefits for the four Andean nations of Bolivia, Ecuador, Colombia, and Peru.¹⁹² The Andean Trade Promotion and Drug Eradication Act (ATPDEA) renewed and expanded the ATPA, providing beneficiary countries duty-free access to the U.S. market for any product not specifically excluded. Sections 203(c) and 203(d) and Section 204(b)(6)(B) of ATPA,¹⁹³ as amended by the ATPDEA, require that countries meet certain criteria in order to be designated as an ATPDEA beneficiary country and to maintain such beneficiary status. As is the case with the GSP and CBERA programs, the ATPA and ATPDEA establish both mandatory and discretionary criteria. Designation by the President as an ATPA/ATPDEA beneficiary is subject to seven conditions identical to the mandatory criteria for beneficiary designation under CBERA.¹⁹⁴ These conditions also are

191. 19 U.S.C. § 2703(b)(5)(B).

192. 19 U.S.C. §§ 3201-3206.

193. 19 U.S.C. §§ 3202 (c), (d), 3203 (b)(6)(B) (2010).

194. The mandatory criteria for renewed ATPA benefits and for ATPDEA benefits are as follows:

The President shall not designate any country:

- (1) if such country is a Communist country;
- (2) if such country:
 - has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens,
 - has taken steps to repudiate or nullify any existing contract or agreement with, or any patent, trademark, or other intellectual property of, a United States citizen or a corporation, partnership, or association, which is 50 percent or more beneficially owned by United States citizens, the effect of which is to nationalize,

expropriate, or otherwise seize ownership or control of property so owned, or

- has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that: prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association,

- good-faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or

- a dispute involving such citizen, corporation, partnership or association, over compensation for such a seizure has been submitted to arbitration under the provisions of the Convention for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and promptly furnishes a copy of such determination to the Senate and House of Representatives;

(3) if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute;

(4) if such country affords preferential treatment to the products of a developed country, other than the United States, and if such preferential treatment has, or is likely to have, a significant adverse effect on United States commerce, unless the President:

- has received assurances satisfactory to him that such preferential treatment will be eliminated or that action will be taken to assure that there will be no such significant adverse effect, and

- reports those assurances to the Congress;

(5) if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent or such country fails to work towards the provision of adequate and effective protection of intellectual property rights;

(6) unless such country is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of United States citizens; and

(7) if such country has not or is not taking steps to afford internationally recognized worker rights (as defined in section 507(4) of the Trade Act of 1974) to workers in the country (including any designated zone in that country).

19 U.S.C. § 3202(b). Despite Ecuadorian laws protecting intellectual property and membership in numerous international intellectual property organizations, intellectual property rights protection and enforcement remain “major problems,” according to the

subject to the same waiver authority as under CBERA.¹⁹⁵ The President may not designate an ATPA/ATPDEA country as a beneficiary if the country fails to meet the mandatory criteria, described in the statute as “limitations on designation,” unless the President finds that designation would be in the national economic or security interest of the United States (the reverse preferences criterion and extradition treaty criterion may not be waived).¹⁹⁶ In addition, the ATPA country-designation process is subject to eleven discretionary factors identical to those under CBERA,¹⁹⁷ with an additional

USTR. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, FIFTH REPORT TO CONGRESS ON THE OPERATION OF THE ANDEAN TRADE PREFERENCE ACT 33 (2010) (copyright piracy described as “pervasive,” and pirated products openly sold with little threat of prosecution).

195. 19 U.S.C. § 3202(c)(7).

196. *Id.* § 3202(c). That subsection provides, “Paragraphs (1), (2), (3), (5), (7) shall not prevent the designation of any country as a beneficiary country under this chapter if the President determines that such designation will be in the national economic or security interest of the United States and reports such determination to the Congress with his reasons therefore.”

197. *Id.* § 3202(d). The discretionary criteria applicable to both renewed ATPA benefits and ATPDEA benefits are as follows:

- (1) an expression by such country of its desire to be so designated;
- (2) the economic conditions in such country, the living standards of its inhabitants, and any other economic factors which he deems appropriate;
- (3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;
- (4) the degree to which such country follows the accepted rules of international trade provided for under the WTO Agreement and the multilateral trade agreements (as such terms are defined in paragraphs (9) and (4), respectively, of section 2 of the Uruguay Round Agreements Act);
- (5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade;
- (6) the degree to which the trade policies of such country as they relate to other beneficiary countries are contributing to the revitalization of the region;
- (7) the degree to which such country is undertaking self-help measures to protect its own economic development;
- (8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights;
- (9) the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;

twelfth factor relating to narcotics cooperation certification criteria required to be met for eligibility for U.S. agricultural assistance.¹⁹⁸ The President must take the discretionary criteria, described in the statute as “factors affecting designation,” into account in determining whether to designate any country as a beneficiary country, but he is not barred from designating a country that fails to meet those criteria as a beneficiary. Separate discretionary criteria exist for ATPDEA eligibility.¹⁹⁹

(10) the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent;

(11) whether such country has met the narcotics cooperation certification criteria set forth in section 481(h)(2)(A) [deemed to be a reference to section 490 of the Foreign Assistance Act of 1991 by section 6(a) of Public Law 102-583] of the Foreign Assistance Act of 1961 for eligibility for United States assistance; and

(12) the extent to which such country is prepared to cooperate with the United States in the administration of the provisions of the Andean Trade Preference Act, as amended.

198. *Id.* § 3202(d)(11).

199. 19 U.S.C. § 3202. The discretionary criteria, applicable to ATPDEA benefits only, are as follows:

(1) Whether the beneficiary country has demonstrated a commitment to undertake its obligations under the WTO, including those agreements listed in section 101(d) of the Uruguay Round Agreements Act, on or ahead of schedule, and participate in negotiations toward the completion of the FTAA or another free trade agreement;

(2) the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights described in section 101(d)(15) of the Uruguay Round Agreements Act;

(3) the extent to which the country provides internationally recognized worker rights, including:

the right of association;

the right to organize and bargain collectively;

a prohibition on the use of any form of forced or compulsory labor;

a minimum age for the employment of children; and

acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

(4) whether the country has implemented its commitments to eliminate the worst forms of child labor, as defined in section 507(6) of the Trade Act of 1974;

The President's ATPA withdrawal or suspension authority, and the notification procedures to be followed in the event of a proposed withdrawal or suspension, are identical to the authority granted under CBERA.²⁰⁰ In 2008 President Bush suspended Bolivia's designation as a beneficiary country under the ATPA/ATPDEA, effective December 15, 2008, citing Bolivia's failure to meet the program's eligibility criteria related to counternarcotics cooperation.²⁰¹ In its previous extension of the program, Congress stipulated that Bolivia would not receive ATPA/ATPDEA benefits after June 30, 2009, unless by that date the President determined that Bolivia was satisfying the program's eligibility criteria. In a June 30, 2009 report to Congress, President Obama determined that Bolivia did not satisfy the program's eligibility requirements.²⁰² As a result, no ATPA/ATPDEA benefits remained in effect for Bolivia after that date, although Bolivia continues to be GSP eligible.²⁰³

4. The AGOA Program

The central U.S. trade and development program for sub-Saharan Africa is the African Growth and Opportunity Act (AGOA), enacted by Congress

(5) the extent to which the country has met the counternarcotics certification criteria set forth in section 490 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291(j)) for eligibility for United States assistance;

(6) the extent to which the country has taken steps to become a party to and implements the Inter-American Convention Against Corruption;

(7) the extent to which the country applies transparent, nondiscriminatory, and competitive procedures in government procurement equivalent to those contained in the Agreement on Government Procurement described in section 101(d)(17) of the Uruguay Round Agreements Act, and contributes to efforts in international fora to develop and implement rules on transparency in government procurement; and

(8) the extent to which the country has taken steps to support the efforts of the United States to combat terrorism.

200. *Id.* § 3202(e). The President was initially required to submit a triennial report to Congress on the third, sixth, and ninth anniversaries of the ATPA (1994, 1997, and 2000) regarding the operation of the ATPA program. *Id.* § 3202(f). That reporting requirement was subsequently changed to a biennial report. For an overview of the ATPA and ATPDEA, see Kevin Grubbs, *The Andean Trade Preference Act: Historical Effectiveness, Modern Trends, and Outlook for the Future*, 16 L. & BUS. REV. AM. 95 (2010).

201. *Bush Suspends Bolivia's ATPA Participation Because of Failure to Cooperate on Narcotics*, INT'L TRADE DAILY (BNA), (Nov. 28, 2008).

202. Rossella Brevetti, *Obama Continues ATPA Benefits For Ecuador, Does Not Reinstate Bolivia*, INT'L TRADE DAILY (BNA), (July 2, 2009).

203. See *HTSUS*, *supra* note 20, General Note 4.

in 2000.²⁰⁴ As originally enacted, AGOA had three broad objectives: (1) to “increase[] trade and investment between the United States and sub-Saharan Africa” (SSA), (2) to strengthen the private sector in SSA nations, and (3) to encourage political and economic reform in the region.²⁰⁵ Nearly all products of AGOA beneficiary countries may enter the United States duty-free, either under AGOA, GSP, or under an MFN zero rate of duty. Products are eligible for preferential access to the U.S. market from AGOA-eligible countries in three ways. First, AGOA extends the GSP program for beneficiary countries through September 30, 2015. For sub-Saharan African exporters, this provides longer-term access to the U.S. market than they enjoy under the GSP program. AGOA also eliminates the application of the GSP’s competitive need limits.²⁰⁶ Second, AGOA grants the President authority to provide duty-free treatment for certain goods not covered under the GSP program.²⁰⁷ Third, separate AGOA provisions grant duty-free treatment to qualifying apparel articles of beneficiary sub-Saharan African countries.²⁰⁸ Very few products of AGOA beneficiary countries are not eligible for duty-free treatment.²⁰⁹

AGOA’s clothing and textile benefits are the heart of the program.

AGOA provides duty-free and quota-free treatment for eligible clothing articles made in qualifying sub-Saharan African countries through 2015. Qualifying articles include clothing made of U.S. yarns and fabrics; clothing made of sub-Saharan African yarns and fabrics, subject to a cap until 2015; clothing made in a lesser-developed sub-Saharan African country from third-country yarns and fabrics, subject to a cap until 2012;²¹⁰ clothing made

204. See generally note 22. See H.R. Conf. Rep. No. 106-606 (2000), reprinted in 2000 U.S.C.C.A.N. 323. For an analysis and critique of AGOA, see J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya’s Trade and Development*, 33 N.Y.U. J. INT’L L. & POL. 651, 663-85 (2001); Rebecca Trent, *Implications for Foreign Direct Investment in Sub-Saharan Africa under the African Growth Opportunity Act*, 23 NW. J. INT’L L. & BUS. 213 (2002). AGOA was amended in 2002, Pub. L. No. 107-210, 116 Stat. 1038 (2002), and again in 2004, Pub. L. No. 108-274, 118 Stat. 823 (2004).

205. See Pub. L. No. 106-200, 114 Stat. 252, §103 (2000); 19 U.S.C. § 2463 (2000).

206. 19 U.S.C. § 2463(c)(2)(D).

207. 19 U.S.C. § 3721.

208. *Id.*

209. The full list of products from AGOA beneficiaries that may enter the U.S. duty-free may be found in the AGOA Implementation Guide, Office of the U.S. Trade Representative, *African Growth and Opportunity Act Implementation Guide* (Oct. 2000), http://ustraderep.gov/assets/Trade_Development/Preference_Programs/AGOA/AGOA_Implementation_Guide/asset_upload_file505_6510.pdf.

210. 19 U.S.C. § 3721(c)(1)(A). Through September 30, 2012, lesser-developed beneficiary sub-Saharan African countries may use third-country fabric and yarn in apparel wholly assembled in their countries and still qualify for duty-free and quota-free treatment. exports under the Special Rule are subject to a cap. Lesser-developed countries are those with a per capita gross national product of less than \$1500 a year in 1998 as measured by the World Bank. Botswana, Namibia, and Mauritius continue to receive lesser-developed country status and are eligible to use the third-country fabric provision. 19 U.S.C. § 3721(c)(3). See Office of the U.S. Trade Representative, 2008 Comprehensive Report on

of yarns and fabrics not produced in commercial quantities in the United States; certain cashmere and merino wool sweaters; hand loomed, handmade, or folklore articles, or ethnic printed fabrics; and textile articles (e.g., towels, sheets, blankets, floor coverings) produced entirely in one or more designated lesser-developed sub-Saharan African countries.²¹¹

Unlike GSP or ATPA where beneficiaries may lose their eligibility status through a private-party petition process, AGOA requires the President to determine annually whether sub-Saharan African countries are, or remain, eligible for benefits based on their progress in meeting criteria set out in the Act (a similar biennial process applies under CBERA). These criteria include all of the GSP eligibility criteria plus the following: (1) establishment of a market-based economy, (2) establishment of the rule of law, (3) elimination of barriers to U.S. trade and investment, (4) implementation of economic policies to reduce poverty, (5) the protection of internationally recognized worker rights, and (6) establishment of a system to combat corruption.²¹² Additionally, countries cannot engage in violations of internationally recognized human rights, support acts of international terrorism, or support activities that undermine U.S. national security or foreign policy interests.²¹³

U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act 24-25 (2008). The most current data on aggregate imports under the cap are available at <http://web.ita.doc.gov/tacgi/eamain.nsf/d511529a12d016de852573930057380b/8a3cec919226ed0f852573940048b050?OpenDocument> (last visited July 23, 2011).

211. 19 U.S.C. § 3721(b).

212. *Id.* §§ 3703(b), 3705.

213. The statutory criteria for AGOA eligibility provide as follows:

(a) In general

The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country—

(1) has established, or is making continual progress toward establishing—

(A) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets;

(B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;

(C) the elimination of barriers to United States trade and investment, including by—

(i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;

(ii) the protection of intellectual property; and

Table 3 summarizes the eligibility criteria under the four U.S. trade preference programs. The next section analyzes the conditions that the EU has established for eligibility under its GSO scheme.

Table 3. U.S. Trade Preference Programs: Conditions for Eligibility

Conditions for Eligibility	GSP	CBERA	ATPA	AGOA
Beneficiary is not classified as a high-income country based on World Bank criteria	✓			
Beneficiary must not be a Communist country, subject to certain exceptions	✓	✓	✓	✓
Beneficiary has not expropriated or nationalized property of U.S. persons without compensation and other due process protections	✓	✓	✓	✓
Beneficiary has acted in good faith in recognizing as binding or in enforcing arbitral awards in favor of U.S. persons	✓	✓	✓	✓
Beneficiary does not afford preferential treatment to the products of a developed country, other than the United States	✓	✓	✓	✓
Beneficiary does not engage in the broadcast of copyrighted material belonging to U.S. copyright owners without express consent		✓	✓	
Beneficiary is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of U.S. citizens		✓	✓	
Beneficiary has or is taking steps to afford internationally recognized worker	✓	✓	✓	✓

(iii) the resolution of bilateral trade and investment disputes;

(D) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;

(E) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and

(F) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

(2) does not engage in activities that undermine United States national security or foreign policy interests; and

(3) does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities.

(b) Continuing compliance

If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1) of this section, the President shall terminate the designation of the country made pursuant to subsection (a) of this section.

rights to workers within the beneficiary country [†]				
Beneficiary is not a member of a commodity cartel	✓			✓
Beneficiary does not aid or abet any individual or group which has committed an act of international terrorism	✓			✓
Beneficiary has implemented commitments to eliminate worst forms of child labor [‡]	✓			✓
Beneficiary has established, or is making progress toward establishing, a market-based economy, the rule of law, poverty reduction, and the elimination of official corruption				✓
Beneficiary has not engaged in gross violations of internationally recognized human rights or failed to cooperate in international efforts to eliminate human rights violations				✓
Beneficiary has eliminated barriers to U.S. trade and investment				✓
Beneficiary does not engage in activities that undermine U.S. national security or foreign policy interests				✓
Imports of a particular GSP-eligible product from a beneficiary country (excluding LDCs) do not exceed either (1) \$140 million in 2010, with annual adjustments of \$5 million, or (2) 50% of total U.S. imports of the product by value in a calendar year. In either event, GSP eligibility for that product must be withdrawn for that beneficiary country, subject to presidential waiver authority	✓			

[†] Internationally recognized worker rights are defined as the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, a prohibition on the worst forms of child labor, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. 19 U.S.C. § 2467(4).

[‡] The worst forms of child labor are defined as all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes; the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children. 19 U.S.C. § 2467(6).

With regard to the conditions that are shaded, they all plainly have a focus on protecting U.S. commercial and national interests. Query: Where is the causal link or nexus between the development needs of beneficiaries and these conditions? What “development need” are these conditions addressing? Aren’t the needs that are being addressed those of the United States rather than those of the beneficiary country? The term “development need” would have to be interpreted quite expansively to include these conditions within its ambit. These issues are explored more fully at the end of the next section.

D. Conditionality in the EU GSP Scheme

According to the EU, the EU’s GSP scheme is the most widely used of all developed-country GSP programs.²¹⁴ In the aftermath of the *EC—Tariff Preferences* case, the EU adopted a replacement GSP scheme in 2005 that underwent minor technical revisions in 2008. The EU’s current GSP scheme creates three separate arrangements:²¹⁵ (1) standard GSP, which provides

214. See WTO Comm. on Trade & Dev., *Generalized System of Preferences, Notification by the European Communities*, at 1-2, WT/COMTD/N/4/Add.4 (Mar. 12, 2009) [hereinafter *EU GSP Notification*].

215. See Council Reg. No. 980/2005, 2005 O.J. (L 169) 1. The EU notified the WTO of the Council Regulation in 2006. See WTO Comm. on Trade & Dev., *Generalised System of Preferences, Communication from the European Communities*, WT/COMTD/57 (March 28, 2006). The entire Council Regulation is reprinted in that notification to the WTO. The EU GSP scheme was renewed in 2008 for an additional three-year period. See Council Reg.

nonreciprocal tariff preferences to 176 developing countries and territories on over 6,200 tariff lines;²¹⁶ (2) the Special Incentive Arrangement for Sustainable Development and Good Governance (popularly known as “GSP Plus” or “GSP+”), which offers additional preferences to support vulnerable developing countries in their ratification and implementation of relevant international conventions in the areas of human rights, labor rights, environment, and good government;²¹⁷ and (3) Everything But Arms (EBA), which provides duty-free, quota-free access to the EU for the 48 LDCs on all products (7,140 tariff lines) except arms, ammunition, and parts and accessories thereof.²¹⁸

The GSP-eligible products are classified as either non-sensitive or sensitive products. Non-sensitive products (approximately 3,200 tariff lines representing slightly more than half of the products covered) enjoy duty-free access. Sensitive products (a mix of agricultural, textile, clothing, carpets, and footwear items) benefit from a tariff reduction of 3.5 percentage points off the MFN tariff rate on *ad valorem* duties, or a 30 percent reduction of those duties when calculated on a specific rate basis. For textiles and clothing, the reduction is 20 percent of the *ad valorem* MFN duty rate.²¹⁹

In terms of country coverage, tariff preferences under standard GSP are granted to all countries that are not classified by the World Bank as high-income countries for three consecutive years and which are not sufficiently diversified in their exports to the EU. Lack of export diversification is deemed to exist when the value of imports for the five largest sectors of a country’s GSP imports into the EU represent more than 75 percent of the total GSP imports from that beneficiary country into the EU.²²⁰ Any of the GSP arrangements may be temporarily withdrawn for serious and systematic violations of core human and labor rights conventions and on a

No. 732/2008, 2008 O.J. (L 211) 1 EC [hereinafter EU Council Reg. 732/2008], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF>.

216. The EU’s Combined Nomenclature (the EU’s version of the Harmonized Commodity Description and Coding System) consists of 9,568 tariff lines, of which 2,405 carry an MFN duty rate of zero. See *EU GSP Notification*, *supra* note 214, at 1-2.

217. See generally UNCTAD, *Generalized System of Preferences: Handbook on the Scheme of the European Community 12-16* (2008), http://www.unctad.org/en/docs/itcdtsbmisc25rev3_en.pdf; EU Council Reg. 732/2008, *supra* note 215. See also Lorand Bartels, *The WTO Legality of the EU’s GSP+ Arrangement*, 10 J. INT’L ECON. L. 869, 991 (2007) (GSP+ does not comply with Appellate Body’s report in *EC—Tariff Preferences* because, *inter alia*, “it is difficult to see how the imposition of an immediate cost [in the form of adopting and implementing 27 international conventions] on a developing country can be seen as a ‘positive response’ to a development need.”).

218. See *Handbook on the Scheme of the European Community*, *supra* note 217, at 9-12; *EU GSP Notification*, *supra* note 214, at 4.

219. See *EU GSP Notification*, *supra* note 214, at 3. For illustrations of the various duty-rate reductions under the EU GSP scheme, see *Handbook on the Scheme of the European Communities*, *supra* note 217, at 3-5.

220. EU Council Reg. 732/2008, *supra* note 215, art. 3(1).

number of other grounds such as unfair trading practices and serious shortcomings in customs controls.²²¹ This measure was applied in 2006 to Belarus on the grounds of serious and systematic violations of labor rights.²²² In addition, GSP+ benefits may be temporarily withdrawn if the national legislation of a GSP+ beneficiary country no longer incorporates the relevant human rights, environmental, and good governance conventions or if that legislation fails to effectively implement the relevant conventions.²²³

The GSP+ scheme—formally known as “the special incentive arrangement for sustainable development and good governance”—was adopted by the EU in order to bring its former GSP program into compliance with the Appellate Body report in *EC—Tariff Preferences*.²²⁴ As with its predecessor, GSP+ offers additional tariff preferences for countries deemed to be “vulnerable,” provided the country ratifies and effectively implements 16 core human and labor rights conventions and 11 conventions related to the environment and good governance principles (the 27 conventions are listed in Table 4 below). Imported products originating in a GSP+ beneficiary generally receive duty-free treatment.²²⁵ This tariff preference has the potential for being a significant benefit for GSP+ beneficiaries that export products to the EU that are deemed to be sensitive, in particular textiles and clothing, and thus excluded from duty-free treatment under standard GSP.

A country is deemed to be vulnerable if (1) it lacks export diversification to the EU, i.e., more than 75 percent of its GSP exports to the EU are based on five or fewer product groups, and (2) it is a small exporter to the EU, i.e., its GSP exports to the EU account for less than 1 percent of total GSP imports into the EU.²²⁶ The Euro-centric nature of the vulnerability criteria is self-evident.

221. *Id.* art. 15(1).

222. *See EU GSP Notification, supra* note 214, at 6.

223. EU Council Reg. 732/2008, *supra* note 215, art. 15(2).

224. *See* Council Reg. No. 980/2005, 2005 O.J. (L 169) 1. The EU notified the WTO of the Council Regulation in 2006. *See* WTO Comm. on Trade & Dev., Communication from the European Communities, Generalised System of Preferences, WT/COMTD/57 (March 28, 2006) (the entire Council Regulation is reprinted in the EU’s notification to the WTO).

225. EU Council Reg. 732/2008, *supra* note 215, art. 8(1).

226. *Id.* art. 8(2). Article 8(2) provides as follows:

[A] vulnerable country means a country:

- (a) which is not classified by the World Bank as a high-income country during three consecutive years, and of which the five largest sections of its GSP-covered imports into the Community represent more than 75% in value of its total GSP-covered imports; and

Table 4. Conditions for Eligibility in EU Trade Preference Programs

Conditions for Eligibility	GSP	GSP +	EB A
Beneficiary is not classified by the World Bank as a high-income country for three consecutive years	✓✓	✓✓	
Beneficiary is classified as an LDC based on U.N. Economic & Social Council criteria			✓✓
Beneficiary must be removed when the value of imports for the five largest sections of its imports covered by the GSP into the Community represents less than 75% of the total GSP-covered imports from that beneficiary country into the Community.	✓✓	✓✓	
Beneficiary must be removed when it benefits from a preferential trade agreement with the EU which covers all the preferences provided for by the present scheme to that country	✓✓		
Beneficiary must ratify and effectively implement the core human and labor rights conventions [†] and the conventions related to the environment and good governance [‡]		✓✓	
GSP-covered imports into the EU represent less than 1% in value of the total GSP-covered imports into the EU		✓✓	
Tariff preferences must be removed for products covered in a section of the Common Customs Tariff when the average value of EU imports from that country of products included in the section exceeds 15% of the value of EU imports of the same products from all beneficiary countries over three consecutive years, unless imported products under any section represent more than 50% in value of all GSP-covered imports into the EU originating from that country	✓✓	✓✓	
The preferential arrangements may be withdrawn temporarily, in respect of all or of certain products originating in a beneficiary country, for any of the following reasons: (a) the serious and systematic violation of principles laid down in the core human and labor rights UN/ILO Conventions; [†] (b) the export of goods made by prison labor; (c) serious shortcomings in customs controls on the export or transit of illicit drugs, or failure to comply with international conventions on money-laundering; (d) serious and systematic unfair trading practices which have an adverse effect on EU industry and which have not been addressed by the beneficiary country; (e) serious and systematic infringement of the objectives of regional fishery organizations or arrangements of which the EU is a member	✓✓	✓✓	✓✓
The preferential arrangements may be withdrawn temporarily in cases of fraud, irregularities or systematic failure to comply with or to ensure compliance with the rules concerning the origin of the products	✓✓	✓✓	✓✓
Where a product originating in a beneficiary country causes, or threatens to cause, serious difficulties to an EU producer of like or directly competing products, normal Common Customs Tariff duties on that product may be reintroduced at any time at the request of a Member State or on the Commission's initiative.	✓✓	✓✓	✓✓

[†]Core human and labor rights UN/ILO Conventions (Annex III, Council Regulation 732/2008)

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination Against Women
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide

(b) of which the GSP-covered imports into the Community represent less than 1% in value of the total GSP-covered imports into the Community.

In 2008, the following 16 countries were designated as GSP+ beneficiaries through 2011: Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nicaragua, Peru, Paraguay, El Salvador, and Venezuela. See Commission Decision 2008/938, 2008 O.J. (L 334) 90 (EC).

8. Convention concerning Minimum Age for Admission to Employment
 9. Convention concerning the Prohibition and Elimination of the Worst Forms of Child Labor
 10. Convention concerning the Abolition of Forced Labor
 11. Convention concerning Forced or Compulsory Labor
 12. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
 13. Convention concerning Discrimination in Respect of Employment and Occupation
 14. Convention concerning Freedom of Association and Protection of the Right to Organize
 15. Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively
 16. International Convention on the Suppression and Punishment of the Crime of Apartheid
- ‡*Conventions related to the environment and to good governance principles (Annex III, Council Regulation 732/2008)*
17. Montreal Protocol on Substances that Deplete the Ozone Layer
 18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
 19. Stockholm Convention on Persistent Organic Pollutants
 20. Convention on International Trade in Endangered Species of Wild Fauna and Flora
 21. Convention on Biological Diversity
 22. Cartagena Protocol on Biosafety
 23. Kyoto Protocol to the United Nations Framework Convention on Climate Change
 24. United Nations Single Convention on Narcotic Drugs (1961)
 25. United Nations Convention on Psychotropic Substances (1971)
 26. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
 27. United Nations Convention against Corruption (Mexico)

Assuming that trade, financial, and development needs are the litmus test of the validity of GSP conditionality, the conditions that the United States and the EU have established in their respective GSP schemes are both over-inclusive and under-inclusive. They are over-inclusive to the extent that they link GSP benefits to market access for goods, services, and capital, to IPR protection, and to the fight against illicit drugs. These conditions introduce elements of reciprocity into the GSP scheme. Why are conventions on apartheid and genocide included on the EU's GSP+ list? Where is the causal link between beneficiaries' development needs and the 27 conventions listed in the EU's GSP+ scheme? Do all countries have a "need" or a risk of suffering apartheid or genocide? Is the EU compensating countries for "needs" that they do not have? Will tariff preferences alleviate the identified "need"? If not, then the necessary causal link between the condition and the preference is broken. In addition, the EU's vulnerability criteria for GSP+ preferences are patently euro-centric which doesn't necessarily translate into a country being vulnerable vis-à-vis other countries. For example, certain countries might be major exporters to the United States and only to the EU on a secondary or tertiary basis. In other words, they might not be economically vulnerable, at least from a more global perspective rather than through the lens of the vulnerability criteria set out in the GSP+ scheme. Moreover, what does a developing country's status as a Communist country—a disqualifying condition under all the U.S. trade preference programs—have to do with its trade, financial, and development needs? Why is the Kyoto Protocol on the EU's list of 27 conventions? Just how big is the carbon footprint of the GSP+ beneficiaries?

Both the U.S. trade preference program conditions and the EU's GSP+ conditions are under-inclusive to the extent that none of the conditions include preferences for developing countries, for example, that are battling an AIDS epidemic or that are the chronic victims of natural disasters. Why aren't such countries singled out for special GSP treatment in either the U.S. GSP or EU GSP+ scheme? Why aren't anti-corruption campaigns one of the conditions of the U.S. GSP program? Exactly who are the intended beneficiaries of the GSP programs? The clear focus of some of the U.S. and EU conditions is on the economic and social welfare of persons in the EU and the United States rather than on the economic and social welfare of persons living in the developing world.

E. Conditionality Revisited

The legality of conditionality in GSP programs, whether such conditions actually promote development, and whether they even have a colorable link to trade and development have been hotly contested.²²⁷ Furthermore, critics of GSP conditionality charge that preference-granting countries' conditions violate principles of morality, justice, and equality.²²⁸ Regarding the legality of GSP conditionality, do such conditions violate the spirit, if not the letter, of the Enabling Clause? The Appellate Body's report in EC—Tariff Preferences notwithstanding, the preamble to the GSP Decision refers to “mutually acceptable arrangements . . . drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment.”²²⁹ While preambulatory language does not create a legally binding commitment, the Enabling Clause makes permanent the GSP “described in” the GSP Decision.²³⁰ No one has ever seriously argued that national GSP schemes are the product of a “mutually acceptable arrangement” between preference-granting and beneficiary countries. The phrase “mutually acceptable arrangement,” contemplates consultation, if not a modicum of negotiation as well. Because GSP schemes are unilateral in nature, by definition they cannot be mutual. Beyond that, however, the Appellate Body in EC—Tariff Preferences elevated the preambulatory language to a legally binding commitment when it interpreted the Enabling Clause as permitting discrimination among GSP beneficiary countries, provided such discrimination treats similarly

227. See generally Lorand Bartels, *The WTO Ruling on EC—Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programs*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE*, *supra* note 106, at 463.

228. See, e.g., FRANK J. GARCIA, *TRADE INEQUALITY, AND JUSTNESS: TOWARD A LIBERAL THEORY OF JUST TRADE* 156-68 (2003); Ernst-Ulrich Petersmann, *Mini-Symposium on Developing Country in the Doha Round: Introduction*, 8 *J. INT'L ECON. L.* 347, 349-57 (2005).

229. *Waiver Decision on a Generalized System of Preferences*, *supra* note 68, prmb1.

230. Enabling Clause, *supra* note 47, at n.3.

circumstanced countries in a similar fashion.²³¹ The Appellate Body gave a rather perfunctory interpretation of the pivotal term “generalized” as meaning that GSP schemes must be “generally applicable,”²³² thus approving conditionality to the extent that objective criteria are laid down for distinguishing among classes of beneficiaries that have a nexus to the trade, development, and financial needs of developing countries. Most importantly for purposes of the present discussion, the Appellate Body clearly did not adopt an interpretation of the Enabling Clause that condemns GSP conditionality per se. In short, according to the Appellate Body, identical preferences need not be given to all developing countries. Whether the Appellate Body is correct as a matter of law and policy has been challenged by more than one commentator.²³³ As noted by Lorand Bartels:

The Appellate Body’s reasoning and conclusion are quite plausible from a purely textual perspective. However, there are certain outstanding issues which could prove problematic in the future. First, it is difficult to share the Appellate Body’s confidence that “objective standards” exist according to which it might be possible to differentiate legitimate from illegitimate developing country needs. . . . Why should Pakistan’s troubles with drug production and trafficking be any more a legitimate “development need” than another developing country’s problems with poor education, health epidemics—or refugee flows (the EC’s rationale for adding Pakistan to the list of beneficiaries of the drugs preferences)?²³⁴

Another difficulty is how to square the Appellate Body’s reasoning in EC—Tariff Preferences with what the Appellate Body said in the Shrimp—Turtle dispute regarding discrimination among countries where the same conditions prevail. In Malaysia’s challenge to the revised U.S. regulations on shrimp harvesting for the protection of sea turtles, the Appellate Body stated with regard to discrimination among similarly circumstanced countries: “We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”²³⁵ Building on this, the Appellate Body, in

231. The Appellate Body reached this conclusion by reference to the French and Spanish versions of the GSP Decision which use the phrase “as defined in” rather than “as described in” that is used in the English language version. *EC—Tariff Preferences*, *supra* note 15, ¶ 147.

232. *Id.* ¶ 156.

233. See, e.g., Howse II, *supra* note 107, at 1352 (the description of GSP programs as “generalized, non-discriminatory and non-reciprocal” was meant to be aspirational); Bartels, *supra* note 227, at 482-83.

234. Bartels, *supra* note 227, at 482 (footnote omitted).

235. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 165, WT/DS58/AB/RW (Oct. 22, 2001) (adopted Nov. 26, 2001).

Malaysia’s Article 21.5 recourse challenging the compliance with the Appellate Body’s initial *Shrimp—Turtle* report of the revised U.S. guidelines on the harvesting of shrimp, stated:

We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member, including, of course, Malaysia. Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* Member.²³⁶

This statement indicates that, in the Appellate Body’s view, GSP programs should be sufficiently flexible so as not to be a straight jacket when addressing developing countries’ trade, development, and financial needs. Of course, that is not the same thing as saying that the Enabling Clause mandates national GSP programs to identify and address all relevant trade, development, and financial needs of each individual GSP beneficiary.²³⁷ Still, the Appellate Body in *EC—Tariff Preferences* did not take the position that it would totally defer to national legislatures insofar as conditionality is concerned, leaving them at liberty to impose whatever conditions they desire as part of their GSP schemes. Rather, in any future disputes concerning GSP conditionality—as unlikely as such disputes will be²³⁸—the Appellate Body has carved out a role for itself in resolving them, albeit an arguably hypothetical role. The Appellate Body added “the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification.”²³⁹

Conditions for Eligibility	GSP	CBERA	ATPA	AGOA
Beneficiary is not classified as a high-income country based on World Bank criteria	✓			
Beneficiary must not be a Communist country, subject to certain exceptions	✓	✓	✓	✓

236. *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, *supra* note 235, ¶ 149 (footnote omitted, emphasis in original).

237. See, e.g., Bartels, *supra* note 227, at 483.

238. See Gregory Shaffer & Yvonne Apea, *GSP Programmes and Their Historical-Political-Institutional Context*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE*, *supra* note 107, at 488, 500-02 (authors note the unlikelihood of future disputes concerning the WTO legality of GSP conditionality because of the costs involved and human resources required to bring a successful WTO complaint).

239. *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, *supra* note 235, ¶ 148.

Beneficiary has not expropriated or nationalized property of U.S. persons without compensation and other due process protections	✓	✓	✓	✓
Beneficiary has acted in good faith in recognizing as binding or in enforcing arbitral awards in favor of U.S. persons	✓	✓	✓	✓
Beneficiary does not afford preferential treatment to the products of a developed country, other than the United States	✓	✓	✓	✓
Beneficiary does not engage in the broadcast of copyrighted material belonging to U.S. copyright owners without express consent		✓	✓	
Beneficiary is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of U.S. citizens		✓	✓	
Beneficiary has or is taking steps to afford internationally recognized worker rights to workers within the beneficiary country [†]	✓	✓	✓	✓
Beneficiary is not a member of a commodity cartel	✓			✓
Beneficiary does not aid or abet any individual or group which has committed an act of international terrorism	✓			✓
Beneficiary has implemented commitments to eliminate worst forms of child labor [‡]	✓			✓
Beneficiary has established, or is making progress toward establishing, a market-based economy, the rule of law, poverty reduction, and the elimination of official corruption				✓
Beneficiary has not engaged in gross violations of internationally recognized human rights or failed to cooperate in international efforts to eliminate human rights violations				✓
Beneficiary has eliminated barriers to U.S. trade and investment				✓
Beneficiary does not engage in activities that undermine U.S. national security or foreign policy interests				✓
Imports of a particular GSP-eligible product from a beneficiary country (excluding LDCs) do not exceed either (1) \$140 million in 2010, with annual adjustments of \$5 million, or (2) 50% of total U.S. imports of the product by value in a calendar year. In either event, GSP eligibility for that product must be withdrawn for that beneficiary country, subject to presidential waiver authority	✓			

Does this mean that all GSP programs must be tailored to the individual needs of each and every developing country? In the *Shrimp—Turtle* dispute the Appellate Body strongly suggested that the conditions prevailing in a country exporting shrimp to the United States must be taken into account. However, the *EC—Tariff Preferences* and *Shrimp—Turtle* cases arguably are an apples-to-oranges comparison, given that the *Shrimp—Turtle* dispute concerned a U.S. import prohibition to protect endangered sea turtles. In addition, the *Shrimp—Turtle* dispute dealt with discrimination under the chapeau of GATT Article XX which contains the general exceptions to the GATT core obligations of non-discrimination. By its terms, GATT Article XX condemns “arbitrary or unjustifiable” discrimination. In other words,

the term “discrimination” is not monolithic but rather contextual, having different meanings and interpretations depending upon the legal setting.²⁴⁰

Finally, in its report in *EC—Tariff Preferences*, the panel identified what it described as “*a priori* limitations” that are a permissible basis for discriminating among developing countries in GSP programs, namely “import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country.”²⁴¹ The panel’s source for reading into the Enabling Clause an exception for *a priori* limitations was an UNCTAD document, Agreed Conclusions of the Special Committee on Preferences, that served as the basis for the 1971 GSP waiver and, ultimately, the Enabling Clause itself.²⁴² The Agreed Conclusions provide in part as follows:

The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted. The preference-giving countries, however, declare that such measures would remain exceptional and would be decided on only after taking due account in so far as their legal provisions permit of the

240. See generally Qin, *supra* note 106.

241. Panel Report, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, ¶ 7.108 (Dec. 1, 2003) [hereinafter *Panel Report, EC—Tariff Preferences*].

242. See *Panel Report, EC—Tariff Preferences*, *supra* note 242, where the panel states:

[T]he Panel is of the view that the Agreed Conclusions were incorporated by reference into the 1971 Waiver Decision. From the above factual review, the Panel considers that the 1971 Waiver Decision is intended to cover the Agreed Conclusions. According to Article 31.2(a) of the Vienna Convention, an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” constitutes context of the treaty. The Panel considers that Resolution 21(II) and the Agreed Conclusions establish such an agreement relating to the conclusion of the 1971 Waiver Decision; therefore, they are context for the 1971 Waiver Decision in the sense of Article 31.2(a) of the Vienna Convention. This is confirmed by the fact that the 1971 Waiver Decision itself does not contain any specifics on GSP arrangements. The fact that the Enabling Clause incorporates GSP “as described in the Decision of the Contracting Parties of 25 June 1971, relating to the establishment of generalized, nonreciprocal and non-discriminatory preferences to developing countries”, also strongly suggests that Resolution 21(II) and the Agreed Conclusions were carried over from the 1971 Waiver Decision into the 1979 Enabling Clause so as to constitute a context for the Enabling Clause in relation to GSP arrangements, and paragraphs 2(a) and 3(c) in particular.

Id. ¶¶ 7.85-7.87.

aims of the generalized system of preferences and the general interests of the developing countries, and in particular the interests of the least developed among the developing countries. . . .

Certain preference-giving countries provide for a mechanism_[.] including an *a priori* limitation formula_[.] under which quantitative ceilings will be placed on preferential imports. Some of these countries might, nevertheless, have recourse also to escape type measures, for those products which are not covered by *a priori* limitation formulae.²⁴³

Without passing on the validity of other types of graduation mechanisms in GSP programs, the panel stated in a footnote that “[s]everal of the GSP schemes mentioned in this Note [by the WTO Secretariat on WTO members’ GSP programs] contain different forms of ‘graduation’ mechanisms.”²⁴⁴ The panel added, “[w]hether a particular *a priori* limitation measure in a GSP scheme complies with the terms of paragraph 3(c) [of the Enabling Clause] is a matter that can only be decided in light of the particular factual setting of the measure, and this is not a matter before this Panel.”²⁴⁵ On appeal, the Appellate Body declined to address this question or whether *a priori* limitations are permitted at all. In the words of the Appellate Body, “Given our interpretation, which permits differentiation among GSP beneficiaries, it is not necessary for us to rule on whether *a priori* limitations are permitted under the Enabling Clause.”²⁴⁶ We are thus left to wonder what other *a priori* limitations, if any, might be permitted under the Enabling Clause.

F. The Top Heavy Distribution of GSP Benefits and the Shrinking Margin of Preference

As noted, the Enabling Clause alludes to the principle of graduation, but makes no express provision for it.²⁴⁷ The former Director-General of GATT, Olivier Long, was less elliptical on the subject:

The contention that equality of treatment creates a condition of inequality between developed and developing countries was the main justification and motive for the introduction of preferential treatment. A logical consequence of this precept is that, as the economic situation of developing countries improves, equality should become progressively the rule [C]ertain developing countries are already competitive in

243. UNCTAD, *Agreed Conclusions of the Special Committee on Preferences*, TD/B/330, ¶¶ III.1, III.3, attached as Annex D-4 to *Panel Report, EC—Tariff Preferences*, *supra* note 242.

244. *Panel Report, EC—Tariff Preferences*, *supra* note 242, ¶ 7.111 n.332.

245. *Id.* ¶ 7.114.

246. *EC—Tariff Preferences*, *supra* note 15, ¶ 174 n.355.

247. *See supra* note 102 and accompanying text.

particular sectors. In fact, some of them have lost the benefit of preferences for certain of their exports within the framework of the GSP.

* * * *

Differential treatment should not be looked upon as immutable. If it were, the results of the efforts made through national and international policies to promote development would amount to little.²⁴⁸

Olivier Long's observation raises a question that has yet to be answered satisfactorily: When should a developing country graduate from GSP?

The principle of graduation from GSP became increasingly popular among donor developed countries during the pre-Uruguay Round years.²⁴⁹ While developed countries have tried to push developing countries down the road to fuller participation in the multilateral trading system, developing countries have pushed back.²⁵⁰ In fact, no developing country has ever volunteered to be graduated. Preference-granting countries have reminded beneficiary developing countries that preferential tariff treatment is neither an end in itself nor is it meant to last in perpetuity.²⁵¹

While all developing countries may avail themselves of the WTO provisions on special and differential treatment, under national GSP programs preferential tariff treatment ends for those developing countries which attain a certain level of wealth. For example, as noted above, under the U.S., EU, Japan, and Canada GSP programs, graduation is mandatory once a beneficiary country becomes a "high income" country under World Bank criteria.²⁵² The concept of graduation was put into practice in the years leading up to the Uruguay Round, with the most noteworthy being the GSP graduation exercise in 1988 when President Reagan graduated the four Asian "tigers" of Hong Kong, Korea, Singapore, and Taiwan, which

248. LONG, *supra* note 57, at 103-04.

249. See Hindley, *supra* note 40, at 71-74; Gregory O. Lunt, *Graduation and the GATT: The Problem of the NICs*, 31 COLUM. J. TRANSNAT'L L. 611 (1994).

250. See, e.g., Hindley, *supra* note 40, at 72, where the author notes that in 1979 the Group of 77, a bloc of developing countries, rejected the concept of graduation being introduced by developed countries. In the 1982 Report of UNCTAD's Secretary-General, ASSESSMENT OF THE RESULTS OF THE MULTILATERAL TRADE NEGOTIATIONS, the graduation principle in paragraph 7 of the Enabling Clause was criticized to the extent it would permit developed countries to discriminate among developing countries in their trade relations. See REPORT OF THE SECRETARY-GENERAL OF UNCTAD, ASSESSMENT OF THE RESULTS OF THE MULTILATERAL TRADE NEGOTIATIONS 29, ¶ 179, UNCTAD Doc. T/B/778/Rev. 1 (1982).

251. Within the Committee on Trade and Development, the view was expressed that the Enabling Clause and GSP contemplated differentiation among different developing countries, given that they were at different stages of economic development. See GUIDE TO GATT LAW AND PRACTICE, *supra* note 46, vol. 1, at 58.

252. See 19 U.S.C. § 2462(e); *supra* note 120 and accompanying text.

collectively accounted for 57 percent of U.S. GSP imports in 1985.²⁵³ In 1996, President Clinton withdrew Malaysia's GSP designation, effective January 1, 1997, because it had made sufficient progress in economic development and international competitiveness.²⁵⁴ Five countries were notified in 1996 that they were being graduated from the U.S. GSP program as "high income" countries, effective January 1, 1998: Aruba, Cyprus, Greenland, Macao, and the Netherlands Antilles.²⁵⁵ In 2009 (effective January 1, 2011), Croatia and Equatorial Guinea were removed from U.S. GSP eligibility as high income countries.²⁵⁶ To date, the economies of these countries have not collapsed due to a GSP graduation.²⁵⁷

What seems to be clear is that unilateral trade preference programs have been beneficial for some developing countries, harmful to others, and insignificant for still others.²⁵⁸ Take, for example, the U.S. GSP program: the statutory goals of the GSP are, in part, to (1) promote the development of developing countries; (2) promote trade, rather than aid, as a more efficient way of promoting economic development; (3) stimulate U.S. exports in developing country markets; and (4) promote trade liberalization in developing countries.²⁵⁹ As observed by the Congressional Research

253. H.R. DOC. No. 100-162 (1988). See *Reagan Decides Asia's 'Four Tigers' can Fend for Themselves*, CHRISTIAN SCI. MONITOR, Feb. 1, 1988, at 7; Jay S. Newman, *Korea and the American Generalized System of Preferences: Was Graduation A Proper Response?*, 11 U. PA. J. INT'L BUS. L. 687 (1990). The EU took similar action in 1995. See Simon Lester, *The Asian Newly Industrialized Countries to Graduate from Europe's GSP Tariffs*, 36 HARV. INT'L L.J. 220 (1995).

254. Presidential Proclamation to Amend the GSP, 61 Fed. Reg. 54,719 (Oct. 21, 1996). See *GSP: Malaysia Graduated from Program, Some Pakistan Products Suspended*, 13 INT'L TRADE REP. (BNA) 1629 (1996).

255. See Presidential Proclamation to Amend the GSP, 61 Fed. Reg. 54,719 (1996); U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1996: OPERATION OF THE TRADE AGREEMENTS PROGRAM 143 (Pub. No. 3024 1997).

256. See Presidential Proclamation To Modify Duty-Free Treatment Under the GSP, Presidential Proclamation 8467, 74 Fed. Reg. 69,221 (Dec. 23, 2009).

257. See, e.g., TOH MUN HENG & LINDA LOW, INSTITUTE OF SOUTHEAST ASIAN STUDIES, ECONOMIC IMPACT OF THE WITHDRAWAL OF THE GSP ON SINGAPORE 36 (1991). Under the U.S. GSP program, if a country loses its GSP beneficiary status, its exports to the United States are thereafter assessed the prevailing MFN duty rate, barring eligibility under another U.S. trade preference program, e.g., CBERA or AGOA, which does not have a high-income graduation requirement.

258. See Hoekman, Martin & Primo Braga, *supra* note 41, at 23.

259. When it renewed the U.S. GSP program in 1984, Congress identified the following ten purposes of the GSP program:

- (1) promote the development of developing countries, which often need temporary preferential advantages to compete effectively with industrialized countries;
- (2) promote the notion that trade, rather than aid, is a more effective and cost-efficient way of promoting broad-based sustained economic development;

Service, “[i]t is difficult to assess whether or not the program has achieved these goals, however, because the GSP is only one of many such foreign aid initiatives employed by the United States to assist poorer countries.”²⁶⁰ Economic success within countries is also related to endogenous factors such as political stability, sound macroeconomic policies, availability of infrastructure to foster industry, and legal/financial frameworks that encourage foreign investment. In the period 1996-2007, total U.S. imports

(3) take advantage of the fact that developing countries provide the fastest growing markets for United States exports and that foreign exchange earnings from trade with such countries through the Generalized System of Preferences can further stimulate United States exports;

(4) allow for the consideration of the fact that there are significant differences among developing countries with respect to their general development and international competitiveness;

(5) encourage the providing of increased trade liberalization measures, thereby setting an example to be emulated by other industrialized countries;

(6) recognize that a large number of developing countries must generate sufficient foreign exchange earnings to meet international debt obligations;

(7) promote the creation of additional opportunities for trade among the developing countries;

(8) integrate developing countries into the international trade system with its attendant responsibilities in a manner commensurate with their development;

(9) encourage developing countries--

(A) to eliminate or reduce significant barriers to trade in goods and services and to investment,

(B) to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights, and

(C) to afford workers internationally recognized worker rights; and

(10) address the concerns listed in the preceding paragraphs in a manner that--

(A) does not adversely affect United States producers and workers, and

(B) conforms to the international obligations of the United States under the General Agreement on Tariffs and Trade.

Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501(b), 98 Stat. 3019 (1984), *codified at* 19 U.S.C. § 2461(b). For the legislative history of the 1984 Act, see HOUSE COMM. ON WAYS AND MEANS, GENERALIZED SYSTEM OF PREFERENCES RENEWAL ACT OF 1984, H.R. REP. NO. 98-1090 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1501.

260. GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 20.

from GSP BDCs increased threefold, from \$107.8 billion in 1996 to \$313.4 billion in 2007.²⁶¹ This may indicate, in very general terms, that the GSP and other preferential programs have helped generate some export-driven growth in developing countries. However, that is only half the story. Total exports from BDCs claiming a GSP preference for their exports increased from \$11.6 billion in 1996 to \$32.6 billion in 2006 (in 2007, GSP imports declined slightly to \$30.8 billion).²⁶² Thus, the percentage of goods entering the United States under the GSP program, relative to total U.S. imports from BDCs, has remained relatively flat at around 10 percent.²⁶³ This may be due, in part, to competitive need limits (absent CNL waivers) on GSP-eligible products and mandatory graduation of high-income countries from the program.

If it can be agreed that nonreciprocal trade preference programs are not a silver bullet for eradicating poverty in beneficiary countries, is the shortfall in efficacy inherent in the programs or is it attributable more to endogenous factors within beneficiary countries? Arguably, the internal factors within beneficiary countries outweigh the external ones. One of the intrinsic factors for many potential beneficiary countries—especially LDCs—is limited supply capacity. If a country lacks the manufacturing capacity to supply value-added goods to a potential export market, then the promise of duty-free treatment in that market is an especially hollow one. A pivotal factor that can determine the impact of trade preference programs on economic development is the ability of developing countries to take advantage of global trading opportunities.²⁶⁴ A preferential tariff is of little benefit to countries without the ability to produce the goods that are subject to the preferential duty rate at competitive prices for which import demand exists. This ability to produce and trade competitively on world markets, which is termed “trade capacity,” is generally related to having the appropriate economic conditions and institutions that help attract investment and enhance efficiency. Yet, many developing countries’ lack of trade capacity prevents them from taking full advantage of opportunities to export goods and services. The lack of trade capacity is due to inadequate economic, legal, and governmental infrastructure. Poor networks of roads, small and outdated ports, inadequate supplies of energy and other utilities, rigid financial institutions, inefficient or corrupt customs bureaus, and poorly educated citizens are some of many obstacles that can make production and exporting difficult and more costly.²⁶⁵ In addition,

261. *See id.*

262. *See id.*

263. *See id.*

264. *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-150, FOREIGN ASSISTANCE: U.S. TRADE CAPACITY BUILDING EXTENSIVE, BUT ITS EFFECTIVENESS HAS YET TO BE EVALUATED (2005).

265. For example, in Haiti, an apparel manufacturer located in a government-owned industrial park complained they did not have reliable public sources of electricity or water.

entrepreneurs in developing countries may have little access to information about markets and export standards or to affordable financing that would enable them to set up a successful export business. Even countries that have well-developed industries that produce items with strong global demand, with or without the boost of tariff preferences, may need to improve their trade capacity. For example, mineral commodities such as oil or agricultural products such as sugar and soybeans are an important source of export income to many developing countries. However, developing a greater diversity of export industries requires new skills, technologies, and investment.

Even assuming that supply capacity exists within a GSP beneficiary country and that it is not weighed down by negative internal factors, a number of extrinsic factors may raise the bar to foreign market access: (1) country exclusions based on economic or political grounds; (2) product exclusions for domestic political reasons on items of keen export interest to beneficiary countries, in particular textile and clothing products, and for economic reasons when a beneficiary has achieved a certain level of international competitiveness in a particular product; and (3) rules of origin and the associated record keeping that goes with such rules that make compliance with them difficult.

Regarding country exclusions on economic or political grounds, over the course the 40-year life of GSP questions about which countries should benefit and how more benefits could be directed to poorer countries have been raised repeatedly. The concerns relate to the original intention that preference programs would confer temporary trade advantages on developing countries, which would eventually become unnecessary as the countries became more competitive. The GSP program has mechanisms to limit duty-free benefits by “graduating” countries that are no longer considered to need preferential treatment, based on income and competitiveness criteria. As noted, the U.S. GSP program has used two approaches to graduation: outright removal of a country from GSP eligibility once it becomes a World Bank high-income country, and the more gradual approach of ending duty-free access for individual products from a country. Why not graduate the perennially largest users of GSP programs—for example, Brazil and India—on the ground that they have achieved an overall level of international competitiveness to warrant such removal? Against the backdrop that some members of Congress were concerned that GSP benefits are reaped largely by a few countries while many developing countries are not trading much under the program, the USTR announced in 2006 that it would conduct a more comprehensive evaluation of the GSP program to determine whether the program should be changed so that benefits are not focused on a few countries and developing

Consequently, they had to pay for backup electricity generators and trucked-in water to operate their factories. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 126, at 30.

countries that traditionally have not been major traders under the program receive benefits.²⁶⁶ As part of that overall review, the USTR examined trade and development indicators for large users of the GSP program to determine whether they could be considered sufficiently competitive in terms of trade in eligible products and, therefore, should no longer be designated as GSP beneficiaries.²⁶⁷ No firm conclusions were reached,²⁶⁸ arguably since a built-in tension exists with such a proposal because some beneficiaries may be very competitive in certain industries but nevertheless have large numbers of poor people.²⁶⁹ For example, a large developing country such as India may have more competitive export industries than smaller least-developed countries, but it also may have many more people living in poverty who may benefit from the economic opportunities provided under trade preference programs.²⁷⁰ At the same time, if GSP beneficiary countries are to be differentiated, the process must be consistent with the Enabling Clause as interpreted by the Appellate Body in EC—Tariff Preferences.

Regarding product exclusions for domestic political reasons, as noted *supra*, U.S. preference programs provide duty-free treatment for a little over half of the 10,500 U.S. tariff lines, in addition to those that are already duty-free on an MFN basis for all countries. Still, they also exclude many other products from duty-free status, including some that developing countries are capable of producing and exporting. Some product exclusions were established in preference legislation to protect sensitive U.S. industries from

266. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 17.

267. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 125, at 41.

268. See GSP: Initiation of Reviews and Request for Public Comments, 71 Fed. Reg. 45079 (Aug. 8, 2006). As part of the Trade Policy Staff Committee's, all previously granted CNL waivers were individually evaluated, in addition to the standard practice of examining requests for new CNL waivers. The TPSC also examine the eligibility status of several middle-income countries (Argentina, Brazil, Croatia, India, Indonesia, Kazakhstan, Philippines, Romania, Russia, South Africa, Thailand, Turkey, and Venezuela) based on (1) their World Bank classification as upper-middle-income economies and (2) the fact that exports from each of these countries accounted for more than 0.25% of world goods exports in 2005 as reported by the WTO. Although none of these countries were graduated or otherwise removed from GSP eligibility as a result of the 2006 review, several competitive need limit waivers (meaning that these products had been permitted to be imported duty-free under GSP despite the statutory import thresholds) from these countries were revoked. For example, effective July 1, 2007, Brazil lost CNL waivers for ferrozirconium and some motor vehicle parts exports, and India and Thailand lost CNL waivers for precious metal jewelry articles.

269. See Andy Sumner, *Global Poverty and the New Bottom Billion: What if Three-Quarters of the World's Poor Live in Middle-Income Countries?* (Inst. Dev. Stud. Sept. 2010) (author concludes that three-fourths of the world's poorest people live in low-middle income countries, including India, China, Pakistan, and Nigeria, thus complicating the design of trade and development programs), <http://www.ids.ac.uk/files/dmfile/GlobalPovertyDataPaper1.pdf>.

270. See *id.*

import competition. As noted, the GSP statute prohibits various “import-sensitive” categories of products from being designated as eligible, including most textiles, apparel, watches, footwear, handbags, luggage, flat goods, work gloves, and leather apparel; import-sensitive electronics, steel, and glass products; and “any other articles which the President determines to be import-sensitive in the context of the Generalized System of Preferences.”²⁷¹ In addition, agricultural products subject to a tariff-rate quota are not eligible under GSP for duty-free treatment if such imports exceed the in-quota quantity. The three regional trade preference programs exclude some of these products as well. U.S. tariffs on a number of these excluded products tend to be high.²⁷² However, the statutory language for each of these other product categories is based on business conditions as of specific dates—June 30, 1989, for watches; January 1, 1994, for textiles and apparel; and January 1, 1995, for footwear, handbags, luggage, flat goods, work gloves, and leather apparel. U.S. industries have changed in the intervening years, and these statutory provisions may not be up-to-date.²⁷³

Regarding product exclusions based on international competitiveness grounds, the United States uses competitive need limits to end GSP duty-free status for individual products from individual countries once the value or volume of an imported product crosses a certain threshold.²⁷⁴ The

271. 19 U.S.C. § 2463 (2006).

272. The GSP statutes provide some discretion for the President to determine which items within some of these product categories are not import-sensitive. Specifically, for electronic, steel, and manufactured and semi-manufactured glass products, the President may determine which of these items are eligible for GSP benefits, based on advice from the ITC about import sensitivity. Typically, the determinations for individual products are based on petitions filed by interested parties. There is no administrative discretion to add products for the other product categories specifically excluded by statute from GSP eligibility. See generally Office of the U.S. Trade Representative, Results of the 2009 GSP Review: Decisions on Petitions to Add Products to the List of Eligible Products for the Generalized System of Preferences 1 (2010), www.ustr.gov/webfm_send/2016; GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 125, at 36.

273. For example, in comments to USTR on the GSP program in 2006, the Footwear Distributors and Retailers of America stated that imports now account for 99 percent of U.S. footwear sales and urged that the footwear exclusion be removed from the GSP legislation. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 125, at 37.

274. See *supra* note 107 and accompanying text. The CNL caps—\$150 million in GSP imports of one product from a single country in 2011, or 50 percent of all U.S. imports of the product—are set by statute. When GSP imports of a product reach one of these limits, the country is denied GSP benefits for that product unless imports fall below the CNL level in a subsequent year and it seeks renewed designation for GSP eligibility. However, an interested party could petition for a CNL waiver before imports reach the CNL cap. In 2010, President Obama determined that duty-free treatment for certain products from Brazil, India, and Thailand should be withdrawn because they had reached the CNL cap for passenger tires from Thailand, wood flooring from Brazil, and gold rope necklaces from India. See Office of the U.S. Trade Representative, Results of the 2009 GSP Review: Products Newly Subject to Exclusion by Competitive Need Limitation 2 (2010), www.ustr.gov/webfm_send/2016; *Obama Withdraws Duty Free GSP Benefits For Certain Thai, Indian, Brazilian Imports*,

rationale for these limits is that they indicate a country has become a sufficiently competitive exporter of the product and that ending preferential benefits may allow other GSP-eligible countries to expand their access to the U.S. market. The value of trade from GSP beneficiaries that is ineligible for duty-free entry because of the CNL ceiling is substantial. The GAO identified \$13 billion in imports in 2006 that could not enter duty-free under GSP due to CNL exclusions—over one-third of the trade from GSP beneficiaries potentially subject to the CNL ceiling.²⁷⁵

Although the intent of country and product graduation is to redistribute preference benefits more widely among beneficiary countries, GSP beneficiary countries will not necessarily benefit from another country's loss of preference benefits. The benefits cannot be transferred directly from one country to another; rather, preferences are a marginal advantage that can make a country's product competitive only if other factors make it nearly competitive. In fact, the loss of a tariff preference to a given country may give an advantage to a country that is not a beneficiary of U.S. trade preference programs, such as China.²⁷⁶

In addition to the uneven distribution of GSP benefits among developing-country beneficiaries, as a direct result of the progressive reduction in the MFN duty rates on many products imported into the Quad countries following the Tokyo Round in 1979 and Uruguay Round in 1993, the margin of preference—the difference between the MFN duty rate and the GSP duty rate—has been drastically reduced for beneficiary developing countries, in many cases to zero.²⁷⁷ For the Quad countries as a group, it has been estimated that the margin of preference for industrial products is

INT'L TRADE DAILY (BNA), July 1, 2010. Regarding Thai passenger tires, when the Obama administration imposed safeguards relief on tires from China in 2009 by increasing the duty on Chinese passenger tires to 35 percent, U.S. importers turned to Thailand as an alternative supplier. Thailand's success pushed it over the CNL cap, with the result being that its passenger tire exports to the United States were subject to the 4-percent MFN duty rate. See James, *supra* note 159, at 12.

275. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 125, at 40. In 2007, President Bush revoked eight CNL waivers as a result of legislation passed in December 2006. Consequently, over \$3.7 billion of trade in 2006 from six GSP beneficiaries lost duty-free treatment. Members of the business community and members of Congress raised concerns that the revocation of these waivers would harm U.S. business interests while failing to provide more opportunities to poorer beneficiaries. See *id.* at 41. Under the regional trade programs CNLs do not apply.

276. As reported by the GAO, "In the countries we visited, we repeatedly heard concerns that China, or sometimes other countries, would be most likely to gain U.S. imports as a result of a beneficiary's loss of preferences." *Id.* at 40.

277. For an economic analysis and the policy implications of the shrinking margin of preference, see TRADE PREFERENCE EROSION, *supra* note 41. See generally AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES (1984).

virtually zero, with the exception of textiles and clothing.²⁷⁸ For agricultural products, the margin has been estimated to be 3.3 percentage points for non-LDCs and as much as 14.3 percentage points for LDCs.²⁷⁹ Nevertheless, despite the shrinking margin of preference overall, the duty rates for selected products that are GSP-eligible can be high.²⁸⁰

Have the overall benefits of GSP been eroded to the point of irrelevancy as a result of the progressive reduction in MFN tariff rates in the last two multilateral trade negotiation rounds? Opinion is divided. The answer depends to some extent on GSP utilization rates by beneficiary countries, i.e., the share of eligible imports entering the preference-granting country under its trade preference program.²⁸¹ One study of the U.S. GSP program concludes that U.S. tariff preference erosion may be significant for

278. See Fabien Candau & Sébastien Jean, *What Are European Union Trade Preferences Worth for Sub-Saharan African and Other Developing Countries* in TRADE PREFERENCE EROSION, *supra* note 41, at 65, 70-71 [hereinafter Candau & Jean]. *But see* The Trade Partnership, *The U.S. Generalized System of Preferences Program: An Update* (2010) (noting the economic importance of the U.S. GSP program for both beneficiary countries and U.S. consumers), www.tradepartnership.com/pdf_files/2010_GSP_Update.pdf.

279. See Candau & Jean, *supra* note 278, at 70-71. The authors note that in the case of agricultural products the average preference margin for all developing countries is higher in Canada and Japan than it is in the United States and the EU. *See id.*

280. See, e.g., Coalition for GSP, *Statement to the U.S. Senate Committee on Finance Regarding U.S. Preference Programs: Options for Reform*, Mar. 9, 2010, at 3 (noting double-digit duty rates ranging from 12.5-26 percent on GSP-eligible products, such as certain household porcelain, china tableware, kitchenware, certain artificial flowers, and flashlights), http://www.tradepartnership.com/pdf_files/GSPCoalition_SFC_03092010.pdf. Moreover, in a 2001 study conducted by the WTO Secretariat of the Quad members' GSP programs, the Secretariat issued a caveat about drawing any firm conclusions about the impact of GSP programs, given the spotty reporting of statistical data. *See* Note by the Secretariat, *supra* note 25, at 1 ("The elaboration, by the WTO Secretariat, of a study on the functioning of GSP schemes was complicated by the lack of comprehensive and easily usable notifications by Members and lacunae in the data available on the application of the GSP schemes preferences in general. This means that the statistical information, in particular, needs to be read with caution. Moreover, drawing firm conclusions about the effects of the GSP from these limited data is fraught with difficulties.").

281. In the United States overall utilization rates are high for nonagricultural products, although GSP utilization is low for countries eligible under the three regional trade preference programs. *See* Judith M. Dean & John Wainio, *Quantifying the Value of U.S. Tariff Preferences for Developing Countries*, in TRADE PREFERENCE EROSION, *supra* note 41, at 40-43, 50. In the case of Canada, one study concludes that for developing countries the utilization rate is dichotomous, with the bulk of developing-country exports to Canada not utilizing the GSP program because most of their exports receive duty-free treatment under the prevailing MFN duty rate. *See* Kowalski, *supra* note 78, at 141-42, 159. In the case of LDCs, a similar dichotomous situation is observed. *See id.* at 159. In the WTO's 2007 trade policy review for Australia, it was observed that the value of preferential tariffs was being eroded because of MFN duty rate reductions. *See* WTO, *Trade Policy Review: Australia*, WT/TPR/S/104 (2007). For a graphical analysis of the percentage of imports entered under the U.S. trade preference programs for the largest importers, *see of U.S. Trade Preference Programs*, *supra* note 129, at 33-35. For the largest U.S. importers, the share of imports receiving preferences is a mixed bag. *See id.* at 35.

exporting countries because the preference margins remain high, particularly in the case of textiles and clothing.²⁸² The authors of one study conclude that “[a]lthough the erosion of U.S. tariff preferences may not have large impacts on development, it may be more significant for a large number of countries and products than previously thought.”²⁸³ However, these same authors add a caveat that bilateral and regional free trade agreements (FTAs) that the United States has with other countries, e.g., NAFTA, will lower the benefit for trade preference program beneficiaries, regardless of the program, because such FTAs effectively lower the nominal MFN duty rate published in the Harmonized Tariff Schedules of the United States.²⁸⁴

It is equally important to note that having statutory duty-free access is not the same as having such access in practice. Compliance with rules of origin, supply capacity, and health and safety requirements affect overall utilization rates. The costs of complying with rules of origin in particular—which can range from one to five percent of the value of the imported goods—have a strong tendency to wipe out the benefit of any margin of preference.²⁸⁵ One study conducted in 2002 estimated that 62 percent of

282. See Dean & Wainio, *supra* note 281, at 31, 61-62.

283. *Id.* at 62.

284. See *id.*

285. See Candau & Jean, *supra* note 278, at 73. The U.S. Government Accountability Office notes the negative impact that competitive need limits and rules of origin can have on GSP utilization rates. According to the GAO:

Conditions on product entry are also a significant factor affecting opportunities and trade under U.S. preference programs. Two specific conditions, “competitive need limits” and “rules of origin,” illustrate how administration of program provisions, although addressing important policy considerations, may affect the ability of beneficiary countries to fully access the opportunities otherwise offered by U.S. preference programs. GSP places export ceilings or “competitive need limits” (CNL) on eligible products for certain beneficiaries that exceed specified value and import market share thresholds. (LDCs and AGOA beneficiaries are exempt.) Our analysis of 2006 data shows that some 37 percent of the value of imports of GSP products from non-LDC, non-AGOA GSP beneficiaries — or \$13 billion of the \$35 billion — were excluded from entering duty-free under GSP largely due to CNLs. Researchers also warn that rules of origin and related paperwork are often complex and can raise costs. As a result, it may not be worth incurring the expense of compliance to use preferences.

Rules of origin for U.S. trade preference programs typically specify a minimum percentage value-added to the entering product that must come from the beneficiary country in order to qualify for duty-free treatment. However, some programs allow countries to “cumulate” inputs from other countries or regions. More complex rules apply to some products, notably apparel. The fact that U.S. Customs and Border Protection [CBP]— the U.S. agency charged

imports from all developing countries to Quad members were eligible for preferential tariff treatment under all GSP schemes, but only 39 percent of such products were entered claiming preferential tariff treatment under one of those schemes.²⁸⁶ In the case of LDC imports, the percentages were 64

with enforcing such rules when goods enter the United States — used a 70-page PowerPoint presentation to train its officers on the conditions associated with apparel access under U.S. preference programs is illustrative of the complexity of such rules. For example, our meetings with CBP and statements by Haitian textile industry groups indicate that some of the rules of origin for HOPE are highly complex to administer and use. Indeed, as recently as late November, 2007 industry sources had indicated to us that HOPE has yet to become fully operational for Haiti to benefit because of delays in issuing export visas, and the complicated nature of HOPE rules of origin. Another possible indication of the impact of rules of origin are the “fill rates” for each region’s quotas (known as “tariff preference levels”). Within Africa, the LDCs that qualify for liberalized rules of origin allowing “third country” (non.-U.S., non-AGOA) fabric and yarn to be used in apparel and still qualify for duty-free entry under AGOA had achieved a relatively high 43.3 percent “fill rate” for their quotas in 2006, versus other African suppliers, which must use domestic African or U.S. inputs, whose fill rate stood at 1.8 percent. Recent economic literature also suggests that AGOA had some success in increasing export activity for some countries, but the increased exports are mainly associated with the liberalized apparel provisions.

GAO Report on Integrating U.S. Trade Preference Programs, *supra* note 125, at 75-76 (footnotes omitted).

286. See Candau & Jean, *supra* note 278, at 74. The U.S. Government Accountability Office reports that “the utilization rate for GSP or GSPLDC imports from all eligible partners was 61 percent. The utilization rate for imports from countries eligible for only GSP or GSPLDC was slightly higher, at about 75 percent. Countries eligible for GSPLDC, with enhanced duty-free access, had a utilization rate of 58 percent. Countries that were eligible for AGOA and CBI/CBTPA had utilization rates of 77 percent and 47 percent, respectively. The four Andean countries eligible for ATPA/ATPDEA had the highest utilization rate of 90 percent.” *GAO Report on Integrating U.S. Trade Preference Programs*, *supra* note 125, at 78. The GAO adds that “to some extent, low utilization of GSP may reflect the fact that coverage across programs is relatively uniform for many products, whereas program conditions and rules of origin vary. As a result, countries that have access to both GSP and regional programs may opt to use the regional programs.” *Id.* It must be borne in mind that these statistics represent aggregate utilization rates. Such rates are not smooth across all countries, but rather will vary from country to country and across product sectors. See Patrick Low, Roberta Piermartini & Jürgen Richter, *Multilateral Solutions to the Erosion of Nonreciprocal Preferences in Nonagricultural Market Access*, in *TRADE PREFERENCE EROSION*, *supra* note 41, at 235-36 (where the authors note that “aggregation often hides high variance”). *Accord GAO Report on Integrating U.S. Trade Preference Programs*, *supra* note 126, at 78 (“The utilization rates of the leading GSP exporters to the United States in terms of value vary widely, ranging from 99 percent (Zimbabwe) to 9 percent (Chad).”). For statistics on the utilization rates of U.S. trade preference programs in 2006 on a beneficiary-by-beneficiary basis, see *id.* at 82-91.

percent and 43 percent, respectively.²⁸⁷ Given the overlapping nature of both the U.S. and EU trade preference schemes, not only with each other but also within the United States and the EU, assessing utilization rates and the impact of the shrinking margin of preference is a complex exercise. For example, a low utilization rate under the U.S. GSP program might simply mean that a beneficiary country has entered the imported product under one of the three U.S. regional trade preference programs. Such could be the case when the applicable rules of origin for alternative trade preference programs are more favorable than those of the GSP program—which appears to be the case under the three regional U.S. trade preference programs relative to the U.S. GSP program and appears to have been the case under the now-superseded Cotonou Agreement relative to the EU's EBA initiative.²⁸⁸ In other words, familiarity with the administration and rules of origin of a preferential tariff regime creates inertia and inhibits resort to an alternative one, even if the latter offers a more favorable margin of preference. In addition, when the margin of preference is *de minimis*—say, one to two percentage points—the incentive for exporters to seek entry under the preferential tariff regime is wiped out by the costs of compliance with rules of origin.²⁸⁹ So long as compliance costs are greater than or equal to the

287. See Candau & Jean, *supra* note 278, at 74. Candau and Jean observe that under AGOA the utilization rate was 67 percent for mineral products, but only 36 percent for textiles and clothing. See *id.*

288. See *Id.* at 74, 76. The EC's trade relations with the African, Caribbean and Pacific (ACP) countries are governed by the ACP-EC Cotonou Agreement signed in 2000 to run for a period of 20 years. The ACP countries are comprised of 48 sub-Saharan African countries, 15 Caribbean nations, and 15 countries in the Pacific. The Cotonou Agreement replaced the Lomé Convention (1975-2000). The Agreement received a WTO waiver at the Doha Ministerial Conference that expired on December 31, 2007. See WTO Ministerial Conference, *European Communities—ACP-EC Partnership Agreement, Decision of 14 November 2001*, WT/MIN(01)/15 (Nov. 14, 2001). Under the Agreement, ACP countries (except for South Africa) benefited from non-reciprocal trade preferences during an interim period (2001-07), i.e., duty-free treatment on industrial, certain agricultural, and fishery products, subject to a safeguard clause. Moreover, preferential rules of origin contain product-specific requirements that allowed for cumulation between the ACP countries, the EU, and overseas countries and territories. Pursuant to the Agreement, the EU negotiated reciprocal Economic Partnership Agreements (EPAs) with the ACP countries. Specifically, the EPAs define bilateral trade-related provisions, within the broader framework of WTO rules. Thus, they provide for progressive elimination of tariffs and non-tariff measures (including technical barriers to trade), on both goods and services, and address other trade-related issues. Development concerns are reflected through flexibility regarding the depth of liberalization, its asymmetry, the length of transition periods, and trade coverage and exceptions. See Trade Policy Review Body, *Report by the Secretariat, Trade Policy Review for the European Communities*, WT/TPR/S/177/Rev.1, at 37-38 (May 15, 2007).

289. As noted in UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA:

Over the past 30 years, the track record on unilateral preference programs remains mixed. Although many developing countries have benefited overall from the programs through increased exports and

margin of preference, no incentive exists for an exporter to seek preferential duty treatment.²⁹⁰ In short, a correlation exists between utilization rates and the margin of preference; i.e., the smaller the margin of preference, the lower the utilization rate.²⁹¹ Onerous rules of origin and the accompanying compliance costs set the stage for even lower utilization rates.²⁹²

economic growth, they have also been hamstrung by high costs and inefficiencies that program rules often cause.

Clearly, the rules and criteria that donor countries prescribe for granting trade preferences are a daunting obstacle for most developing countries to overcome. For example, manufacturers and exporters must determine the preference program(s) for which their country qualifies, if the programs cover their products, and finally wade through complex guidebooks, laws, and regulations to determine whether they can meet (and substantiate) the individual compliance standards for the various programs. For some producers, the costs of compliance may be higher than the tariff preference. According to one UNCTAD report, fulfilling the administrative requirements related to rules of origin may cost as much as 3 percent of the value of the goods concerned. Meanwhile, average applied tariffs for non-agricultural goods ranged from only 3.2 percent to 3.8 percent in the United States, EU, and Canada in 2007. Meeting these standards—and doing so in a cost-effective manner—is particularly challenging for producers in countries with poor infrastructure and limited experience exporting.

The myriad of rules and potentially high compliance costs affect not only developing-country producers' ability to take advantage of the preferences, but also developed-country importers' willingness to source from the GSP beneficiary countries. GSP tariff preferences improve competitiveness vis-à-vis imports from developed or other non-beneficiary countries, but program uncertainty (i.e., frequent expirations), limited country or product coverage, and strict rules of origin that increase costs all cut into the real preference margins gained by producers and importers alike. In the sense that complex program rules limit both overall export growth by and direct investment in the beneficiary countries, they severely inhibit the ability of the various GSP schemes to deliver on the promise of promoting economic development in needy countries.

ANTHONY *supra* note, at 15-16 (footnotes omitted).

290. See Candau & Jean, *supra* note 278, at 82.

291. See *id.* at 84.

292. See, e.g., Low, Piermartini & Richter, *supra* note 286, at 236 (where the authors observe that “if the cost of compliance with rules of origin exceeds the margin of preference, the producer would not use the preference”); Komuro, *supra* note 41, at 110 (“The low GSP utilization rate [in Japan] reflects trade liberalization under GATT/WTO and Japan’s legal regime. With the promotion of trade liberalization following the Uruguay Round, the preference margin gradually decreased; hence, the benefits arising from preference margins faded compared to the costs incurred in qualifying for preferences. Major exporting GSP beneficiaries . . . incurred significant costs in meeting GSP rules of origin and keeping necessary evidence to obtain certificates of origin; moreover, small local industries in GSP beneficiaries frequently lack the financial and human resources to comply with

If additional reductions in MFN duty rates of developed countries are one of the positive outcomes of the Doha Round negotiations, what will be the losses for certain developing countries? For example, it is estimated that if the Quad cut its MFN duty rates by 40 percent, the loss in exports from LDCs in the aggregate—which with some exceptions²⁹³ currently receive duty-free treatment from the Quad—would be 1.7 percent, with select LDCs suffering even greater export losses of up to 11.5 percent.²⁹⁴ In terms of total world trade these amounts are small, but for the adversely affected LDCs these losses would be a substantial blow. On the other hand, it is estimated that developing countries other than LDCs would on the whole stand to gain from such MFN duty-rate reductions by the Quad members.²⁹⁵ This asymmetrical effect of trade liberalization is more than a little disturbing.²⁹⁶ However, these estimates rest on three heroic assumptions: (1) that the Doha Round will eventually be concluded, (2) that the Doha Round will achieve ambitious results insofar as tariff reductions on goods of export interest to developing countries are concerned, and (3) that with or without a successful and ambitious Doha Round, that the pace of reciprocal bilateral and regional free trade agreements will slow or stop. Currently, there exists little evidence to support any of these assumptions.²⁹⁷

Chalk it up to the law of unintended consequences, but one of the foreseeable outcomes of the Tokyo and Uruguay Rounds was the reduction in MFN duty rates. Tariff reductions have always been a top priority on negotiators' agendas at the MTN rounds, and this is no different in the Doha Round. However, in the Doha Round there is a clear recognition of the problem of the shrinking margin of preference. The shrinking margin of preference has arguably created an incentive to foot-drag at the Doha Round.²⁹⁸ In 2004 the WTO General Council flagged the issue in a rather

onerous rules of origin.”). It has been suggested that in the case of very low utilization rates, where liberalizing rules of origin is not an option, it might be preferable to lower the MFN duty rate. *See* Low, Piermartini & Richtering, *supra* note 286, at 239.

293. Although Australia, Canada, and the EU have extended duty-free treatment to nearly all imports originating in LDCs, Japan and the United States have not extended an across-the-board, duty-free exception for LDCs.

294. *See* Hoekman, Martin & Primo Braga, *supra* note 104, at 18.

295. *See id.* at 19.

296. *See id.* at 20. By one estimate real income losses to African LDCs if the EU were to eliminate all import duties would be \$460 million. *See id.* In addition to the trade preference erosion that beneficiary developing countries will experience if donor countries' MFN duty rates are further lowered in the Doha Round, developing countries that are parties to reciprocal bilateral and regional free trade agreements with developed countries will likewise experience trade erosion.

297. *See* Daniel Pruzin, *Punkte Says U.S. Frustrated by Talks With Brazil, China, India on Doha Tariffs*, INT'L TRADE DAILY (BNA), June 25, 2010; Daniel Pruzin, *WTO Chief Lamy to Admit Doha Talks At Impasse as Fears of Collapse Grow*, INT'L TRADE DAILY (BNA), (Mar. 29, 2011).

298. The U.S. Government Accountability Office has noted the perverse incentive that the shrinking margin of preference has created for foot-dragging in the Doha Round:

[I]nternational movement toward lowering tariffs has an unavoidable effect on the marginal value of trade preferences to beneficiaries. Because of this, beneficiary countries' desire to keep their preferential advantages may generate some internal resistance to multilateral liberalization. As some countries make unilateral decisions to liberalize their national trade policies, and as others enter into bilateral and regional trade agreements that result in lower tariffs among trading partners, countries that rely on preferential margins find the advantages they gain from preferences fading away.

The erosion of the value of trade preferences poses yet another trade-off. All of the preference programs include provisions to encourage countries to move into reciprocal and liberalized trading relationships. Indeed, a number of countries that were former beneficiaries of preference programs have gone on to conclude free trade agreements with the United States, and some have joined the ranks of newly industrialized nations. However, members of Congress and some administration officials have raised concerns that some preference beneficiaries are placing their interests in trade preference programs above the broader interest in multilateral liberalization, which the United States has traditionally advocated. They note that, in an effort to maintain their preference benefits, some beneficiary countries have created roadblocks at WTO in the Doha Round of negotiations. This was confirmed by U.S. agency officials we interviewed. The assurance of continued preferential access to the U.S. market has at times, created a disincentive to negotiation of reciprocal free trade agreements. For example, officials at Commerce and Labor told us that the extension of AGOA preferences during the negotiations toward a free trade agreement with members of the Southern African Customs Union may have contributed to the suspension of those negotiations since countries were already granted broad access to the U.S. market. In the past, spokesmen for countries that benefit from trade preferences have told us that any agreement reached under the Doha framework must, at a minimum, provide a significant transition period to allow beneficiary countries to adjust to the loss of preferences. Additionally, they questioned whether it is even fair to expect certain countries, such as small-island states, to survive without some trade preference arrangements under any deal that may be reached through WTO negotiations.

[E]conomic studies predict that global trade liberalization, such as might be achieved in a new WTO agreement from the Doha negotiations, would generally benefit most developing countries. Moreover, with regard to preference erosion and its impact on developing countries, some research has suggested that the negative effects of preference erosion may be outweighed by other factors — in particular, the benefits generated by more open trade on the part of developing countries. For example, one recent study estimates that while a small number of countries, particularly those that currently receive very large benefits under existing preference schemes, could experience a loss of market access, most countries would benefit

oblique manner in the context of negotiations on tariff reductions on non-agricultural products. The General Council stated that “[w]e recognize the challenges that may be faced by non-reciprocal preference beneficiary Members . . . as a result of these negotiations on non-agricultural products”²⁹⁹—with a similar acknowledgment in the case of agricultural products³⁰⁰—and then handed the problem off to the negotiators to devise solutions.³⁰¹ A few suggestions have been made, including the following: (1) limit the scope of product coverage when negotiating MFN tariff reductions,³⁰² (2) extend the phase-in period for MFN tariff reductions in the

from the expanded market access due to reduced tariffs under the Doha Round.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-443, U.S. TRADE PREFERENCE PROGRAMS PROVIDE IMPORTANT BENEFITS, BUT A MORE INTEGRATED APPROACH WOULD BETTER ENSURE PROGRAMS MEET SHARED GOALS 43-45 (2008) (footnotes omitted).

299. WTO, *Decision Adopted by the General Council on 1 August 2004*, Annex B, ¶ 16, WT/L/579 (Aug. 2, 2004) [hereinafter General Council Decision].

300. See General Council Decision, *supra* note 299, annex A, ¶ 44. That paragraph provides that “[t]he importance of long-standing preferences is fully recognised. The issue of preference erosion will be addressed. For the further consideration in this regard, paragraph 16 and other relevant provisions of TN/AG/W/1/Rev.1 will be used as a reference.” The cross-reference is to a document issued in 2003 by the chairman of the Doha Round negotiating group on agricultural products. That document called for extending the period for phasing in tariff reductions on agricultural products of export interest to developing countries from 5 years (a phase-in period that would be presumptively applicable to all agricultural products) to 8 years. See WTO Comm. on Agriculture, Special Session, *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments*, TN/AG/W/1/Rev.1, ¶16 (March 18, 2003).

301. The General Council instructed the Negotiating Group on Market Access “to take into consideration, in the course of its work, the particular needs that may arise for the Members concerned.” General Council Decision, *supra* note 299, annex A, ¶ 44.

302. See, e.g., WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Mauritius*, TN/MA/W/21/Add.1, ¶ 6 (July 15, 2003) (proposing that tariff lines on products of strong export interest to developing countries be either excluded from tariff reductions or that a maximum tariff reduction of 10 percent on each tariff line so identified be staggered over 10 annual installments); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Trinidad and Tobago on behalf of the ACP Group of States*, TN/MA/W/47, ¶ 11 (March 30, 2004) (proposing that specific tariff lines of products exported under preferences be identified and then excluded or adapted so that the margin of preference is less drastically affected as a result of MFN tariffs reduction); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Benin on behalf of the ACP Group of States*, TN/MA/W/53, ¶ 3 (March 11, 2005) (proposing that certain products of export interest to select developing countries be subject to more modest tariff reductions and resulting tariff preference erosion using an “index of vulnerability” that is based on three factors: (1) the share of the particular product of the importing country on the total exports of the exporting country, (2) the share of the particular product of the exporting country in the importing country, and (3) the world market share of the exporting country for the particular product; in other words, a country will be deemed to be more vulnerable the less diversified its export markets and export products and the smaller its share of world trade in those products). See also WTO,

case of agricultural and non-agricultural products that are key exports for developing countries,³⁰³ (3) expand the scope of existing GSP programs to embrace excluded products of export interest to LDCs,³⁰⁴ (4) encourage developing countries to launch their own nonreciprocal trade programs in favor of LDCs,³⁰⁵ and (5) provide compensation to beneficiary developing countries that suffer trade losses as a result of MFN tariff reductions.³⁰⁶

Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Barbados, Jamaica and Trinidad and Tobago*, TN/MA/W/30, ¶ 18 (March 25, 2003) (noting that the continued erosion of preferential market access will hinder the integration of these countries into the multilateral trading system, and proposing that certain unspecified “positive measures” be found to mitigate against the negative impact of the loss of preferential market access); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Egypt, India, Indonesia, Kenya, Malaysia, Mauritius, Nigeria, Tanzania, Uganda and Zimbabwe*, TN/MA/W/31, ¶ 18 (March 25, 2003) (same); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Fiji*, TN/MA/W/38, ¶ 13 (June 16, 2003) (same).

303. See, e.g., General Council Decision, *supra* note 299, annex A, ¶ 44; WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Papua New Guinea*, TN/MA/W/39, ¶ 24 (July 2, 2003) (proposing that tariff reductions affecting GSP schemes in respect of products of vital importance for developing countries be implemented in equal annual installments over a period which is double the normal implementation period for tariff reductions or 8 to 10 years, with the first installment being deferred to the third year of the implementation period); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Morocco*, TN/MA/W/34, ¶ 21 (May 9, 2003) (noting tariff preference erosion and proposing that tariff reductions and the time period for their implementation be adapted when they affect preferences for products whose export is of importance to developing countries and least-developed countries benefiting from the preferential regimes).

304. Such an expansion would be consistent with the WTO waiver permitting duty-free access to products originating in LDCs. The waiver was granted for an initial ten-year period in 1999 and then extended in 2009 for another ten years until June 30, 2019. See WTO, General Council, *Preferential Tariff Treatment for Least-Developed Countries, Decision on Extension of Waiver*, WT/L/759 (May 29, 2009). For example, in 2003 Canada expanded its GSP program for LDCs by adding 903 tariff line items to the list of eligible products and relaxing the rules of origin for clothing. This new coverage includes agricultural, textile, apparel, and footwear products. With the exception of over-quota tariff items for dairy, poultry, and egg products, Canada provides duty-free access under all tariff items for imports from LDCs. Under the new rules of origin, apparel products exported from LDCs will be eligible for duty-free treatment provided they are cut, or knit to shape, and sewn or assembled from inputs from any of the 48 eligible LDCs. Inputs from General Preferential Tariff (GPT) beneficiary countries may also be used provided at least 25 percent of the content of the clothing originates in the LDC. The rules of origin for fabrics and yarn allow for full accumulation of originating inputs from LDCs or GPT beneficiary countries. Any materials used in the textile or apparel products that originate from Canada are deemed to have originated in the LDC. See WTO, Comm. on Trade and Dev., *Notification of Improvements to the Canadian Preferential Scheme for Least-Developed Countries*, WT/COMTD/N/15/Add.1 (Feb. 13, 2003).

305. See, e.g., WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Negotiating proposal submitted by Bangladesh on behalf of the least developed countries*, TN/MA/W/22, ¶ 13 (Jan. 8, 2003); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Ghana, Kenya,*

Some of these proposals—in particular the first and second—are not novel. In 1973 during the Tokyo Round negotiations Brazil tabled a proposal that would have preserved the margin of preference for developing countries under developed-country national GSP programs.³⁰⁷ Its proposal included exempting certain products from the MFN tariff-cutting formula, expanding the scope of product coverage under national GSP schemes, eliminating tariff peaks and tariff escalation, and making overall improvements in the GSP. In connection with the last point, Brazil proposed the margin of preference be preserved by binding it or, alternatively, by phasing in tariff cuts first on a preferential basis in favor of GSP beneficiary countries and then thereafter on an MFN basis.³⁰⁸ These proposals also are somewhat delusional given that today most developed countries' tariff lines are MFN duty free. In other words, for most products, the margin of

Nigeria, Tanzania, Uganda, Zambia and Zimbabwe, TN/MA/W/27, ¶ 8 (Feb. 18, 2003) (proposing that maximum attention be given in the negotiations to reducing and eliminating tariff peaks and tariff escalation on products of export interest to developing countries).

306. See, e.g., WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Mauritius*, TN/MA/W/21/Add.1, ¶ 9 (July 15, 2003) (proposing that the international financial institutions establish a competitiveness fund in order to assist the industrial restructuring and adjustment of countries most affected by the reduction or phasing out of tariffs); WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products, Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe*, TN/MA/W/27, ¶ 11 (Feb. 18, 2003) (proposing that the modalities include a procedure for establishing measures to deal with erosion of preferences, with the aim of avoiding or offsetting this problem or compensating the affected members). Such compensation could, for example, come in the form of direct payments or freezing existing export market shares. See Low, Piermartini & Richtering, *supra* note 287, at 221 & n. 8; Hoekman & Prowse, *infra* note 309, at 437 (the authors suggest the creation of a compensation fund to compensate developing countries for their trade losses resulting from trade liberalization and the resulting erosion in tariff preferences). This proposal has been criticized because if compensation in the form of trade adjustment assistance is to be paid for the erosion of potential future preferences, the prospects of arriving at a mutually agreed estimate of the present value of future preferences seems extremely dim. Brenton & Özden, *supra* note 42, at 422. More importantly, the countries that would benefit most from compensation would probably not be the ones in greatest need of such compensation but rather the ones that have benefitted the most from trade preferences. *Id.*

307. See GATT, Trade Negotiations Committee, *Special Procedures for Developing Countries, Working Paper Presented by the Brazilian Delegation*, MTN/W/2, at 2 (Oct. 26, 1973), www.wto.org/gatt_docs/English/SULPDF/91910095.pdf. See also Low, Piermartini & Richtering, *supra* note 286, at 220.

308. The first and second proposals are also reminiscent of a call by some developing countries in 2004 to postpone the implementation date of the Agreement on Textiles and Clothing out of fear that the elimination of all WTO-inconsistent quotas on imports of textiles and clothing would put them at a competitive disadvantage relative to China, India, and Pakistan. See Daniel Pruzin, *Divide Grows Among Developing Countries over 2005 Phase-Out of ATC Textile Quotas*, INT'L TRADE DAILY (BNA), March 18, 2004; Daniel Pruzin, *Worried Textile Producers to Meet Sept. 24 on Strategy to Cope With Quota Elimination*, INT'L TRADE DAILY (BNA), Sept. 23, 2004; Daniel Pruzin, *Worried Textile Producers Seen Refraining from Proposing Quota Extension at Meeting*, INT'L TRADE DAILY (BNA), Sept. 27, 2004.

preference is zero as a result of the progressive reduction of tariffs over the course the MTN Rounds.³⁰⁹

Some economists point out if multilateral rounds of tariff reductions continue, the margin of preference may disappear completely unless the list of GSP-eligible products is expanded to include more “import-sensitive” products.³¹⁰ The duty rates on such “import-sensitive” products reflect tariff escalation, i.e., duty rates increase as more value is added to a product in the manufacturing process, with lower overall duty rates on raw products, higher duties on semi-manufactured goods, and still higher duties on finished goods.³¹¹ This phenomenon is typically observed with duties on textiles, clothing, footwear, and processed agricultural products, all of which are of keen export interest to developing countries.³¹² The UN Development Program characterizes tariff escalation as a form of regressive tax that hits the poorest countries the hardest; i.e., those countries least able to pay are forced to pay the highest rates of duty on the products of greatest export interest to them.³¹³ However, the scope for expanding the coverage of

309. See Bernard Hoekman & Susan Prowse, *Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade*, in TRADE PREFERENCE EROSION, *supra* note 41, at 425, 428 (the authors note that two-thirds of the major items exported from Africa to Canada are MFN duty free and that 69 percent of African exports to the EU face a zero MFN duty rate). In a 1997 OECD study the OECD found that the degree of erosion of preferences resulting from Uruguay Round tariff concessions by the Quad countries was indeed significant. See WTO, *Market Access for the Least-Developed Countries: Where are the Obstacles? Organization for Economic Cooperation and Development*, at 47, tbl. 12, WT/LDC/HL/19 (Oct. 21, 1997) [hereinafter OECD Study]. The study estimated that in 1997, the loss in the Canadian market was approximately 71 percent, in the EU 26 percent, in Japan 34 percent, and in the United States 50 percent.

310. See SÁNCHEZ ARNAU, *supra* note 1, at 282.

311. See *id.* at 37-40. The phenomenon of tariff escalation within the Quad members “highlights the importance of the GSP for the beneficiary countries, given that the higher the tariff escalation in the industrialized countries, the greater the potential benefit for the developing countries” if the protected products are included in the GSP programs. *Id.* at 40.

312. See HUMAN DEVELOPMENT REPORT, *supra* note 37, at 126-27.

313. The U.N. Development Program provides the following illustrations of tariff escalation in its 2005 Human Development Report:

On average, low-income developing countries exporting to high-income countries face tariffs three to four times higher than the barriers applied in trade between high-income countries. The average conceals very large differences between countries and the very high tariffs on labour-intensive products of great importance for employment in developing countries. For example, while the average tariff on imports from developing countries to high income countries is 3.4%, Japan imposes a tariff of 26% on Kenyan footwear. The European Union taxes Indian garment imports at 10%. Canada levies a 17% tariff on garments from Malaysia.

Trading partners’ ability to pay has little bearing on developed country tariffs. Developing countries account for less than one-third of developed country imports but for two-thirds of tariff revenues

product eligibility to compensate for preference erosion may be limited, especially in the case of the EU GSP+ and U.S. AGOA programs.³¹⁴ At the same time, other studies conclude developing countries in the aggregate stand to lose little from tariff preference erosion, in the case of both agricultural and non-agricultural exports to developed countries, because such preference erosion could be more than outweighed by the benefits of increased market access, even for developing countries, brought about by multilateral trade liberalization.³¹⁵ Rather than continuing GSP and other preferential programs (either through inertia or concern that removing them would be seen as a callous act taken against the world's poorest populations), a better approach might be to "assist them in addressing the constraints that really underlie their sluggish trade and growth performance."³¹⁶ As noted by two other economists, "[a] careful analysis reveals that the majority of preference-receiving countries obtain very little benefit from existing preference schemes and, as a result, would not appear to lose much from the liberalization of global trade through lower MFN tariffs."³¹⁷ It has been suggested if tariff preferences were set at zero, the

collected. They also account for two-thirds of developed country imports subjected to tariffs higher than 15%. In concrete terms this means that Viet Nam pays \$470 million in taxes on exports to the United States worth \$4.7 billion, while the United Kingdom pays roughly the same amount on exports worth \$50 billion. Customs revenue collection as a share of imports graphically illustrates perverse taxation in operation. The effective US import duty for countries like Viet Nam and Bangladesh is some 10 times higher than for most countries in the European Union.

Tariff escalation is one of the more pernicious forms of perverse graduation. Developed countries typically apply low tariffs to raw commodities but rapidly rising rates to intermediate or final products. In Japan tariffs on processed food products are 7 times higher than on first-stage products; in Canada they are 12 times higher. In the European Union tariffs rise from 0 to 9% on cocoa paste and to 30% on the final product.

This tariff structure prevents developing countries from adding value to their exports. Tariff escalation is designed to transfer value from producers in poor countries to agricultural processors and retailers in rich ones—and it works.

Id. at 127 (footnotes omitted).

314. See Low, Piermartini & Richter, *supra* note 286, at 230.

315. See *id.* at 277, 299; Dominique van der Mensbrugghe, *The Doha Development Agenda and Preference Erosion: Modeling the Impacts*, in TRADE PREFERENCE EROSION, *supra* note 41, at 357-59 (where the author concludes that for developing countries combined tariff preferences may be worth about \$8 billion in added income, or 0.1 percent of their income).

316. OECD Study, *supra* note 309, at 27.

317. Brenton & Özden, *supra* note 42, at 401.

added income from increased trade would more than offset the loss in preferences, at least for low-income countries.³¹⁸

In a twist on preferential trade programs, a small group of developing countries currently grant tariff preferences to other developing countries within the context of the Global System of Trade Preferences for Developing Countries (GSTP).³¹⁹ In 2010 nine developing countries (Argentina, Brazil, Cuba, Egypt, India, Indonesia, Malaysia, Morocco, Paraguay, South Korea, and Uruguay) concluded negotiations lowering tariffs by 20 percent on 70 percent of the goods traded between them under the auspices of the GSPT.³²⁰ While any agreement on cutting tariffs is to be lauded, this 2010 agreement can hardly be described as bold. First of all, while the group's total imports in 2009 were \$1 trillion, only 10 percent came from within the group of 11.³²¹ Second, assuming hypothetically that Brazil or India has a 30-percent *ad valorem* tariff on widgets, a 20-percent reduction of that 30-percent tariff still leaves a 24-percent *ad valorem* tariff. Third, exempting 30 percent of the goods traded among the parties to the agreement is not an insubstantial carve-out. Undoubtedly, the most trade-sensitive goods were exempted from the tariff cuts. Finally, the agreement must be approved by the national legislatures of the eleven participating nations.³²² According to a U.S. government official, 70 percent of all

318. See van der Mensbrugghe, *supra* note 315, at 359.

319. See *supra* note 82 and accompanying text. The first round of negotiations within the context of the GSTP took place in 1988. At the conclusion, 48 countries exchanged concessions and ratified the agreement. A new round of negotiations under the GSTP framework was launched in June 2004 and was concluded in December 2010. Participants in the GSTP included Algeria, Argentina, Bangladesh, Benin, Bolivia, Brazil, Cameroon, Chile, Colombia, Cuba, Democratic People's Republic of Korea, Ecuador, Egypt, Ghana, Guyana, India, Indonesia, Iran, Libya, Malaysia, Mexico, Morocco, Mozambique, Myanmar, Nicaragua, Nigeria, Pakistan, Peru, the Philippines, the Republic of Korea, Romania, Singapore, Sri Lanka, Sudan, Thailand, Trinidad and Tobago, Tunisia, Tanzania, Venezuela, Vietnam, Yugoslavia, and Zimbabwe. The text of the Agreement on the Global System of Trade Preferences for Developing Countries is available at www.unctadxi.org/templates/Page_6207.aspx. See also Sub-Comm. on Least-Developed Countries, Negotiating Group on Market Access, *Note by the Secretariat: Market Access Issues Related to Products of Export Interest Originating from Least-Developed Countries*, 15 n.6, 38 n.24, WT/COMTD/LDC/W/35 (Oct. 13, 2004). The list of preferences can be found at the GSTP's website at www.unctadxi.org/templates/Page_6206.aspx. The GSTP does not strictly meet the conditions for derogating from MFN, but was granted a waiver by the Enabling Clause. See SALLIE JAMES, *THE U.S. GENERALIZED SYSTEM OF PREFERENCES: HELPING THE POOR, BUT AT WHAT PRICE?* 3 (2010), available at <http://www.cato.org/pubs/tpa/tpa-043.pdf>.

320. See Ed Taylor, *Brazil, India and Nine Emerging Nations Sign Trade Accord Lowering Tariffs by 20 Percent*, INT'L TRADE DAILY (BNA) (Dec. 18, 2010).

321. See *id.*

322. Besides the GSPT, many developing nations are parties with other developing countries to preferential regional trading agreements. Examples include MERCOSUR among Argentina, Brazil, Paraguay, and Uruguay, and the ASEAN Free Trade Agreement among the member nations of the Association of Southeast Asian Nations. In addition, several developing countries have preferential trade programs that are focused on aiding LDCs. Among the developing countries that provide duty-free access to all or nearly products

customs duties paid by developing countries are paid to other developing countries.³²³ That fact, coupled with the need for domestic economic reforms by developing countries, strongly suggest that developing countries need to push each to lower their tariffs on trade *inter se* and at the same time to examine and reform their macroeconomic policies.³²⁴

IV. FOUR REFORM PROPOSALS

Sentiment within Congress has been strong that U.S. trade preference programs need to be reformed. In 2009 Senator Max Baucus stated he favored an overhaul of the trade preference programs.³²⁵ Senator Charles Grassley stated he would like to see trade preference benefits spread more evenly among the beneficiary countries.³²⁶ This article suggests four reform proposals: (1) integrate trade preference programs and renew the integrated program for a minimum of ten years; (2) revisit conditionality; (3) harmonize preferential rules of origin at the international level; and (4) provide better focused and coordinated aid for trade.

A. Integrate U.S. Trade Preference Programs and Renew the Integrated Program for a Minimum Ten-Year Period

There are at least six alternatives open to preference-granting countries under their respective trade preference schemes, in particular to the United States: (1) renew the existing programs for all beneficiaries without major amendments; (2) extend the programs in a modified form; (3) allow the GSP program to expire permanently; (4) support reciprocal tariff and market access benefits through free trade agreements; (5) renew the GSP for LDC beneficiaries only; or (6) in the case of the four U.S. trade preference

originating in LDCs are Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Turkey, and Uzbekistan. *See* Sub-Comm. on Least-Developed Countries, *Note by the Secretariat: Market Access for Products and Services of Export Interest to Least-Developed Countries*, 41-44 tbl. 3, WT/COMTD/LDC/W/46/Rev.1 (Feb. 26, 2010). For a list of all countries, developed and developing, that provide preferential market access to some or all products originating in LDCs, *see id.*

323. *USTR Looks to Expiration of AGOA in 2015 In Trade Preference Debate, Marantis Says*, INT'L TRADE Daily (BNA) (Feb. 27, 2010).

324. Adding its voice to this cacophony of diverse opinion, the OECD has concluded that developing countries stand to benefit more from cutting tariffs on each other's trade than from additional tariff reductions by developed countries. The OECD estimates that the gains from liberalizing South-South trade would be double those from liberalizing North-South trade. OECD, PERSPECTIVES ON GLOBAL DEVELOPMENT 2010: SHIFTING WEALTH 161-62 (2010). To that end, a group of 22 developing countries are engaged in negotiating tariff reductions of at least 20 percent on their trade *inter se* as part of the Global System of Trade Preferences. PERSPECTIVES ON GLOBAL DEVELOPMENT, *supra*, at 162.

325. *See Baucus Does Not Want GSP To Lapse During Reform Effort, Aide Says*, INT'L TRADE Daily (BNA) (Oct. 29, 2009).

326. *See id.*

programs, merge them into a single, comprehensive program.³²⁷ All of these options can be viewed through the lens of leverage, both in the Doha Round negotiations and with individual countries and their compliance with donor-country conditions for continued trade preference program eligibility.

The first alternative—renew the existing program for all beneficiaries without major amendments—have the benefits of continuity and familiarity. However, as the previous discussion illustrated, the shrinking margin of preference is close to rendering trade preference programs irrelevant—at least for some countries and for those products whose MFN duty rate is 3 percent or less. Renewing trade preference programs that are not already permanent (which in the case of the United States is all of them with the exception of CBERA) raises the ancillary question of whether all trade preference programs should be made permanent. A favorable aspect of such a proposal is that it introduces stability and predictability, which are essential to long-range business planning and investment.³²⁸ The

327. Although the GSP is a unilateral and non-reciprocal tariff preference, any changes to such programs would need to be considered in light of the Enabling Clause, as interpreted by the Appellate Body. At a minimum, the United States would need to notify and possibly consult with other WTO Members regarding any withdrawal or modification of GSP benefits, as required by paragraph 4 of the Clause. The United States could also seek a WTO waiver were any modifications of the GSP program considered not to comport fully with U.S. WTO obligations. WTO waivers have been secured for the three U.S. regional trade preference programs.

328. See, e.g., *Open Markets for the Poorest Countries*, *infra* note 344, at 12-13, which makes the following point:

Stability and predictability of access are key features of effective programs because they encourage international buyers to establish supply relationships in preference countries and firms to invest in potential export sectors. A critical goal of reform should thus be to redesign program elements that may not directly block access, as rules of origin can, but that increase risk and uncertainty. Two sources of increased risk for investors and buyers arise when programs must be renewed frequently, and when eligibility conditions are numerous, nontransparent, or arbitrary in application. Both of these elements are, unfortunately, problems in U.S. programs. . . .

The EU's [EBA] program has no expiration date, while Canada and Japan routinely extend their preference programs for LDCs for 10-year periods. It would be helpful in promoting development goals if all preference programs, but especially those for LDCs, had strong legal foundations that authorize them permanently or for long periods to maximize effectiveness in promoting investment, trade, and job creation. U.S. legislation recently introduced to phase in [duty-free, quota-free] market access for LDCs recognizes the importance of stability for effective preference programs, and it authorizes that part of the program for a decade, then renews it automatically every five years for countries that are still LDCs.

counterargument is that periodic renewal provides essential leverage in other international fora, such as at the WTO and the stalled Doha Round negotiations. Threatening termination of GSP and other trade preference programs is seen as a tactic for moving intransigent developing countries to more acceptable negotiating positions in multilateral trade talks.³²⁹ One proposal is to introduce presidential certification into the statutory schema under which the President would periodically certify that beneficiary countries are making a positive contribution to the Doha Round negotiations. Absent such certification, the beneficiary country would lose eligibility.³³⁰ An obvious flaw with such a recommendation is it would impermissibly discriminate in violation of the Enabling Clause as interpreted by the Appellate Body in *EC—Tariff Preferences*.

The second alternative—allowing GSP to expire permanently—has been suggested as a way of moving the stalled Doha Round forward. In a perverse spin on the running complaint developing countries have had with GSP schemes in general, the view has been expressed that Brazil and India are blocking progress in the Doha Round negotiations by their refusal to

Id. at 12-13. The U.S. legislation to which the report refers is H.R. 4101, New Partnership for Trade Development Act of 2009. After being introduced the bill was never reported out of Committee. A similar bill, H.R. 3905, was introduced in the 110th Congress by Representative Jim McDermott, the same sponsor of H.R. 4101, but that bill met the same fate as H.R. 4101. Besides extending the GSP program for 10 years and providing duty-free, quota-free treatment of all imports from LDCs, H.R. 4101 would remove the GSP's statutory product exclusions and create a Trade Development Review Panel to review these goods for preferential treatment within three years. Under the bill, AGOA preferences would be extended to non-AGOA LDCs. To protect AGOA countries, significant apparel suppliers from the group of non-AGOA LDCs would have a 10-year quota of 50 percent on those categories of apparel where their production overlaps with AGOA countries. The immediate beneficiaries of DFQF treatment of LDC textile and clothing imports would be Bangladesh and Cambodia. The McDermott bill would also extend the AGOA third-country fabric rule from September 30, 2012, when it is set to expire, to September 30, 2015, with the goal of strengthening and stabilizing the AGOA textiles program. U.S. textile industry trade groups, as well as sub-Saharan Africa LDCs and Haiti, have opposed such an extension, arguing that clothing exports from Bangladesh and Cambodia had grown by 63 percent from 2005-2009, while clothing exports from the U.S. trade preference and free trade agreement partners had fallen by 38 percent. Rossella Brevetti, *Rangel Sees Short Term Extensions This Year for GSP, ATPA*, INT'L TRADE DAILY (BNA), (Nov. 19, 2009). See Daniel Pruzin, *U.S. Textile Industry Group Slams WTO Push for LDC Duty-Free/Quota-Free Deal*, INT'L TRADE DAILY (BNA), (June 14, 2011) (for the 12-month period ending April 2011, U.S. clothing imports from Bangladesh increased almost 27 percent and U.S. clothing imports from Cambodia increased 26 percent).

329. See, e.g., COALITION FOR GSP, CONSENSUS RECOMMENDATIONS FOR U.S. TRADE PREFERENCE PROGRAM IMPROVEMENTS 5 (2009), www.tradepartnership.com/pdf_files/USPreferenceReformWorkingGroup-JointSubmission.pdf. Of course, no Congress can permanently tie the hands of a subsequent Congress to prevent amendments to or repeal of legislation enacted by the prior Congress. However, once legislation is enacted with no sunset provision, legislative inertia and third-party reliance interests make subsequent repeal politically difficult.

330. *Id.* at 6.

lower tariffs on items of export interest to developed countries.³³¹ Threatening them with GSP expiration would supposedly bring them to their senses and to the negotiating table.³³² Such a strategy could backfire, of course, by hardening rather than softening the negotiation positions of India, Brazil, and other large users of GSP.

A third alternative—extending the program in a modified form—could move in one of two opposite directions. In the direction of making the program more stringent, the GSP program could be restricted by: (1) making all discretionary conditions for designation as a GSP beneficiary mandatory with noncompliance resulting in automatic ineligibility; (2) removing certain products from GSP eligibility; and (3) tightening the rules of origin to require that a greater percentage of value-added come from the beneficiary country and eliminating cumulation provisions.³³³ Alternatively, moving in the diametrically opposite direction, the GSP program could be expanded by: (1) amending the eligibility criteria so that as many developing countries as possible are designated GSP beneficiaries;³³⁴ (2) making certain import-sensitive products that are currently ineligible GSP eligible with no *a priori* product exclusions; and (3) relaxing the rules of origin to require that a lower percentage of value-added come from the beneficiary country, expanding the cumulation provisions,³³⁵ and

331. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 28.

332. A similar position was also advocated in early 2002 when then-USTR Robert B. Zoellick, while testifying on intellectual property issues, mentioned that “the threat of loss of GSP . . . benefits has proven to be an effective point of leverage with some of our trading partners.” *See id.*

333. See, e.g., GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 30-31.

334. One recommendation is to establish two sets of criteria, one economic and the other socio-political. The economic criteria would borrow from the EU’s GSP+ model and UNCTAD’s LDC criteria by focusing on economic vulnerability and international trade competitiveness. The socio-political criteria would in effect be a blend of the current mandatory/discretionary criteria that currently are found in the four U.S. trade preference programs. See, e.g., Consensus Recommendations for U.S. Trade Preference Program Improvements, *supra* note 329, at 2-3, 7; *Broad Coalition Offers Recommendations For Reform of Trade Preference Programs*, INT’L TRADE DAILY (BNA), (Dec. 3, 2009). See also UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA, *supra* note 77, at 17-18 (“Canada and the EU extend preferences to more than 170 most developing countries, compared to just 130 in the United States. Minimal upfront eligibility criteria in Canada and the EU ensure that more developing countries benefit from the program, including China and Vietnam. However, in no way has the limited criteria in Canada and the EU prevented the removal of benefits from ‘bad actors’ (e.g., Belarus), when necessary.”).

335. The current GSP cumulation rules treat certain associations of countries as a single country for purposes of origin, so that if inputs from Countries A and B are used in making a finished product that is exported from Country C, and A, B, and C are all members of a designated association, then the product will be deemed to originate in Country C. The list of eligible associations can be found in HTSUS General Note 4, at 172, www.usitc.gov.

eliminating the uncertain “substantial transformation” test and adopting a more predictable change-in-tariff heading methodology.³³⁶

The fourth alternative—in lieu of GSP, pursuing reciprocal tariff and market access through free trade agreements—is a strategy that the EU has been pursuing in its trade relations with the ACP countries via its Economic Partnership Agreement program. In a less ambitious fashion, the United States has concluded FTAs with a handful of developing countries in the Middle East and Persian Gulf region (Israel, Jordan, Oman, and Bahrain) and in Latin America (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Peru, with FTAs with Panama and Colombia pending congressional approval). Given the current state of congressional antipathy toward FTAs—even with countries whose trade flows with the United States are *de minimis*, clearly demonstrated when DR-CAFTA was approved by the House of Representatives by a mere two-vote margin,³³⁷ by the reluctance of some members of Congress to approve the pending FTAs with Panama and Colombia that were concluded by the Bush Administration in 2007, and by the apparent reluctance on the part of the Obama Administration to submit them to Congress for its approval³³⁸—a policy of reciprocal trade agreements with developing countries, in lieu of GSP, would seem to be politically dead on arrival. Even when the benefits to the United States of DR-CAFTA were so clear, i.e., the DR-CAFTA countries had non-reciprocal, duty-free access to the U.S. market on a wide-range of products under GSP and CBERA, DR-CAFTA was still a hard sell in Congress.³³⁹ Even if a more pliable Congress existed,

336. A change-in-tariff heading methodology can also be restrictive, depending upon how significant the tariff shift has to be. For example, a requirement that the shift be from one chapter of the HTSUS to another chapter is onerous and restrictive. In contrast, a requirement that there be a shift from one four-digit heading to another four-digit heading within the same chapter is far less restrictive.

337. Edmund L. Andrews, *Pleas and Promises by G.O.P. as Trade Pact Wins by 2 Votes*, N.Y. TIMES, July 29, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9D01E2DE113FF93AA15754C0A9639C8B63>.

338. See Rossella Brevetti & Nancy Ognanovich, *44 GOP Senators Will Block Nomination of Commerce Secretary over Stalled FTAs*, INT'L TRADE DAILY (BNA), (March 15, 2011); Rossella Brevetti & Amy Tsui, *Outlook for Moving Stalled, Colombia, Panama, Korea FTAs in 2011 Improves*, INT'L TRADE DAILY (BNA), (Jan. 10, 2011).

339. Domestic concerns might also make this option undesirable. As observed by the Congressional Research Service:

[S]uch reciprocal agreements could actually harm import-competing U.S. manufacturers more than unilateral preferences under the GSP, because automatic safeguards written into the statute, such as competitive need limitations, might no longer apply. Any such agreement could also involve a greater number of U.S. tariff concessions, thus certain import-sensitive items ineligible for GSP status could also be on the table. On the other hand, other U.S.

it is improbable that bilateral or even regional FTAs would be negotiated with all current 130+ GSP beneficiaries. Query whether the USTR's office has the time, energy, or capacity to engage in such a herculean endeavor. A wholesale alternative to country-by-country FTAs or EPAs is to negotiate ambitious tariff cuts and market access openings on a multilateral basis in the Doha Round. A multilateral approach would also eliminate—or at least mitigate—the problem of trade diversion that can result from FTAs, i.e., a comparatively less competitive FTA partner that is a developing country might gain duty-free access to the U.S. market on a product that is not GSP-eligible at the expense of another more competitive developing or developed country which has to pay the MFN duty on that product.³⁴⁰

A fifth alternative is to have a trade preference program for LDCs only. Such a scheme could take one of two forms: (1) renew the GSP program for least-developed beneficiaries only, but otherwise keep the program's existing product exclusions in place or (2) renew the GSP program for least-developed beneficiaries only and expand the list of eligible products to meet the 2005 Hong Kong Ministerial Conference commitment of duty-free/quota-free access for all LDC imports.³⁴¹ ³⁴² Some in Congress have

manufacturers might benefit from the increased market access that an FTA or RTA would provide.

GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 29. This argument is equally true in the context of multilateral trade negotiations where improved market access is on the table. While safeguards relief is nominally available in the case of injurious imports, such safeguards relief has seen limited use in the United States (73 safeguards actions have been filed in the United States over the span of 35 years and fewer than half have been successful). Safeguards relief has seen limited action in other WTO members as well. See KEVIN C. KENNEDY, *INTERNATIONAL TRADE REGULATION: READINGS, CASES, NOTES, AND PROBLEMS* 547, 699-740 (2009). See generally GREGORY BOWMAN, NICK COVELLI, DAVID A. GANTZ & IHN H. UHM, *TRADE REMEDIES IN NORTH AMERICA* 351-401 (2010).

340. One study conducted in 2006 concludes that with every enlargement of the EU, the countries joining the EU decrease their imports from developing countries, i.e., there is evidence of significant trade diversion. See Maria Persson & Fredrik Wilhelmsson, *Assessing the Effects of EU Trade Preferences for Developing Countries* 20 (Working Paper No. 2006:4, Lund Univ. Dep't of Economics 2006), http://ideas.repec.org/p/hhs/lunewp/2006_004.html.

341. Annex F of the Hong Kong Ministerial Conference Declaration provides as follows:

We agree that developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:

(a)(i) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.

(ii) Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.

(iii) Developing-country Members shall be permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage.

(b) Ensure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access.

Hong Kong Ministerial Declaration, *supra* note 82, annex F.

342. Annex F of the Hong Kong Ministerial Conference Declaration provides as follows:

We agree that developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:

(a)(i) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.

(ii) Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.

(iii) Developing-country Members shall be permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage.

(b) Ensure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access.

advocated the first option.³⁴³ If enacted, it would preserve the bifurcated treatment that LDCs currently receive under U.S. trade preference programs, with one cohort of LDCs receiving the most preferential tariff treatment under the HOPE Act (Haiti) and AGOA (for eligible AGOA beneficiaries) relative to all other LDCs and the second cohort receiving more preferential tariff treatment under the least-developed beneficiary provisions of the GSP program relative to all other developed countries. The second option would be in effect to create an AGOA “plus” program, but reserved solely for LDCs. With its exclusive LDC focus to the exclusion of other developing countries, it has been estimated this option would simultaneously create an economically significant margin of preference in favor of LDCs, provided the list of eligible products is expanded to 100 percent of all LDC imports.³⁴⁴ However, all donor countries need to move to

Hong Kong Ministerial Declaration, *supra* note 82, annex F.

343. See GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE, *supra* note 38, at 30.

344. Since 2000, there has been significant progress toward the goal of duty-free, quota-free (DFQF) market access for LDCs. Between 2000 and 2005, Australia, New Zealand and Norway announced that they were opening their markets to 100 percent of products from LDCs. See WTO, Briefing Notes, *Towards free market access for least-developed countries*, http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief03_e.htm. The EU implemented the Everything But Arms (EBA) program in 2001. See *infra* notes ___ and accompanying text. After the restrictions on sugar and rice were phased out in 2009, the EU now provides full market access for LDCs (except for weapons). Following the Hong Kong Ministerial Conference in 2005, Switzerland implemented an EBA-like program that as of 2010 also provides 100 percent market access for LDCs. Norway and Switzerland also went beyond these initiatives by opening their programs to other small, low-income, or heavily indebted countries. Other developed countries also improved market access for LDCs in the 2000s, but none achieved full product coverage, usually because of exclusions for sensitive agricultural products. Canada’s preference program reform, enacted in 2003, extends product coverage for LDCs to 99 percent of products, excluding only quota-controlled products (dairy, poultry, and eggs). Japan’s trade preference program for LDCs has approximately 98-percent product coverage, with exclusions for fish, footwear, sugar, and rice. See Daniel Pruzin, *Key WTO Members Discuss Elements For LDCs in Doha ‘Deliverables’ Package*, INT’L TRADE DAILY (BNA), (July 1, 2011). In 2010 India and Brazil announced that they were implementing duty-free access for goods from LDCs. See WTO, *Brazil, India to push ahead on duty-free schemes for the poorest countries*, March 18, 2010, http://www.wto.org/english/news_e/news10_e/devel_18mar10_e.htm; Madhur Singh, *India Pushing Ahead With Duty-Free Market Access for Goods From LDCs*, INT’L TRADE DAILY (BNA), (March 25, 2010).

In the United States the trade preference picture for LDCs is more complex than in other developed countries. The United States maintains the most exceptions, with some 1,800 tariff lines covering goods such as sugar, cotton, leather, dairy, and textiles and clothing excluded. See Daniel Pruzin, *Key WTO Members Discuss Elements For LDCs in Doha ‘Deliverables’ Package*, INT’L TRADE DAILY (BNA), (July 1, 2011). Altogether, the United States provides DFQF access on 82.4 percent of tariff lines for all LDCs and 90 percent of all tariff lines for AGOA-eligible LDCs. The United States also has AGOA and the HOPE Act that offer greater access for sub-Saharan Africa and Haiti. In 2001, the same

year that the EBA initiative was launched, the United States enacted AGOA which, as noted, expanded duty-free, but not quota-free, access for approximately 98 percent of products originating in sub-Saharan Africa LDCs and other “lesser developed beneficiary countries” in the region. Agricultural products, most notably sugar, peanuts, dairy products, and tobacco, are the major exclusions. In 2006, Congress approved the HOPE Act, which expanded preferences under the Caribbean Basin Initiative for Haiti. It provides duty-free access for about 90 percent of products. Both programs go well beyond the 82.4 percent of products that is available to other LDCs under the U.S. GSP provisions for LDBDCs. However, even under AGOA — the most liberal U.S. trade preference program — not only do the product exclusions for agricultural products bar full market access to potential African agricultural exports, but the 14 LDCs located in Asia are completely excluded and thus discriminated against vis-à-vis sub-Saharan African LDCs with regard to clothing that is not eligible for duty-free treatment. As a result of GSP ineligibility of clothing, it is estimated that the United States collected nearly \$1 billion in duties on imports of Bangladeshi and Cambodian clothing in 2008, more than the total amount collected on imports from the United Kingdom and France. See CGD Working Group on Global Trade Preference Reform, *Open Markets for the Poorest Countries: Trade Preferences That Work* 7-8 (April 2010), <http://www.cgdev.org/content/publications/detail/1423918/>.

In 2011 Senator Dianne Feinstein introduced a bill that would provide AGOA-like trade benefits to the Maldives and 12 LDCs located in the Asia-South Pacific region. Senator Feinstein’s bill excludes from the list of eligible beneficiaries Myanmar (listed by the UN as an LDC) but includes the Maldives (the Maldives graduated from the UN’s LDC list in 2011). In order to be designated as a beneficiary, under the Feinstein bill a country has to meet the AGOA eligibility criteria. See *supra* nn. 204-05 and accompanying text; Asia-South Pacific Trade Preferences Act, S. 1443, 112th Cong., 1st Sess., § 4 (2011). Although her bill is designed to close most of the gap in trade preference coverage between sub-Saharan Africa LDCs and LDCs located outside of sub-Saharan Africa, the bill does not extend AGOA’s third-country fabric provision for textiles and clothing. See *supra* n. 210 and accompanying text. Instead, the Feinstein bill provides a less generous yarn-forward rule, i.e., eligible textile and apparel items must be formed from yarn and material originating in the United States or in the other beneficiary countries. Asia-South Pacific Trade Preferences Act, S. 1443, 112th Cong., 1st Sess., § 5(c)(2) (2011).

Arguably, one of the most disturbing lobbying battles to see played out recently in congressional hearings is that between, on the one hand, groups supporting DFQF treatment of textiles and clothing from Bangladesh and Cambodia and, on the other hand, groups supporting sub-Saharan African countries that have benefited from AGOA’s preferential textile and clothing rules and are fighting to hold on to their preferred U.S. market access to the exclusion of Cambodia and Bangladesh. See Rossella Brevetti, *Trade Associations Urge Duty Free Benefits for Apparel From Cambodia*, INT’L TRADE DAILY (BNA), (Dec. 3, 2009) (the American Apparel & Footwear Association, the National Retail Federation, the Outdoor Industry Association, the Retailer Industry Leaders Association, and the United States Association of Importers of Textiles and Apparel urge expeditious congressional action to grant Cambodia DFQF access to the U.S. market for all clothing products; 40 trade associations representing 29 trade preference and free trade area countries urge Congress to reject a proposal granting Bangladesh and Cambodia DFQF market access for their clothing exports to the United States). As Voltaire observed in *La Bégueule*, “Le mieux est l’ennemi du bien,” which translates as “the best is the enemy of the good.” In the context of international affairs Voltaire’s aphorism has sometimes been expressed as “don’t let the best be the enemy of the good.” Also known as the Nirvana fallacy or the perfect solution fallacy, Voltaire’s aphorism in essence captures the error in logic of comparing actual things with unrealistic, idealized alternatives. AGOA might not be the best trade preference program when compared to a perfect solution — assuming that one exists, and therein lies the fallacy because there is never a perfect solution to any human problem — but

100 percent product coverage, and the list of donor countries needs to expand to include Brazil, China, India, and high-income developing countries.³⁴⁵

it still has many good features to commend it. Nevertheless, an alternative to AGOA that is feasible without being perfect is to have DFQF market access for all LDCs, not only for Haiti under the HOPE Act and for those LDCs in sub-Saharan Africa under AGOA. This alternative is neither unrealistic nor idealized, although it could admittedly erode SSA's and Haiti's respective U.S. market shares for textiles and clothing if demand in the U.S. market remains static. Moreover, there is something arguably morally perverse about a trade preference program that by design pits a group of LDCs against LDCs outside the group. Something seems inherently defective with a trade preference regime when beneficiary countries devote scarce resources to preserving their preferential market access rather than to becoming globally competitive. See James, *supra* note 158, at 2 ("To the extent that preference recipients jealously guard their special access and resist global efforts to liberalize trade on a nondiscriminatory basis, unilateral preference programs can be counterproductive to achieving a more liberal global trade regime and a more stable and permanent path to economic growth."). James relates how the drive to protect the "wasting asset" of trade preferences has pitted developing country against developing country:

Preference erosion pits developing countries against each other in multilateral negotiations, because the same reductions in MFN tariffs that erode beneficiaries' preference margins may help their perhaps equally poor brethren in an "outside" country. Developing country groups have provided an unfortunate but instructive example in the Doha round: there was significant overlap between the list of tropical products for which eight Latin American countries sought especially rapid and significant liberalization during the Doha round talks, and the list of items the African, Caribbean and Pacific Group of States (ACP) wanted shielded from multilateral tariff liberalization because of concerns about preference erosion.

Id. at 12. Such behavior gives a new twist to the term "trade protectionism."

345. See *Open Markets for the Poorest Countries*, *supra* note 344, at 15, which estimates the following gains for LDCs if product coverage is expanded to 100 percent, provided all OECD countries participate and provided further that they are joined by Brazil, China, and India:

Moving to 100 percent coverage, moreover, substantially improves the outcomes relative to 100 percent market access by OECD countries alone, especially for African LDCs. The estimates . . . suggest the range of potential benefits, with export gains increasing by as much as two-thirds for Ethiopia, three-fold for Mozambique, and even more than that for Senegal. Overall, for LDCs as a group, the gains could be as much as US\$7 billion, compared to US\$2 billion when only OECD countries participate. When the large emerging markets also participate, the small loss for Madagascar becomes positive and the less conservative approach suggests that exports could increase 21 percent.

Id. at 15. The authors gently chide Brazil, China, and India for not expanding DFQF product coverage for LDCs: "While the responsibility to move farthest and fastest rests with the high

In a proposed regulation issued by the European Commission in 2011, the EU plans a comprehensive revision of its current GSP scheme with a combination of the fourth and fifth alternatives mentioned above.³⁴⁶ To be initiated in 2014, product coverage and preference margins would remain unchanged. However, more than half of the current 176 GSP beneficiary countries would no longer be beneficiaries—although they would remain GSP eligible if their economic situation changes—including countries that fall under the World Bank high-income or upper-middle-income categories (such as Brazil, Kuwait, Russia, Saudi Arabia, and Qatar), and countries that have preferential access to the EU that is at least as good as under GSP (e.g., under an FTA).³⁴⁷ The number of total GSP beneficiaries under the revised scheme would be reduced from the current 176 to 85 countries.³⁴⁸ GSP+ and EBA would remain in place although GSP+ eligibility criteria would be relaxed.³⁴⁹ Conditionality, in its current form, would continue under the revised GSP scheme.³⁵⁰ By making standard GSP available to fewer beneficiaries, it is anticipated that competitive pressures among GSP beneficiaries will be reduced thereby making the preferences for LDCs and GSP+ beneficiaries more meaningful.³⁵¹

A sixth option is to combine all U.S. trade preference programs into a two-tiered, comprehensive program with uniform and minimal country-eligibility criteria for all beneficiaries but expanded product eligibility for LDCs.³⁵²

income countries, the steps by these countries [Brazil, China, and India], taken voluntarily, have the potential to make the DFQF initiative far more powerful. To realize the enhanced opportunities, however, the principles that apply to high-income countries—full product coverage, flexible rules of origin, and stability and predictability—are also important for these programs.” *Id.* at 14.

346. See European Comm’n, *Focusing on Needs: The EU Reshapes its Import Scheme for Developing Countries*, Press Release, (May 10, 2011), available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147894.pdf; European Commission, *More benefits from preferential trade tariffs for countries most in need: Reform of the EU Generalised System of Preferences*, Press Release, (May 10, 2011), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147892.pdf.

347. European Comm’n, *A Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences*, COM(2011) 241/5 (May 10, 2011), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147893.pdf

348. *A Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences*, *supra* note 347, art. 10-18.

349. See *id.* annex II.

350. See *id.* art. 19. Under the proposed scheme, the GSP+ import-share criterion would be relaxed from 1% to 2%, while the export diversification criterion would remain the same at 75% of a country’s exports to the EU, but for seven, rather than five, of its largest sectors.

351. European Commission, *More benefits from preferential trade tariffs for countries most in need: Reform of the EU Generalised System of Preferences*, Press Release, (May 10, 2011), available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147892.pdf.

352. See, e.g., Coalition for GSP, *Consensus Recommendations for U.S. Trade Preference Program Improvements 2* (2009) (recommending that the United States maintain

As part of the program integration process, the integrated program needs to be renewed for a minimum period of ten years. As noted above, while the Enabling Clause makes nonreciprocal tariff preferences a permanent part of the WTO *acquis*, national GSP programs are not required to be permanent. The Enabling Clause contains no international legal obligation making national GSP tariff preferences permanent and legally binding. Moreover, as previously noted, even if a national GSP scheme is of relatively long duration, there is no assurance that preferential treatment for particular goods will continue. These lacunae stand in contrast to the legal obligation created under GATT Article II on tariff bindings that bar an importing country from raising its bound tariffs above its tariff binding, thus making a country's MFN tariff reduction commitments legally enforceable by all other WTO members.³⁵³ Because the Enabling Clause does not obligate donor countries to make their GSP programs permanent, potential investors and traders might be discouraged.³⁵⁴

National policymakers, thus, face a trade-off in setting the duration of preferential benefits in authorizing legislation. On the one hand, beneficiary countries and U.S. businesses that import from them agree that longer and more predictable renewal periods for program benefits are desirable. On the other hand, some U.S. officials believe that periodic program expirations can be useful as leverage to encourage countries to act in accordance with U.S. interests. Table 5 provides a chronology of U.S. GSP program extensions since it was first enacted in 1975.³⁵⁵

a single preference program that extends duty-free treatment for imports of eligible articles from BDCs, and that provides permanent, 100 percent duty-free and quota-free benefits to imports from eligible lesser-developed countries), www.tradepartnership.com/pdf_files/USPreferenceReformWorkingGroup-JointSubmission.pdf.

353. For the Quad members nearly 100% of their tariff lines are bound (100% for the EU and the United States, 99.7% for Canada, and 99.6% for Japan). See KENNEDY, *supra* note 340, at 119. Granted, a GATT Article II tariff binding is not immutable. If a WTO member that has entered into a tariff binding on a particular product wishes to avoid its obligation, it may withdraw the commitment pursuant to GATT Article XXVIII. However, adversely affected WTO members must be consulted and are entitled to compensatory tariff adjustments on other items of export interest to them. See GATT Article XXVIII:2. Similarly, GATT Article XIX on emergency safeguard measures, together with the WTO Agreement on Safeguards, permits an importing country to temporarily increase duties on imported goods when such goods are a cause of serious injury to a domestic industry. Likewise, GATT Article XII permits a WTO member to increase a bound tariff in order to address a shortfall in its balance-of-payments position.

354. See SÁNCHEZ ARNAU, *supra* note 1, at 32-33.

355. The U.S. GSP program was not enacted until 1975, Pub. L. No. 93-618, *codified at* 19 U.S.C. §§ 2461-65, and was not implemented until a year later, on January 1, 1976, pursuant to Executive Order 11,888. Executive Order No. 11,888, 40 Fed. Reg. 55,276 (1975). The legislative authorization was for an initial ten-year period that expired on January 3, 1985. Congress renewed the GSP program, and substantially amended it as well, in the Trade and Tariff Act of 1984 for an additional 8 1/2 years, until July 4, 1993. Pub. L. No. 98-573, tit. V, 98 Stat. 3019 (1984). For an analysis of the 1984 amendments to the GSP program, see D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System*

Table 5. U.S. GSP Extensions, 1975-2011

Public Law	Effective Date	Date Expired	Comments
Pub. L. No. 93-618, Title V, Trade Act of 1974	January 2, 1985	January 2, 1985	Statute originally enacted.
Pub. L. No. 98-573, Title V, Trade and Tariff Act of 1984	October 30, 1984	July 4, 1993	Substantially amended and restated
Pub. L. No. 103-66, Section 13802 (in Omnibus Budget Reconciliation Act, 1993)	August 10, 1993	September 30, 1994	Extended retroactively from July 5, 1993 to August 10, 1993. Also struck out reference to "Union of Soviet Socialist Republics"
Pub. L. No. 103-465, Section 601 Uruguay Round Agreements Act	December 8, 1994	July 31, 1995	Extended retroactively from September 30, 1994 to December 8, 1994. No other amendments to provision.

of Preferences: "Instant Replay" or a Real Change?, 6 NW. J. INT'L L. & BUS. 1035 (1984-85); Frank A. Hirsch, Jr., *Renewal of the GSP: An Explanation of the Program and Changes Made by the 1984 Legislation*, 18 VAND. J. TRANSNAT'L L. 625 (1985). The GSP program was again renewed with minor amendments for only 15 months, until September 30, 1994, under section 13802 of the Omnibus Budget Reconciliation Act of 1993. Pub. L. No. 103-66, tit. XIII, § 13802(a), 107 Stat. 667 (1993). The GSP was thereafter renewed without amendment for 10 months, until July 31, 1995, by section 601 of the Uruguay Round Agreements Act. Pub. L. No. 103-465, tit. IV, 108 Stat. 4961 (1994). On July 31, 1995, GSP expired and was not again reinstated until August 20, 1996, as part of the Small Business Job Protection Act of 1996. Pub. L. No. 104-188, § 1951, 110 Stat. 1755, 1917 (1996). The 1996 reinstatement extended GSP until May 1997, with retroactive effect from July 31, 1995. *Id.* § 1953, 110 Stat. 1926. The 1996 amendments also changed the criteria for GSP graduation and for the designation of eligible articles, as explained below. The U.S. GSP program was thereafter renewed for one year, until June 30, 1998, under the Balanced Budget Act of 1997, with retroactive effect from May 31, 1996. Pub. L. No. 105-34, tit. IX, § 981, 111 Stat. 788, 902 (1997). The Administration's proposal for a ten-year extension of the GSP program, and for a permanent extension of the program for least-developed countries, was not enacted. *See Administration Submits GSP, CBI and Shipbuilding Subsidies Bill*, 14 INT'L TRADE REP. (BNA) 1080 (1997). Even the more modest proposal for a two-year GSP extension failed to receive congressional approval. *See GOP Budget Reconciliation Tax Plan Includes Provisions for CBI, GSP*, 14 INT'L TRADE REP. (BNA) 1043 (1997). Most recently, the U.S. GSP program expired four times in four years (2006, 2008, 2009, and 2010). By contrast, Canada, Japan, and the EU last extended their programs for 10 years, with periodic reviews to make small changes. As a result, developing-country producers and domestic importers know preferences will remain in effect into the foreseeable future, allowing for long-term investment and sourcing decisions. The pattern that has emerged in Congress since the initial ten-year GSP authorization expired has been to renew the GSP with short extensions—one year to 18 months—sometimes with retroactive effect. The explanation for this pattern lies in part in federal budget politics -- operation of the GSP program means a loss of tariff revenues, forcing Congress and the Administration to find either a substitute revenue source or offsetting budget reductions—as well as the relatively low priority that GSP has on the national legislative agenda.

Pub. L. No. 104-188, Subtitle J, section 1952 GSP Renewal Act of 1996 (in Small Business Job Protection Act of 1996)	October 1, 1996 (for GSP renewal only)	May 31, 1997	Substantially amended and restated. Extended retroactively from August 1, 1995 to October 1, 1996.
Pub. L. No. 105-34, Subtitle H, section 981 (Taxpayer Relief Act of 1997)	August 5, 1997	June 30, 1998	Extended retroactively from May 31, 1997 to August 5, 1997. No other amendments to provision.
Pub. L. No. 105-277, Subtitle B, section 101 (in Omnibus Consolidated and Emergency Supplemental Appropriations, 1999)	October 21, 1998	June 30, 1999	Extended retroactively from July 1, 1998 to October 21, 1998. No other amendments to provision.
Pub. L. No. 106-170, section 508, (in Ticket to Work and Work Incentives Act of 1999)	December 17, 1999	September 30, 2001	Extended retroactively from July 1, 1999 to December 17, 1999. No other amendments to provision.
Pub. L. No. 107-210, Division D, Title XLI Trade Act of 2002	August 6, 2002	December 31, 2006	Extended retroactively from September 30, 2001 to August 6, 2002. Amended to (1) include requirement that BDC's take steps to support efforts of United States to combat terrorism and (2) further define the term "internationally recognized worker rights."
Pub. L. No. 109-432, Title VIII	December 31, 2006	December 31, 2008	Extended before program lapse.
Pub. L. No. 110-436, Section 4	October 16, 2008	December 31, 2009	Extended before program lapse.
Pub. L. No. 111-124, Section 1	December 28, 2009	December 31, 2010	Extended before program lapse.
Pub. L. No. 112-40, Section 1	October 21, 2011	July 31, 2013	Extended retroactively from January 1, 2011 to October 21, 2011.

Sources: Congressional Research Service, Author

At the end of 2010, Congress failed to renew the U.S. GSP program because Senator Jeff Sessions from Alabama blocked proposed Senate consideration of a House-passed trade bill (H.R. 6517) that would have extended the GSP program and the ATPA, as well as the trade adjustment assistance program for workers displaced by imports, for 18 months.³⁵⁶

356. Brevetti, *Sessions Blocks Consideration of Trade Bill In Senate Over Bangladesh Sleeping Bag GSP*, INT'L TRADE DAILY (BNA), (Dec. 18, 2010). Trade adjustment assistance

According to Senator Sessions, Exxel Outdoors, Inc., which is located in Alabama, manufactures 85 percent of the sleeping bags made in the United States.³⁵⁷ In July 2010, the USTR rejected Exxel Outdoors' petition that sleeping bags are a textile product and thus should be removed from GSP eligibility on that basis. The USTR determined instead that sleeping bags are not textiles and are thus eligible for duty-free entry under the U.S. GSP program.³⁵⁸ In response to the USTR's denial of Exxel Outdoors' petition, in August 2010 Senator Sessions introduced a bill that would have removed sleeping bags from the list of GSP-eligible products.³⁵⁹ Arguably, there is something deeply flawed with a trade preference program when a single U.S. Senator can hold up renewal of the entire GSP program over an administrative decision affecting one company and a single product. Reliance interests of foreign exporters and U.S. importers are clearly undermined. In addition, in a textbook example of the law of unintended consequences at work, the windfall beneficiary of a lapse in GSP may be China.³⁶⁰ In recognition of the importance of continuity to business

and the ATPA were extended for seven weeks. See Amy Tsui, *House, Senate Pass Pared Down Version of Omnibus Trade Measure*, INT'L TRADE DAILY (BNA), (Dec. 23, 2010).

357. See Brevetti, *supra* note 356. The detrimental impact of the lapse of the GSP program was felt almost immediately after its expiration at the end of 2010. See Rossella Brevetti, *Coalition of Nine GSP Countries Urge Renewal of Expired Preferences*, INT'L TRADE DAILY (BNA), (May 4, 2011).

358. Notice of the USTR's decision denying Exxel Outdoor's petition is available at www.ustr.gov/webfm_send/2016. Textiles and textile articles are classified under Chapters 50-63 of the Harmonized Tariff Schedule of the United States (HTSUS). Sleeping bags are classified under Chapter 94 of the HTSUS whose title provides in part, "bedding, mattresses, mattress supports, cushions and similar stuffed furnishings." There are two *eo nomine* (i.e., by name) provisions for sleeping bags contained in Chapter 94: HTSUS 9404.30.40 (sleeping bags containing 20 percent or more by weight of feathers and/or down, with an MFN duty rate of 4.7-percent ad valorem) and HTSUS 9404.30.80 (sleeping bags other than those containing 20 percent or more by weight of feathers and/or down, with an MFN duty rate of 9-percent ad valorem). The HTSUS is available at the U.S. International Trade Commission's website, www.usitc.gov/publications/docs/tata/hts/bychapter/1002C94.pdf.

359. See Rossella Brevetti, *supra* note 356; Len Bracken, *Group Blasts Denial of GSP Petition On Sleeping Bags; Bangladesh Backs U.S.*, INT'L TRADE DAILY (BNA), (July 8, 2010). Undaunted by its set back, Exxel Outdoors refiled its petition to remove sleeping bags from GSP eligibility as part of the USTR's 2010 GSP annual review. See Office of the U.S. Trade Representative, *List of Product Petitions Accepted for the 2010 GSP Annual Review (2010)*, www.ustr.gov/webfm_send/2356. Congress eventually renewed the GSP program in October 2011 without the amendment removing sleeping bags from GSP product eligibility. See Pub. L. No 112-40, § 1 (Oct. 21, 2011). However, at the end of 2011 the U.S. Trade Representative removed sleeping bags from GSP eligibility on the ground that they are an import-sensitive product. They were the only product to lose GSP eligibility in 2011. Speculation is that the action came after an agreement was reached between the Obama Administration and Senator Sessions. See Len Bracken, *Sleeping Bags No Longer GSP Eligible; No Change to AGOA in Preference Reviews*, INT'L TRADE DAILY (BNA), (Dec. 30, 2011).

360. See Rossella Brevetti, *China Gains Advantage by Expiration Of GSP in Terms of Prices*, Gresser Says, INT'L TRADE DAILY (BNA), (March 14, 2011).

planning, within the EU the European Commission has recommended that a revised GSP scheme that is expected to enter into effect in 2014 will have no sunset provision.³⁶¹

Private sector and foreign government representatives have complained that short program renewal periods discourage longer-term productive investments that might be made to take advantage of preferences, such as factories or agribusiness ventures. They would like to see preference programs become permanent or have a longer duration. The private sector Coalition for GSP cites the frequent lapses in GSP between 1993 and 2001, with authorization periods ranging from 10 to 27 months (and gaps between expiration and legislative renewal of 1 to 15 months), as hindering long-term investment in beneficiary countries.³⁶² Both the USTR and the Coalition have attributed the relatively greater growth in GSP use after 2002 to the stability provided by a 5-year program reauthorization at that time.³⁶³ Business people say that predictable program rules and a longer program renewal period are important to them in making business plans and investment decisions in developing countries with confidence when they are based on preference benefits.³⁶⁴ Members of Congress have recognized this argument with respect to Africa. In December 2006, Congress renewed AGOA's third-country fabric provisions for six years until 2012. AGOA's general provisions had previously been renewed until 2015. On the other hand, it has been suggested that short-term program renewals give Congress more opportunities to respond to changing events and political priorities.³⁶⁵

361. See European Comm'n, *Focusing on Needs: The EU Reshapes its Import Scheme for Developing Countries*, Press Release, (May 10, 2011), available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147894.pdf.

362. See, e.g., Coalition for GSP, *Written Statement of the Coalition for GSP on Ways to Improve Preferences*, Submitted to the House Ways and Means Committee 6 (Dec. 1, 2009) (recommending that U.S. trade preference programs be made permanent), http://www.tradepartnership.com/pdf_files/GSPCoalitionCmntsW%26M2009.pdf.

363. *GAO Report on Integrating U.S. Trade Preference Programs*, *supra* note 125, at 42.

364. See *id.* at 42 (“For example, officials in the Colombian flower industry told us that ATPA’s short time frame and frequent renewals made it difficult to attract investment needed to enable them to compete with other international cut-flower producers. They said investors need certainty about preference benefits for at least 10 years to amortize and project return on investment.”).

365. See *id.* at 42 (“Threatening to let benefits lapse can be used as a way to pressure countries to act on an issue. While acknowledging the need for U.S. vigilance in pursuit of its commercial interests, officials at USTR and Labor told us short-term program renewal can have other adverse consequences, such as creating uncertainty for investors and importers interested in using the program. From their perspective, the discretion the administration exercises over continuation of program benefits offers sufficient leverage to achieve policy goals, based on the country’s desire to maintain benefits and the possibility of removing benefits administratively through reviews of country conformity with eligibility requirements.”). In the context of AGOA, Assistant U.S. Trade Representative for Africa Florizelle Liser opposes making AGOA permanent. In her view, it would send a message that sub-Saharan Africa is a hopeless case that will never be able to compete globally without

U.S. trade preference programs have proliferated since 1976, but the United States makes no pretense to taking an integrated approach toward its unilateral trade preference programs for developing countries. Should there be one? Within the private sector, some advocacy groups—in particular, groups with a pro-Africa agenda—summarily reject the suggestion that U.S. trade preference program be integrated.³⁶⁶ Although the purported rationale for preserving the status quo, especially with regard to Africa, is to maintain the policy leverage that AGOA offers vis-à-vis sub-Saharan Africa,³⁶⁷ it is equally plausible that this knee-jerk rejection of a call for program integration is rooted in the fear that the special trade preferences that are available only to AGOA beneficiaries would be eroded or lost if generalized and made available to all developing countries. In response to statutory requirements, agencies pursue different approaches to monitoring compliance with the various criteria set for programs, resulting in a lack of systematic review. There are other differences in key aspects of the preference programs, such the use of trade capacity building in conjunction with opportunities provided under trade preference programs, which is currently most prominent in AGOA.³⁶⁸

Finally, distinct approaches to reporting and examining the programs limit the ability of the United States to determine the extent to which U.S. trade preferences foster development in beneficiary countries. There is no periodic reporting on the effect of GSP on the economic development of countries covered by that program.³⁶⁹ When reports are prepared on the

trade preferences. Rossella Brevetti, *USTR Official Says Permanent AGOA Would Not Serve Africa's Best Interests*, INT'L TRADE DAILY (BNA), (April 18, 2011).

366. See, e.g., Rossella Brevetti, *Consolidation of Preference Programs Not in U.S. Interest, CCA President Says*, INT'L TRADE DAILY (BNA), (July 16, 2009).

367. See *id.*

368. In 2011 USTR Ron Kirk pledged additional aid for trade capacity building for AGOA beneficiaries. *Kirk Announces Trade Capacity Initiative At Opening of AGOA Ministerial Sessions*, INT'L TRADE DAILY (BNA), (June 10, 2011). The African Competitiveness and Trade Expansion Initiative announced by Kirk at the tenth annual AGOA forum will provide up to \$120 million over four years to “intensify and focus more sharply” the work of four regional trade hubs. Remarks by Ambassador Ron Kirk, United States Trade Representative, Opening Ceremony of the 2011 U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum (AGO Forum), Lusaka, Zambia, June 9, 2011, *available at* <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2011/june/remarks-united-states-trade-representative-ron>. The regional trade hubs in Ghana, Senegal, Botswana, and Kenya work with producers and firms that are ready to export within Africa, to the U.S. market, and worldwide.

369. Only one program (CBERA) requires agencies to directly report on the impact on the beneficiaries. Nevertheless, in response to statutory requirements, several government agencies report on certain economic aspects of the regional trade preference programs. This reporting, nevertheless, is done on a program-by-program basis. For example, the USTR has produced several reports to Congress on the operation of ATPA and CBERA. The ITC prepares biennial reports on ATPA’s impact on U.S. industries and consumers and on drug crop eradication and crop substitution. Additionally, the USTR prepares a biennial report for Congress on the CBERA program’s impact on beneficiaries, U.S. consumers, and the U.S.

economic impact of CBERA, ATPA, and AGOA on the beneficiaries, the ITC and the USTR use different approaches, resulting in disparate analyses that are not readily comparable.³⁷⁰ Moreover, there is no evaluation of how trade preferences as a whole affect economic development in beneficiary countries.³⁷¹

In sum, over the years, Congress has set up a number of trade preference programs to meet the overall goal of development, as well as specific regional objectives. As a result, U.S. trade preferences have evolved into an increasingly complex array of programs with many countries participating in more than one of these programs.³⁷² While there is overlap in various aspects of trade preference programs, each program is currently considered separately by Congress based on its distinct timetable and expiration date. Typically, the focus has been on issues relevant to specific programs, such as counternarcotics cooperation efforts in the case of ATPA, or phasing out benefits for advanced developing countries in the case of GSP. As a result,

economy. 19 U.S.C. § 2704(a)(1). Finally, the USTR produces an annual report on the implementation of AGOA that highlights trade and investment trends in sub-Saharan Africa.

370. For example, the USTR's report on the ATPA provides some examples that illustrate the role of the program in promoting exports and development in each of the four beneficiary countries and refers to analyses by the ITC and Labor on some aspects of the economic impact of ATPA. On the other hand, ITC reporting on the ATPA provides some material on exports and economic diversification for countries under the program. The USTR's reporting on CBERA highlights overall and country-specific increases in U.S. imports from countries in the CBI program. The report includes discussions on individual countries, which generally do not evaluate the impact of CBERA on the exports or development of the beneficiaries. The ITC reports on the impact of CBI examine how that program affects those countries that have relatively large trade flows with the United States. The trade profile for the region presented in this report has shifted over time, with certain countries receiving more emphasis in earlier reports while later iterations focus on others. The USTR's comprehensive report on trade and investment in Sub-Saharan Africa and the implementation of AGOA provides an overview of trade and investment trends in participating Sub-Saharan countries, reviews economic integration efforts at the regional and sub-regional level, and discusses participation by AGOA countries in the WTO. Finally, while there is no regular reporting on the economic impact of GSP on beneficiary countries, in 1980, the administration prepared a statutorily required report to Congress on the first 5 years of operation of the GSP program. That report included an analysis of the impact of the GSP on developing country economies. This appears to have been a one-time report. *See GAO Report on Integrating U.S. Trade Preference Programs*, *supra* note 126, at 58. Thus, while there is an abundance of reporting on various aspects of the economic effects of trade preference programs on beneficiary countries, the analyses and data presented in these reports is typically quite dissimilar and does not lend itself for use in evaluating the overall effects of trade preferences.

371. *See GAO Report on Integrating U.S. Trade Preference Programs*, *supra* note 126, at 56.

372. Of the countries and territories eligible for U.S. trade preference programs, in 2007 78 benefited from more than one program and 39 were eligible for more than two programs. For a list of beneficiary countries and the overlapping programs for which they are eligible, see *id.* at 48.

until 2007³⁷³ congressional deliberations have not provided for cross-programmatic consideration or oversight. The oversight difficulties associated with this array of preference programs and distinct timetables is compounded by different statutory review and reporting requirements for agencies. U.S. trade preferences are neither administered nor evaluated on a cross-programmatic basis. A lack of systematic evaluation limits any judgment about the extent to which the collection of U.S. trade preference programs has increased trade and fostered development in beneficiary countries. While evaluations may occur to determine whether countries should retain eligibility for preferences, such inquiries have not been made regularly or in a consistent manner across the programs or beneficiary countries. Integrating the disparate programs into a comprehensive, single program would bring coherence to what is an otherwise crazy-quilt legal scheme.

B. Eliminate Conditionality

Some commentators have singled out U.S. GSP conditionality for special condemnation on the ground that as a policy instrument it exceeds the bounds of rational policy making by including conditions that have no relationship to promoting international human rights (for example, IPR protection and U.S. investor protection).³⁷⁴ As noted above in connection

373. On May 16, 2007, the Senate Committee on Finance held a hearing to assess U.S. trade preference programs. U.S. Preference Programs: How Well Do They Work? Hearing before the Senate Committee on Finance, 110th Congress (2007).

374. See, e.g., *Open Markets for the Poorest Countries*, *supra* note 344, at 13, where the author notes:

Other arbitrary and nontransparent eligibility conditions can also discourage investment and inhibit exports. Most programs in high-income countries have graduation rules for both countries as their incomes rise and products as exports become more competitive. In terms of other conditions for eligibility, only the United States goes beyond egregious violations of human rights (several countries exclude Myanmar from trade preference programs, for example) to include conditions relating to protection of intellectual property, corruption, and a range of other issues, depending on the program. The application of both types of conditions is often arbitrary and unpredictable. In order to avoid undermining the value of preferences, eligibility conditions should be limited and as objective as possible. Graduation conditions should be phased in gradually and should ensure that higher incomes or product competitiveness are not transitory before preferences are revoked. Political conditions should be based on international definitions of standards where they exist and applied sparingly.

Id. at 13. Whether this patently conclusory critique of U.S. conditionality has any basis in fact is open to question.

with the EU's GSP+ program,³⁷⁵ the United States is not alone among preference-granting countries with regard to having a comparatively expansive list of conditions that it imposes for trade preference eligibility. Two different approaches that are reflected in the U.S. programs' respective statutory authorizations — a petition process and periodic reviews — have evolved to monitor compliance with the conditions for eligibility under the various U.S. trade preference programs. The petition-driven GSP reviews of country practices and product coverage have the advantage of adapting the programs to changing market conditions and the concerns of businesses, foreign governments, and civil society.³⁷⁶ However, the petition process results in gaps in reviews of country compliance with the GSP conditions for eligibility. The GSP program's petition review process, versus the annual or biennial administrative government agency review that takes place under the regional trade preference programs, is at best scattershot.³⁷⁷ From 2001 to 2006, three-quarters of the countries eligible only for GSP did not get examined at all for their conformity with eligibility criteria. From 2001 to 2006, when the number of GSP beneficiaries ranged from 146 to 131, USTR considered petitions against 32 countries.³⁷⁸ In addition, long periods passed between overall reviews of the GSP program. The USTR completed an overall review of the GSP program in 2006. USTR completed the last general review of the program approximately 20 years earlier in 1987.³⁷⁹ The petition-driven review process also fails to systematically incorporate other ongoing monitoring efforts. For example, the lack of review under GSP provisions of any of the 26 preference beneficiary countries cited by USTR in 2006 for having problems related to the adequate and effective protection of U.S. intellectual property rights (IPR) makes it appear no linkage exists between GSP and ongoing monitoring of IPR protection abroad.

375. See *supra* text accompanying notes 225-27 and accompanying text.

376. For example, in 2009 the USTR accepted petitions to review the country practices of Bangladesh, Iraq, Niger, the Philippines, Sri Lanka, and Uzbekistan with regard to labor rights, the country practices of Argentina related to enforcement of arbitral awards, and the country practices of Lebanon, Russia, and Uzbekistan regarding intellectual property rights protection. See Office of the U.S. Trade Representative, Results of the 2009 GSP Review: Petitions for Review of Country Practices 24 (2010), www.ustr.gov/webfm_send/2016. The worker rights petitioners were the AFL-CIO and the International Labor Rights Fund. The petitioner for the IP rights practices was the International Intellectual Property Alliance. See *id.* For its 2010 GSP review the USTR accepted country-eligibility petitions for Sri Lanka (worker rights) and Argentina (enforcement of arbitral awards). See Len Bracken, *USTR Takes Three 2009 GSP Petitions, Initiates Review of 2010 Country Eligibility*, INT'L TRADE DAILY (BNA), (Aug. 12, 2010).

377. Most petitions originate from persons outside of government. See GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 126, at 50 (“NGO and private sector representatives cited the value of the petition process in bringing forward concerns related to intellectual property rights and workers’ rights.”).

378. See *id.* at 51.

379. See *id.*

The periodic reviews under the regional programs offer more timely and consistent evaluations of country performance against the conditions for participation but may still miss important concerns. For example, 11 countries that are in regional programs were later subject of GSP complaints in the 2001 to 2006 period.³⁸⁰ Equatorial Guinea has been reviewed for AGOA eligibility and found to be ineligible. Yet, Equatorial Guinea has not been subject to a GSP country practice petition or reviewed under GSP. As a result, Equatorial Guinea remained eligible for GSP and exported more than 90 percent of its \$1.7 billion in exports duty free to the United States under the GSP program in 2006³⁸¹ (it was subsequently graduated from GSP as a high-income country in 2009.) AGOA requires countries to be eligible for GSP, but the reverse is not true. In addition to the conditions for GSP eligibility, AGOA requires countries to have or be making progress toward political pluralism and the rule of law, and prohibits participation of countries that undermine U.S. national security and foreign policy, commit gross violations of human rights, or support international terrorism.

Table 6. Administrative Oversight of U.S. Trade Preference Programs

	Administrative mechanism	Product addition review	Country review	Reporting	Trade capacity building and related assistance tied to program
GSP	GSP subcommittee of the TPSC	Petition process developed by regulation	Annual petition process	Reporting in GSP done via the USTR annual report	Outreach missions to encourage greater beneficiary use of program
ATPA	Andean subcommittee of the TPSC	No	Annual petition process and biennial general review	Biennial operational report	None
CBI	Caribbean subcommittee of the TPSC	No	Biennial general review	Biennial operational report	None
AGOA	AGOA Implementation subcommittee of the TPSC	GSP petition process to determine product additions	Annual eligibility determination	Annual report on U.S. Trade and Investment Policy toward Sub-Saharan Africa and Implementation of AGOA*	Multiple legislative directions to trade capacity building with specific program linked to AGOA eligibility

*The USTR submitted the statutorily mandated eighth and final annual AGOA report in 2008.

Source: U.S. Government Accountability Office

To its credit, the process does bring to bear the knowledge of NGOs and others about problems in these areas and helps the government pursue credible cases.³⁸² However, some of the countries reviewed frequently are

380. *See id.* at 54.

381. *See id.* at 46-47.

382. For example, from 2001 through 2006, USTR conducted an investigation on copyright piracy and enforcement in Brazil in response to a petition filed under GSP by a coalition of seven trade associations concerned about IPR violations in that country. The investigation resulted in an agreement between the U.S. and Brazilian governments, hailed

not necessarily those that perform the worst relative to the criteria for participation but rather those countries of most concern to particular groups, such as businesses or NGOs.³⁸³ In this sense, U.S. government resources may be unduly invested in performing repeated reviews of a country that is of particular concern to a given interest group, while other countries with potential problems receive substantially less scrutiny.

In contrast to the episodic petition review process of the GSP program, the periodic reviews under the regional programs offer more timely and consistent evaluations of country performance against the criteria for participation. Among the regional programs, AGOA has the most intensive evaluation of country performance against the criteria for participation. AGOA requires the President to determine annually whether Sub-Saharan African countries are, or remain, eligible for the program.³⁸⁴ The key difference between the AGOA review and the CBERA and ATPA reviews is that only AGOA requires a determination periodically as to whether a country should remain a beneficiary.³⁸⁵

by the petitioner, to increase antipiracy raids in well-known marketplaces, establish antipiracy task forces at the state and local level in Brazil, and enhance deterrence through criminal prosecutions, among other actions. *See id.* at 51.

383. GAO REPORT ON INTEGRATING U.S. TRADE PREFERENCE PROGRAMS, *supra* note 126, at 51.

384. *See id.* at 53. Between 2001 and 2007, the President terminated eligibility four times and conferred eligibility eight times. In contrast, between 2001 and 2006, one country was removed and reinstated for GSP, and another country was reinstated after being removed in 1990. No country lost eligibility under the ATPA or CBI programs.

385. Regarding the efficacy and labor-intensive nature of AGOA annual reviews, the GAO has reported the following:

A USTR official testified that AGOA's annual review process has resulted in improved country performance under the eligibility criteria. In July 2007, a senior USTR official testified before the Subcommittee on Africa and Global Health of the House Foreign Affairs Committee that the President had removed, or threatened to remove, AGOA beneficiaries that did not meet the criteria for participation. This official noted that some of these countries had taken action to meet the criteria, and countries such as Liberia and Mauritania, which had been ineligible, were now eligible. However, U.S. officials also commented that the AGOA review is extremely time-consuming and demands a considerable investment of staff resources, since each beneficiary country must be reviewed on its performance on a range of criteria, such as respect for the rule of law and poverty reduction efforts. Moreover, these reviews must be updated on an annual basis.

Despite more regular and comprehensive reviews, 11 countries that are in regional programs were later subject of GSP complaints in the 2001 to 2006 period. In several cases, the petition-based examination associated with the GSP process validated and resulted in further progress in resolving concerns with regional partners such as Guatemala, Swaziland, and Uganda on labor issues. For example,

Realistically, considering the low number of petitions that are filed annually with the USTR seeking revocation of a country's GSP beneficiary status based upon a violation of the GSP conditions, coupled with the extremely high denial rate by the USTR, it has to be seriously questioned whether the filing of such petitions isn't anything more than a sop to petitioners and an irritant to the beneficiaries and their U.S. importers. Although a handful of petitions are filed annually to have a beneficiary country's GSP status suspended or revoked, few result in actual GSP suspension or revocation. (Country suspension or removal from GSP and the ATPA only occurs through a petition process and not through an annual or biennial administrative review as is the case under AGOA and CBERA, respectively).³⁸⁶ For the six-year period 2001-06, 52 petitions were filed against 32 countries under the GSP program (in some instances multiple petitions were filed against the same country), alleging violations of workers' right (24 petitions), intellectual property rights (15 petitions), market access (6 petitions), reverse preferential treatment (4 petitions), contract nullification (2 petitions), and expropriation (1 petition).³⁸⁷ In that six-year period, only Ukraine had its benefits suspended, which were eventually restored, and Liberia had its GSP status restored following a 1990 suspension.³⁸⁸ As Tables 7-11 below illustrate, this situation has not changed in subsequent years. Few country-practice petitions challenging a

in 2005, the American Federation of Labor and Congress of Industrial Organizations filed a petition regarding Uganda's performance against workers' rights criteria under GSP and AGOA. The petition led to an interagency investigation that was closed after Uganda enacted new legislation facilitating organization of unions, among other things. A Labor official told us that these issues had not been remedied under the AGOA review.

See id. at 53-54.

386. *See GAO Overview of U.S. Trade Preference Programs, supra* note 129, at 4. Although there was no formal process for removal or suspension under the ATPA for its first ten years, with the amendments to the program made under the ATPDEA in 2002 a formal petition process was instituted in 2003. Since 2003, the USTR conducts annual reviews and provides the opportunity for the submission of petitions for the withdrawal or suspension of certain benefits of the program to ATPDEA recipient countries. Petitions must indicate the eligibility criterion that the petitioner believes warrants review. In 2003 17 petitions were filed (8 against Peru, 8 against Ecuador, and 1 against Colombia) alleging violations of workers' rights and investors' rights. *See id.* at 46.

387. *See id.* 44. For a list of the countries that were the subject of these petitions, *see id.* at 72. For a list of the countries that have had their GSP status changed as a result of a petition since the start of the GSP program, *see id.* at 68-71. Any person may file a petition in the annual GSP review requesting that the status of any eligible beneficiary be reviewed with respect to any of the designation criteria listed in the statute governing the GSP program, including workers' rights and intellectual property rights.

388. *See id.*

beneficiary's compliance with GSP conditions are filed each year, and the USTR's disposition of those petitions are generally against the petitioner.

Table 7. Results of GSP Country-Practice Petitions, 2005

Petitioner(s)	Country	Subject*	Decision
AFL-CIO	Bangladesh, Oman	WR	Not accepted for review
International Labor Rights Fund (ILRF) and Asociación Servicios de Promoción Laboral (ASEPROL)	Costa Rica, El Salvador, Guatemala, Honduras, Panamá,	WR	Not accepted for review
AFL-CIO and Teamsters	El Salvador	WR	Not accepted for review
Washington Office on Latin America (WOLA) and U.S. Labor Education in the Americas Project (US/LEAP)	Guatemala	WR	Not accepted for review
AFL-CIO endorsing WOLA and US/LEAP petition	Guatemala	WR	Not accepted for review
ILRF and UNITE HERE	Uganda	WR	Review Continued
AFL-CIO	Swaziland	WR	Review closed; no changes to beneficiary status
International Intellectual Property Alliance (IIPA)	Brazil, Kazakhstan, Pakistan	IPR	Review closed; no changes to beneficiary status
Motion Picture Association of America	Dominican Republic	IPR	Not accepted for review
IIPA	Lebanon, Russia, Uzbekistan	IPR	Review continued
Distilled Spirits Council of the United States	Bulgaria, Romania	RPT	Review continued
Pharmaceutical Research and Manufacturers of America	Romania	RPT	Review continued
* WR=Worker's Rights; IPR=Intellectual Property Rights; RPT=Reverse Preferential Treatment			

Source: Office of the U.S. Trade Representative, www.ustr.gov

Table 8. Results of GSP Country-Practice Petitions, 2006

Petitioner(s)	Country	Subject*	Decision
AFL-CIO	Iraq	WR	Not accepted for review
International Labor Rights Fund (ILRF)	Niger	WR	Review continued
AFL-CIO	Uganda	WR	Review closed; no changes to beneficiary status
International Intellectual Property Alliance (IIPA)	Lebanon, Russia, Uzbekistan	IPR	Review continued
Distilled Spirits Council of the United States	Bulgaria, Romania	RPT	Review closed
Pharmaceutical Research and Manufacturers of America	Romania	RPT	Withdrawn

R&J Trading International Co.	Ukraine	Expropriation	Not accepted for review
* WR=Worker's Rights; IPR=Intellectual Property Rights; RPT=Reverse Preferential Treatment			

Source: Office of the U.S. Trade Representative, www.ustr.gov

Table 9. Results of GSP Country-Practice Petitions, 2007

Petitioner(s)	Country	Subject*	Decision
AFL-CIO	Bangladesh	WR	Review continued
International Labor Rights Fund (ILRF)	Niger, Uzbekistan	WR	Review continued
International Intellectual Property Alliance (IIPA)	Lebanon, Russia, Uzbekistan, Philippines	IPR	Review continued
* WR=Worker's Rights; IPR=Intellectual Property Rights			

Source: Office of the U.S. Trade Representative, www.ustr.gov

Table 10. Results of GSP Country-Practice Petitions, 2008

Petitioner(s)	Country	Subject*	Decision
AFL-CIO	Bangladesh	WR	Review continued
AFL-CIO	Iraq	WR	Decision deferred on whether to accept
International Labor Rights Fund (ILRF)	Niger, Philippines, Uzbekistan	WR	Review continued
AFL-CIO	Sri Lanka	WR	Decision deferred on whether to accept
International Intellectual Property Alliance (IIPA)	Lebanon, Russia, Uzbekistan	IPR	Review continued
* WR=Worker's Rights; IPR=Intellectual Property Rights			

Source: Office of the U.S. Trade Representative, www.ustr.gov

Table 11. Results of GSP Country-Practice Petitions, 2009

Petitioner(s)	Country	Subject*	Decision
AFL-CIO	Bangladesh	WR	Review continued
AFL-CIO	Iraq	WR	Decision deferred on whether to accept
International Labor Rights Fund (ILRF)	Niger, Philippines, Uzbekistan	WR	Review continued
AFL-CIO	Sri Lanka	WR	Petition accepted
International Intellectual Property Alliance (IIPA)	Lebanon, Russia,	IPR	Review continued

	Uzbekistan		
Azurix Corp.	Argentina	Arbitral awards	Petition accepted
* WR=Worker's Rights; IPR=Intellectual Property Rights			

Source: Office of the U.S. Trade Representative, www.ustr.gov

In short, conditionality is a stage for bad political theater, and its impact on the beneficiary level is arguably negligible. The elimination of conditionality in all donor-country GSP programs should be given serious consideration.

C. Harmonize Preferential Rules of Origin at the International Level

Any type of preferential trade arrangement requires rules of origin in order to prevent goods produced in non-beneficiary countries from being transshipped through beneficiary countries receiving preferential market access.³⁸⁹ Eligibility for preferential treatment usually requires that imported inputs must be “substantially transformed” in the beneficiary country. “Substantial transformation” can be expressed in a number of ways. In determining whether the country of origin of an otherwise eligible article is a BDC, the U.S. GSP statute³⁹⁰ provides that an eligible article that is the

389. In addition to preventing transshipment, some argue that rules of origin should be used as a form of industrial policy to promote backward linkages, for example encouraging local textile production as inputs for clothing exports. See *Open Markets for the Poorest Countries*, *supra* note 344, at 10. As the author of this report observes:

[T]he EU's Everything But Arms program is a model program with respect to product coverage, but it failed to deliver on its potential because of rules of origin that still block access for key products. The EBA rule for apparel, for example, restricts imports of woven garments by requiring that the fabric be manufactured locally and then cut and assembled in the beneficiary country to be eligible for access. But textile production is more capital-intensive and requires more skills than the cutting and sewing of apparel, and this rule is impossible to meet in smaller, poorer countries. By contrast, the U.S. rule for “lesser developed” beneficiaries under AGOA allows them to source fabric and other inputs globally and still claim AGOA benefits, as long as the apparel is cut and sewn in the beneficiary country.

Id.

390. 19 U.S.C. § 2463. In interpreting the pre-1990 amendments to the Act, a 1989 Federal Circuit opinion, *Madison Galleries, Ltd. v. United States*, 870 F.2d 627 (Fed. Cir. 1989), held that an article did not have to be the growth, product, or manufacture of a BDC in order to be eligible for duty-free treatment. Congress restructured this section to provide for GSP eligibility for articles, which are the growth, product, or manufacture of a BDC. Pub.

growth, product, or manufacture of a BDC shall receive duty-free treatment if: (1) the article is imported directly from a BDC into the customs territory of the United States; and (2) the sum of (a) the cost or value of the materials produced in the BDC or any two or more BDCs that are members of a trade association (such as a free trade area or customs union), which are treated as one country pursuant to Executive Order or presidential proclamation,³⁹¹ plus (b) the direct costs of processing operations performed in such BDC or such member countries,³⁹² is not less than (c) 35 percent of the appraised value of such article at the time it is entered.³⁹³ In addition, materials imported into a BDC may be counted toward the 35-percent value-added requirement only if they are substantially transformed into a new and different article of commerce in the BDC before they are incorporated into the GSP-eligible article.³⁹⁴ As a general proposition, a good is substantially transformed if it is changed into a new and different article having a distinctive name, character, or use.³⁹⁵ Although it has a low value-added rule of origin (35 percent), the U.S. requirement that one country or small groups of BDCs³⁹⁶ meet that threshold ignores the globally integrated supply chains used to manufacture finished goods today.³⁹⁷

L. No. 101-382, § 226, 104 Stat. 660 (1990). For a Customs Service definition of “imported directly,” see 19 C.F.R. § 10.175. Customs Service regulations identify the following items that may be included in the cost or value of materials: (1) the manufacturer’s actual cost for the materials; (2) when not included in the actual cost, freight, insurance, packing, and costs incurred in transporting the goods to the manufacturer’s plant; (3) the actual cost of waste and spoilage; and (4) taxes and duties imposed on the materials by the BDC, provided they are not remitted upon exportation. See 19 C.F.R. § 10.177(c).

391. Such country associations include CARICOM, the Andean Pact, and ASEAN, and are listed in HTUSU General Note 4.

392. Customs Service regulations identify the following costs that may be included as “direct costs of processing operations:” (1) actual direct labor costs, (2) tools, equipment, and their depreciation allocable to the specific article, (3) research and development allocable to the specific article, and (4) inspection and testing costs. Costs that are not “direct” costs include profit and general expenses not allocable to the specific product, such as advertising and administrative salaries. See 19 C.F.R. § 10.178.

393. 19 U.S.C. § 2463(a)(2). U.S. Customs and Border Protection regulations governing the GSP program require that a GSP Declaration be filed with an entry in a case involving an article that is not wholly the growth, product, or manufacture of a single BDC. The Declaration must set forth in detail the processing operations in the countries that are members of a trade association, such as a free trade area or customs union. 19 C.F.R. § 10.173.

394. 19 C.F.R. § 10.177(a)(2). For an analysis of GSP rule-of-origin issues, see Kenneth G. Weigel, *Preferential Rules of Origin*, in NEW DEVELOPMENTS IN CUSTOMS RULES OF ORIGIN (Am. Bar Ass’n 1993); Thomas P. Cutler, *The United States Generalized System of Preferences: The Problem of Substantial Transformation*, 5 N.C.J. INT’L L. & COM. REG. 393 (1980).

395. *Anheuser-Busch Ass’n v. United States*, 207 U.S. 556, 562 (1908).

396. Such country associations include CARICOM, the Andean Pact, and ASEAN, and are listed in HTSUS General Note 4.

397. CBERA’s rules of origin are similar to those of the GSP program. See 19 U.S.C. § 2703(a). Like the GSP, CBERA requires that a product (1) be imported directly from a

beneficiary country to the United States, (2) satisfy the substantial transformation test for any foreign parts or components, and (3) contain a minimum of 35-percent local value-added. CBERA provides generally that in order for designated products to be eligible for preferential tariff treatment they must either be (1) wholly grown, produced, or manufactured in a CBERA country, or (2) a new or different article of commerce produced from substantially transformed non-CBERA inputs. As is the case under the parallel GSP origin rule, in meeting the 35-percent CBERA content requirement, the value-added may come from two or more CBERA countries. The documentation requirements necessary to claim either CBERA or GSP duty-free entry are identical.

The ATPA rule of origin is slightly more preferential than the CBERA counterpart. Duty-free treatment of any eligible article is granted under the ATPA to an article that is the growth, product, or manufacture of a beneficiary country, provided (1) the article is imported directly from a beneficiary country into the customs territory of the United States, and (2) the sum of (a) the cost or value of materials produced in one or more Andean or CBERA beneficiary countries, plus (b) the direct costs of processing operations performed in one or more Andean or CBERA beneficiary countries is not less than 35 percent of the appraised value of the article. 19 U.S.C. § 3203(a); HTSUS General Note 3(c)(ix)(B)(1)(II). Puerto Rico and the Virgin Islands are included as beneficiary countries, and up to 15 percent of the value of U.S. content may count toward the 35-percent value added. Thus, the ATPA rule is slightly more preferential than the CBERA rule because it allows for the inclusion of costs associated with CBERA-country operations, whereas the CBERA rule does not contain a reciprocal rule permitting the inclusion of ATPA-country costs.

The AGOA rules of origin are essentially bifurcated: there is one rule of origin for products other than textile and clothing and special rules of origin for textiles and clothing. The rule of origin for non-textile and clothing imports is 35-percent SSA value. In addition, 15 percent of the value of the imported product can be attributed to inputs originating in the United States. The AGOA rule of origin provides:

The duty-free treatment provided under paragraph (1) shall apply to any article described in that paragraph that meets the requirements of section 2463(a)(2) of this title [19 U.S.C.], except that--

(A) if the cost or value of materials produced in the customs territory of the United States is included with respect to that article, an amount not to exceed 15 percent of the appraised value of the article at the time it is entered that is attributed to such United States cost or value may be applied toward determining the percentage referred to in subparagraph (A) of section 2463(a)(2) of this title [19 U.S.C.]; and

(B) the cost or value of the materials included with respect to that article that are produced in one or more beneficiary sub-Saharan African countries or former beneficiary sub-Saharan African countries shall be applied in determining such percentage.

19 U.S.C. § 2466a(b)(2). As is true for non-textile and clothing articles, AGOA provides duty-free and quota-free treatment for eligible clothing articles made in qualifying sub-Saharan African countries. However, not only are the rules of origin for textiles and clothing more stringent, but the rules on eligibility for the textile and clothing benefits are also more onerous. Under AGOA I, clothing imports made from sub-Saharan African fabric and yarn were subject to an initial cap of 1.5 percent of overall U.S. clothing imports, increasing to 3.5

percent of overall imports over an 8-year period. The 2002 AGOA amendments doubled the applicable percentages of the cap to 7 percent. The regional fabric quantities are recalculated for each subsequent year and the percentage figure increases incrementally in equal annual increases to a level of 7 percent beginning October 1, 2007. Clothing articles entered in excess of these quantities are subject to otherwise applicable tariffs. The duty-free cap is not allocated among countries, but is filled on a “first-come, first-served” basis. *See* Office of the U.S. Trade Representative, 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act 5-6 (2004). AGOA limits imports of clothing made with regional or third-country fabric to a fixed percentage of the aggregate square meter equivalents (SME) of all clothing articles imported into the United States during the preceding year. The Trade Act of 2002 increased the quantitative limitation for clothing made with regional fabric. AGOA III extended the regional fabric provision until September 2015, but provided that the increase would not apply to clothing imported under the special provision for lesser-developed countries that allows textile and clothing imports to be made of third-country fabrics, i.e., fabrics other than of U.S. or SSA origin, through September 2007. Thus, for the year beginning October 1, 2003, the aggregate quantity of imports eligible for preferential treatment under these provisions was an amount not to exceed 4.7931 percent of all clothing articles imported into the United States in the preceding 12-month period for which data was available, which equaled 956,568,715 square meters equivalent (SME). *See id.* at 5. The percentage increases annually until it reaches 7 percent of total U.S. imports, at which point it is capped. The AGOA III limitations of benefits provision provides:

(i) In general

Preferential treatment under this paragraph shall be extended in the 1-year period beginning October 1, 2003, and in each of the 11 succeeding 1-year periods, to imports of clothing articles in an amount not to exceed the applicable percentage of the aggregate square meter equivalents of all clothing articles imported into the United States in the preceding 12-month period for which data are available.

(ii) Applicable percentage

For purposes of this subparagraph, the term “applicable percentage” means--

(I) 4.747 percent for the 1-year period beginning October 1, 2003, increased in each of the 5 succeeding 1-year periods by equal increments, so that for the 1-year period beginning October 1, 2007, the applicable percentage does not exceed 7 percent; and

(II) for each succeeding 1-year period until September 30, 2015, not to exceed 7 percent.

In 2010, the European Commission promulgated regulations revising the rules of origin for the EU's GSP scheme.³⁹⁸ The revised regulation reintroduced the four origin methodologies, i.e., goods wholly obtained,³⁹⁹ change of tariff heading or sub-heading, specific working and processing operations, and value-added requirement, thus abandoning the application of the unitary, value-added methodology initially proposed.⁴⁰⁰

Annex 1 of the 2010 regulation, *Introductory Notes and List of Working or Processing Operations which Confer Originating Status*, identifies which products are subject to which ROO methodology. An effort was made to make the new rules of origin applicable on a sector-by-sector basis rather than a product-by-product basis, thereby simplifying the origin rules and, in some instances, liberalizing them for LDCs. The revised ROO sets the threshold of value-added at 50 percent for many products originating in non-LDC beneficiary countries.⁴⁰¹ For other products, the revised ROO lowers the thresholds by 10 to 20 percent. For LDCs, a 30-percent value-added test is established, reflecting the EU's stated objective of targeted relaxation of origin rules for these countries.⁴⁰² For clothing products from LDCs, the revised ROO adopts a "single transformation" test.⁴⁰³ As a consequence, clothing that is assembled from imported fabric will confer origin. This single transformation test is sufficiently liberal so as to allow LDCs to effectively meet the requirement. For non-LDC developing countries, the prior requirement based on "dual transformation" rule is maintained.⁴⁰⁴ For some products, the revised ROO establishes alternative tests at the exporter's option: (1) a value-added test, or (2) a change-in-tariff-heading test.⁴⁰⁵ What are styled "tolerance" rules—in effect, de minimis rules—permit the use of non-originating materials in the production of a given product to a certain pre-determined threshold value, even if that would not normally satisfy the origin requirement.⁴⁰⁶

398. Comm'n Regulation 1063/2010, 2010 O.J. (L 307) 1 [hereinafter EU Reg. on GSP Rules of Origin].

399. *Id.* arts. 72, 75.

400. *Id.* annex I.

401. *See, e.g., id.* annex I, at 41.

402. *See id.* annex I.

403. *See, e.g., id.* annex I at 50-51. There are four steps involved in processing natural fibers and making them into a finished item. First, the fiber is harvested. Second, the fiber is spun into yarn. Third, the yarn is woven or knit into fabric. Fourth, the fabric is cut and sewn into clothing (e.g., shirts and blouses) and other made-up textile articles (e.g., bed sheets and towels). *See* U.S. INT'L TRADE COMM'N, TEXTILES AND APPAREL: ASSESSMENT OF THE COMPETITIVENESS OF CERTAIN FOREIGN SUPPLIERS TO THE U.S. MARKET, at 1-2 (Pub. 3671 Jan. 2004).

404. *See* EU Reg. on GSP Rules of Origin, *supra* note 398, annex I at 50-51. Non-LDC developing countries that do not manufacture fabric will have difficulty in meeting this origin requirement.

405. *See id.* annex I, at 41.

406. *Id.* art. 79. For example, the EU current origin rule provides that a doll (HS 9502) imported from a beneficiary country can qualify for the EU GSP if the doll is manufactured

The EU's amended rules of origin have a variety of cumulation provisions. First, regarding bilateral cumulation, under the former rule beneficiary countries could cumulate bilaterally with EU member countries, Norway, and Switzerland. Turkey was added to the countries for which bilateral cumulation is allowed.⁴⁰⁷ However, cumulation is not permitted for agricultural products (HS 1 to 24).⁴⁰⁸ Second, regarding regional cumulation, the current regional cumulation rule is maintained.⁴⁰⁹ Third, cumulation is permitted between a beneficiary country and a country with which the EU has a free trade agreement (excluding agricultural products).⁴¹⁰ Notwithstanding this apparent attempt to simplify the EU's GSP rules of origin, the revised regulation's entry requirements remain complex.⁴¹¹

Canada's GPT scheme allows all work completed in any beneficiary country to count towards its value threshold (i.e., cumulation). This subtle difference provides exporters in small countries, which might be competitive at producing components but not whole goods, a greater chance to integrate into the global production chain.⁴¹²

A value-added rule, such as the 35-percent rule of U.S. GSP, the ATPA, and CBERA, can require extensive documentation of costs, thus deterring some producers in a beneficiary country from tackling the necessary

from any imported materials which are classified under a different heading, e.g., plastics or fabrics. However, the use of imported doll's parts, e.g., doll's eyes, would not normally be allowed as these are classified in the same tariff heading (HS 9502) as the doll itself. In this respect, the tolerance rule allows the use of these imported materials in the production of final products if they do not exceed certain threshold value levels. The "tolerance" level was raised from the current rule of 10 percent to 15 percent.

407. *Id.* art. 85.

408. *Id.* art. 85(3).

409. *Id.* art. 86. The following are the regional cumulation groups: Group I (the members of ASEAN, the Association of Southeast Asian Nations, comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam, excluding Myanmar), Group II (the members of the Andean Community, Central American Common market, comprising Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, and Venezuela, and including Panama), Group III (the members of South Asian Association on Regional Cooperation — SAARC — comprising Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka), and Group IV (MERCOSUR — the Common Market of the South — comprising Argentina, Brazil, Paraguay, and Uruguay). The revised ROO also allows cross-cumulation between Group I (ASEAN) and Group III (SAARC). *Id.* art. 86(5).

410. *Id.* art. 86(7).

411. *See id.* arts. 90-97m.

412. UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA, *supra* note 77, at 18. Japan's GSP program adopts the goods wholly obtained and goods substantially transformed criteria. With the former there is little guesswork or controversy. However, Japan's substantial transformation criterion in reality represents four alternative rules of origin: (1) change in tariff classification, (2) dual substantial transformation, (3) a 55-60% value-added test when the imported goods are assembled from non-originating parts, and (4) a hybrid test that combines value added with certain processing operations. *See* Komuro, *supra* note 41, at 108-09.

paperwork with the result that MFN duties are imposed. At the same time, the preference-granting countries have not adopted harmonized rules of origin, further complicating the life of producers in beneficiary countries who are eager to export but who could be deterred by conflicting rules of origin. In addition, the lack of harmonization among donor countries could further frustrate a producer's ability to achieve scale economies if it has to comply with variant rules of origin among different export markets.

For all these reasons, in lieu of a percentage-based value-added test, some experts recommend using a change-in-tariff-heading approach with the headings defined at a relatively disaggregated level to promote flexibility.⁴¹³ It has been further suggested that allowing cumulation would address many of the problems associated with existing rules of origin and could be adopted unilaterally. Cumulation, which the United States permits under CBERA, the ATPA, and AGOA, allows inputs to be sourced from a designated set of countries without losing eligibility for the final product as long as the inputs still undergo some substantial transformation in the beneficiary, such as a cutting-and-sewing operation for clothing. Under an expansive form of cumulation, if any country's goods would be eligible for duty-free treatment if shipped directly to the preference-giving country, then that country's goods could be inputs in the final product shipped by the ultimate beneficiary country. That would allow cumulation from countries that are eligible for unilateral preference programs such as GSP as well as countries that are parties to a free trade agreement.⁴¹⁴ The problem with such a proposal, however, is that preference-granting countries' lists of eligible beneficiary countries under their unilateral trade preference programs and under their free trade partners are not identical. For example, both China and Vietnam are GSP beneficiaries under the EU's GSP scheme, but neither is under the U.S. GSP program.⁴¹⁵ Moreover, whereas the United States and Canada are free trade partners under NAFTA, neither country is a free trade partner with either the EU or Japan. Nevertheless, at the single donor

413. See UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA, *supra* note 77, at 11 (footnote omitted).

414. See *id.* at 11, where the report notes that "Haiti, for example, has continued to have problems fully using preferences in the Canadian market because its apparel exports often contain U.S. fabric or other inputs (because of U.S. rules under its preference programs). Even though the U.S. fabric would be granted duty-free treatment if exported directly to Canada under the North American Free Trade Agreement, it is not eligible for cumulation under Canada's rule for LDC Preferences."

415. In 2008 Vietnam formally requested to be designated a U.S. GSP beneficiary. *Letter from the Embassy of Vietnam to the United States Trade Representative* (May 9, 2008), www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file29_15061.pdf. See Alexander H. Tuzin, *Vietnam's Eligibility to Receive Trade Benefits under the U.S. Generalized System of Preferences*, 7 LOY. U. CHI. INT'L L. REV. 193, 194 (2010) ("Vietnam's compliance with the GSP eligibility criteria is problematic. Ultimately, Vietnam's protections for both intellectual property rights and internationally recognized worker rights are inadequate.").

country level, a low value-added threshold coupled with a liberal cumulation rule can yield significant gains in trade for beneficiaries.⁴¹⁶ In connection with clothing, would the third-country fabric provision of AGOA and the HOPE Act be carried over? Ultimately, harmonization and rationalization of preferential rules of origin should also be pursued, if not for all preferential trade arrangements at least for the ones with LDCs as the beneficiaries. While it is true that negotiations at the WTO to harmonize non-preferential rules of origin have dragged on for years,⁴¹⁷ that project has proven to be extremely (if not overly) ambitious. A more modest agenda of negotiating harmonized rules of origin for programs that give tariff preferences to LDCs might stand an outside chance of success.

D. Provide Better Focused and Coordinated Aid for Trade

Many developing countries have expressed concern about their inability to take advantage of trade preferences because they lack the capacity to participate in international trade. In response to this criticism, the “Aid-for-Trade” program was launched in 2005 at the WTO’s Hong Kong Ministerial meeting.⁴¹⁸ In brief, the Aid-for-Trade Initiative aims to help developing

416. See UNILATERAL PREFERENTIAL TRADE PROGRAMS OFFERED BY THE UNITED STATES, THE EUROPEAN UNION, AND CANADA, *supra* note 77, at 12. The experience in Canada is illustrative:

The most compelling evidence of the importance of reforming rules of origin comes from the 2003 changes in Canada’s trade preference program. In addition to removing duties on almost all products in its tariff schedule, Canada lowered the threshold for locally added value in LDCs [to 25 percent] and also allowed LDCs to cumulate inputs from all developing-country beneficiaries, not just other LDCs. The result was more countries benefiting from preferential access, increased imports to Canada from existing beneficiaries, and an expanded range of imports into Canada from beneficiaries. Over a few years, the LDC share of non-oil Canadian imports nearly tripled. Less dramatically, the market share of beneficiaries under the U.S. AGOA program, which has relatively flexible rules, increased by roughly a third. By contrast, the market share for LDCs not already eligible for the EU’s African, Caribbean, and Pacific program stayed flat after introduction of the EBA program with its more restrictive rules.

Id. at 12 (footnote omitted).

417. See WTO. Note by the Secretariat, Tenth Annual Review of the Implementation and Operation of the Agreement on Rules of Origin, G/RO/59 (Dec. 10, 2004); WTO, Report (2010) of the Committee on Rules of Origin to the Council for Trade in Goods, G/L/939 (Nov. 8, 2010).

418. The Hong Kong Ministerial Declaration provides the following regarding “Aid for Trade:”

countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure required to implement and benefit from WTO Agreements and, more broadly, to expand their trade. It was set into motion in 2006 with the establishment of a WTO Aid-for-Trade Task Force.⁴¹⁹ The WTO Task Force recommended the following objectives for the initiative:

- Enable developing countries, particularly LDCs, to use trade more effectively to promote growth, development, and poverty reduction
- Help developing countries, particularly LDCs, to build supply-side capacity and trade-related infrastructure in order to facilitate their access to markets
- Help facilitate, implement, and adjust to trade reform and liberalization
- Assist regional integration
- Assist smooth integration into the world trading system, and
- Assist in the implementation of trade agreements.⁴²⁰

In addition, the Task Force recommended strengthening the partner country demand-side and the donor response-side as well as bridging the

We welcome the discussions of Finance and Development Ministers in various fora, including the Development Committee of the World Bank and IMF, that have taken place this year on expanding Aid for Trade. Aid for Trade should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade. Aid for Trade cannot be a substitute for the development benefits that will result from a successful conclusion to the DDA, particularly on market access. However, it can be a valuable complement to the DDA. We invite the Director-General to create a task force that shall provide recommendations on how to operationalize Aid for Trade. The Task Force will provide recommendations to the General Council by July 2006 on how Aid for Trade might contribute most effectively to the development dimension of the DDA. We also invite the Director-General to consult with Members as well as with the IMF and World Bank, relevant international organisations and the regional development banks with a view to reporting to the General Council on appropriate mechanisms to secure additional financial resources for Aid for Trade, where appropriate through grants and concessional loans.

Hong Kong Ministerial Declaration, *supra* note 82, at ¶ 57.

419. The Task Force called for in the Hong Kong Ministerial Declaration reported in July 2006. Aid for Trade Task Force, *Recommendations of the Task Force on Aid for Trade*, WT/AFT/1 (July 27, 2006). Additional information on aid for trade is available at the WTO's website, http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last visited May 11, 2011).

420. *Id.* at 3.

gap between demand and response at the national, regional, and global levels. To track progress on the implementation of this agenda and enhance the credibility of the initiative, the Task Force recommended establishing two accountability mechanisms: (1) at the local level, to foster genuine local ownership and ensure that trade needs are integrated into national development strategies and adequately addressed; and (2) at the global level, to increase transparency about what is happening, what is not, and where improvements are required.⁴²¹

How is aid-for-trade measured? The WTO Task Force concluded that aid-for-trade comprises the following categories: (a) technical assistance for trade policy and regulations (e.g., helping countries to develop trade strategies, negotiate trade agreements, and implement their outcomes); (b) trade-related infrastructure (e.g., building roads, ports, and telecommunications networks to connect domestic markets to the global economy); (c) productive capacity building, including trade development (e.g., supporting the private sector to exploit their comparative advantages and diversify their exports); (d) trade-related adjustment (e.g., helping developing countries with the costs associated with trade liberalization, such as tariff reductions, the shrinking margin of preference, or declining terms of trade); and (e) other trade-related needs, if identified as trade-related development priorities in partner countries' national development strategies.⁴²²

Following these recommendations, the OECD and the WTO established an aid-for-trade monitoring and evaluation framework.⁴²³ The objective of the framework is to promote dialogue and encourage all key actors to honor commitments, meet local needs, improve effectiveness, and reinforce mutual accountability. Qualitative information concerning partner-country demand is obtained through partner country self-assessments, which are based on an OECD-WTO partner questionnaire. These assessments also provide information about mainstreaming trade in development strategies, trade-related priorities, the delivery of aid-for-trade, and the co-operation between partner countries and donors. Information concerning donor response consists of quantitative information (i.e., aid-for-trade flows) relating to trade-related programs and projects that is extracted from the OECD's Creditor Reporting System (CRS) database,⁴²⁴ for the categories

421. *See id.* at 5-7.

422. *See id.* at 24.

423. OECD & WTO, AID FOR TRADE AT A GLANCE 2007: 1ST GLOBAL REVIEW 15-18 (2007) [hereinafter AID FOR TRADE AT A GLANCE 2007].

424. The Creditor Reporting System (CRS) is a database compiled and maintained by the OECD covering approximately 90 percent of all Official Development Assistance (ODA). It is the internationally-recognized source of data on aid activities. For the OECD, the CRS serves as a tool for monitoring specific policy issues, including aid for trade. The CRS enables the tracking of aid commitments and disbursements, and provides comparable data over time and across countries. The CRS does not provide data that match exactly all of

that are most closely related to the Task Force definition,⁴²⁵ and qualitative information concerning the donor response of aid-for-trade that is derived from donor self-assessment based on an OECD-WTO donor questionnaire.⁴²⁶ These self-assessments highlight the progress made by donors in developing operational aid-for-trade strategies, the extent to which these are implemented in line with the 2005 Paris Declaration on Aid Effectiveness,⁴²⁷ and the different steps taken to improve the quality of aid-for-trade programs.

the WTO Task Force-defined, aid-for-trade categories. *See supra* note 422 and accompanying text. The CRS provides proxies under the following five headings:

(1) Technical assistance for trade policy and regulations covering (a) trade policy and administrative management, (b) trade facilitation, (c) regional trade agreements, (d) multilateral trade negotiations, and (e) trade education/training.

(2) Economic infrastructure. This heading covers data on aid for communications, energy, transport, and storage.

(3) Productive capacity building, including trade development.

(4) Trade-related adjustment. This category identifies contributions to developing country budgets to assist the implementation of trade reforms and adjustments to trade policy measures by other countries, and to alleviate shortfalls in balance-of-payments due to changes in the world trading environment.

(5) Other trade-related needs. The CRS covers all ODA, but only those activities reported under the above four categories are identified as aid for trade. A health program, for example, might permit increased trade from areas where the disease burden was previously a constraint on trade. Consequently, accurately monitoring aid for trade would require comparison of the CRS data with donor and partner countries' self-assessments of their aid for trade.

The CRS database is available at *Creditor Reporting System Full*, OECD STATISTICS, <http://stats.oecd.org/Index.aspx?DatasetCode=CRSNEW> (last visited July 25 2011).

425. The OECD's Aid for Trade Statistical Queries webpage, <http://stats.oecd.org/qwids>, offers access to aid-for-trade statistics (through an interface called QWIDS) to measure aid-for-trade flows. Users can extract and download the latest aid-for-trade statistics from 2002 onwards, covering volume, origin, and aid categories for over 150 developing countries and territories, including project-level information reported to the OECD Creditor Reporting System (CRS).

426. *See* AID FOR TRADE AT A GLANCE 2007, *supra* note 423, at 49-59.

427. High-Level Forum on Aid Effectiveness, *Paris Declaration on Aid Effectiveness*, OECD (March 2, 2005), www.oecd.org/dataoecd/30/63/43911948.pdf. The Paris Declaration on Aid Effectiveness resolves to reform aid in order to make it more effective at combating global poverty. The High-Level Forum on Aid Effectiveness of March 2005 was attended by development officials and ministers from 91 countries, 26 donor organizations and partner countries, and civil society and private sector representatives. The Paris Declaration is a roadmap to improve the quality of aid and its impact on development. At the heart of the Paris Declaration is the belief that aid is more effective when partner countries exercise strong and effective leadership over their development policies and strategies. Ownership is therefore the fundamental tenet underpinning the Paris Declaration.

Governments of developing countries are accountable to their own parliaments and citizens, not to donor organizations, for their development policies. In many countries, this means strengthening parliamentary oversight of development policies and budgets and reinforcing the role of civil society (§ 48). It also requires donors to scale down their sometimes excessive demands for accountability from developing countries by (1) relying as much as possible on country systems and procedures (§ 21), (2) avoiding intrusive conditionality (§ 16), (3) decreasing the number of project implementation units that undermine national administrations (§ 21), and (4) providing timely and transparent information on aid flows so as to enable partner authorities to present comprehensive budget reports to their legislature and citizens (§ 49). The Paris Declaration is organized around five key principles:

- *Ownership*. Developing countries are to exercise effective leadership over their development policies and to coordinate development efforts. Donors are responsible for supporting and enabling developing-country ownership by respecting their policies and helping strengthen their capacity to implement them (§§ 14-15).
- *Alignment*. Donors are to base their overall support on partner countries' national development strategies, institutions, and procedures. This means that donors will impose conditions, whenever possible, from a developing country government's development strategy, instead of imposing multiple conditions based on other agendas (§ 16).
- *Harmonization*. Donors aim to be more harmonized in their aid schemes, thereby imposing fewer burdens on those countries that have weak administrative capacities. This means establishing common arrangements at the country level for planning, funding, and implementing development programs (§ 32).
- *Managing for results*. Both donors and partner countries are to manage resources and improve decision-making for results. Donors should fully support developing countries' efforts in implementing performance assessment frameworks that measure progress against key elements of national development strategies (§§ 43-46).
- *Mutual accountability*. Donors and developing countries pledge that they will hold each mutually accountable for development results.

Accountability requirements are often harder on developing countries than donors. The Paris Declaration recognizes that for aid to become truly effective, stronger and more balanced accountability mechanisms are required at different levels. At the international level, the Paris Declaration creates a mechanism by which donors and recipients of aid are held mutually accountable to each other, and compliance in meeting the commitments will be publicly monitored. To this end, the Working Party on Aid Effectiveness has been charged with the responsibility of establishing a medium-term monitoring plan (§ 9). At the country level, the Paris Declaration encourages donors and partners to jointly assess mutual progress in implementing agreed commitments on aid effectiveness by making use of local mechanisms such as consultative groups (§ 50).

The Accra Agenda for Action was drawn up in 2008 and builds on the commitments agreed in the Paris Declaration. The Accra Agenda contains four major points: (1) *predictability* (donors will provide 3-5 year forward information on their planned aid to partner countries), (2) *country systems* (partner country systems will be used to deliver aid as the first option, rather than donor systems), (3) *conditionality* (donors will switch from reliance on prescriptive conditions about how and when aid money is spent to conditions based on the developing country's own development objectives), and (4) *untying* (donors will relax restrictions that prevent developing countries from buying the goods and services they need

The WTO plays an important role overall in monitoring and providing aid-for-trade.⁴²⁸ By its own admission, the WTO is neither a financing agency nor does it have any ambition to become one.⁴²⁹ In addition to its monitoring and advocacy role for aid-for-trade, the WTO provides limited assistance in the area of trade policy and regulation through its Institute for Training and Technical Co-operation,⁴³⁰ Trade Facilitation Technical Assistance for National Self-Assessments of Needs and Priorities,⁴³¹ and the Standards and Trade Development Facility.⁴³² Although the WTO is neither a development nor financing agency, it has a mandate from its members to work with other international organizations, including the IMF and the World Bank, to bring coherence to trade and development discussions. One by-product of this coordinated effort has been the Enhanced Integrated

from whomever and wherever they can get the best quality at the lowest price). See *Accra Agenda for Action*, OECD, www.oecd.org/dataoecd/30/63/43911948.pdf.

A list of the countries, territories, and organizations adhering to the Paris Declaration and Accra Agenda for Action, which includes the major donors of the EU, Japan, the United States, and the World Bank Group, is available at *Countries, Territories and Organisations Adhering to the Paris Declaration and AAA*, OECD, www.oecd.org/document/22/0,3746,en_2649_3236398_36074966_1_1_1_1,00.html (last visited July 25, 2011).

428. Additional information on the work of the WTO on aid for trade is available at *Aid for Trade*, WTO, www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last visited July 25, 2011). Additional information on the work of the OECD on aid for trade is available at *Aid for Trade*, OECD, www.oecd.org/dac/aft (last visited July 25, 2011).

429. See WTO, Comm. on Trade & Dev., *Joint WTO/OECD Background Paper on Aid for Trade: COMESA-EAC-SADC High Level North-South Corridor Aid-for-Trade Meeting*, ¶ 26, WT/COMTD/AFT/W/12 (June 4, 2009).

430. Additional information on the work of the ITTC is available from its webpage at *Institute for Training and Technical Cooperation*, WTO, www.wto.org/english/tratop_e/devel_e/teccop_e/itcc_e.htm (last visited July 25, 2011). For a summary of training activities provided by the WTO Secretariat in 2007 to a number of African countries, see *Joint WTO/OECD Background Paper on Aid for Trade*, *supra* note 429, at 13-14.

431. The raison d'être for the Trade Facilitation Technical Assistance for National Self Assessments of Needs and Priorities is to provide assistance and support for capacity building in the negotiations on trade facilitation, which in turn are part of the broader Doha Round multilateral trade negotiations. In order to assist countries to participate more effectively in the negotiations, assistance is provided by the WTO Secretariat, WTO members, and other intergovernmental organizations, including the World Bank, the World Customs Organization, and UNCTAD. Additional information is available from its webpage, *Trade Facilitation Technical Assistance and Capacity Building*, WTO, www.wto.org/english/tratop_e/tradfa_e/ta_capac_build_negoti_e.htm (last visited July 25, 2011).

432. The Standards and Trade Development Facility is a global program of the United Nations Food and Agriculture Organization, the World Organization for Animal Health, the World Bank, the World Health Organization, and the WTO. Its mandate is to assist developing countries, and in particular LDCs, in enhancing their expertise and capacity to analyze and implement international sanitary and phytosanitary standards. Additional information is available at STANDARDS AND TRADE DEVELOPMENT FACILITY, <http://www.standardsfacility.org/en/index.htm> (last visited July 25, 2011).

Framework for Least-Developed Countries, a part of the broader Aid-for-Trade initiative.⁴³³

A major challenge facing the development community is improving the effectiveness of aid for trade. To enhance the credibility of aid-for-trade and to ensure that locally identified needs—whether financial or performance related—are properly addressed, the Aid-for-Trade Task Force recommended the establishment of two accountability mechanisms.⁴³⁴ The first mechanism, at the local level, would be designed to foster local ownership and ensure that trade needs are adequately addressed and integrated into national development strategies. The second mechanism, at the global level, would be intended to increase transparency about what is and is not happening and where improvements are required.⁴³⁵ The OECD and the WTO established an aid-for-trade monitoring framework.⁴³⁶ The objective of the monitoring framework is to promote dialogue and encourage all key actors to honor commitments, meet local needs, improve effectiveness, and reinforce mutual accountability. According to the OECD and WTO:

The value of the monitoring system lies in creating incentives, through enhanced transparency, scrutiny, and dialogue (*i.e.* putting a “spotlight” on progress), to foster synergies between trade and other economic policy areas in developing countries. This in turn should improve the coherence of aid for trade with overall aid strategies and donor agencies—essential components of an effective aid-for-trade partnership between donors and partner countries as embodied in the Paris Declaration on Aid Effectiveness.⁴³⁷

In short, the focus on local accountability is to provide incentives to strengthen local ownership and management for results. The global periodic review of aid-for-trade, on the other hand, is to ensure that donor and partner countries’ efforts are focused on the needs identified through the local accountability mechanism.⁴³⁸ A number of national and regional aid-

433. The Integrated Framework (IF) for Trade-Related Technical Assistance to LDCs is a process that supports LDC governments in trade capacity building and integrating trade issues into overall national development strategies. The WTO was one of six multilateral organizations which established the IF in 1997. It is the main mechanism through which LDCs access Aid for Trade and a concrete example of Aid for Trade in action. Part of the Enhanced IF included the creation of an Executive Secretariat. Its projects and work product are available at *Enhanced Integrated Framework Establishes an Executive Secretariat, Welcomes Executive Director*, WTO, www.wto.org/english/news_e/pres08_e/pr541_e.htm.

434. See *Joint WTO/OECD Background Paper on Aid for Trade*, *supra* note 429, at 5. For a summary and analysis of the Aid for Trade Initiative shortly after it was launched, see *AID FOR TRADE AT A GLANCE 2007*, *supra* note 423.

435. See *Joint WTO/OECD Background Paper on Aid for Trade*, *supra* note 429, at 5.

436. See *id.*

437. *Id.* at 5.

438. See *id.* at 3. Themes emerging from the first Global Aid-for-Trade Review in 2007 were the need to encourage greater developing-country ownership of the initiative, to

for-trade reviews were held in 2009,⁴³⁹ culminating in the Second Global Review of Aid for Trade, which was held at the WTO headquarters in Geneva, Switzerland.⁴⁴⁰ In their 2009 joint report, *Aid for Trade at a Glance 2009: Maintaining Momentum*,⁴⁴¹ the OECD and the WTO reported progress in partner country engagement, noting that “[a]lmost all partner countries indicate that they have a national development strategy and the majority are also mainstreaming trade based on well-developed trade-related priorities.”⁴⁴²

How effective are aid-for-trade programs? As reported by the OECD and WTO in 2009, in their self-assessments partner countries generally agree that the following four aid-for-trade programs have been most effective (rank-ordered): (1) trade policy analysis, negotiation, and implementation,⁴⁴³ (2) trade facilitation (e.g., simplification of customs procedures and improvements to port authorities), (3) competitiveness,⁴⁴⁴ and (4) export diversification.⁴⁴⁵ Perceptions about the effectiveness of aid-for-trade

strengthen monitoring and evaluation, and to shift the focus on the initiative from awareness-raising to implementation. The report and recommendations of the African Regional review of Aid-for-Trade, *Mobilizing Aid for Trade: Focus Africa*, was prepared by the United Nations Economic Commission for Africa, the African Development Bank, and the WTO in 2007, www.wto.org/english/tratop_e/devel_e/a4t_e/africa_e.pdf. For the report and recommendations for southeast Asia, see WTO Comm. on Trade & Dev., *Joint WTO/OECD Background Paper on Aid for Trade: ASEAN High Level Meeting*, at 11, WT/COMTD/AFT/W/14 (June 4, 2009).

439. See *Joint WTO/OECD Background Paper on Aid for Trade*, supra note 429, at 3.

440. The second review evaluated progress made since the first review in 2007 and scrutinized how Aid for Trade was being put into operation. See WTO Committee on Trade and Development, *Second Global Review of Aid for Trade: Summary Report*, WT/COMTD/AFT/W/15 (Oct. 28, 2009). Additional information on the Second Global Review is available at *Aid for Trade Global Review 2009*, WTO, www.wto.org/english/tratop_e/devel_e/a4t_e/global_review09_e.htm (last visited July 25, 2011).

441. WTO & OECD, *AID FOR TRADE AT A GLANCE 2009: MAINTAINING MOMENTUM* (2009) [hereinafter *AID FOR TRADE AT A GLANCE 2009*], available at http://www.oecd.org/document/0/0,3343,en_2649_34665_42835064_1_1_1_1,00.html (last visited July 5, 2011).

442. *Id.* at 31.

443. According to the OECD and WTO, “The Philippines suggests that training and workshops have been particularly useful in helping its officials to understand better the function, structure and rules of the multilateral trading system. Sri Lanka reports that WTO technical assistance has been useful in helping to train trade negotiators, but it also worries that by focusing too narrowly on rules, rather than development policy, WTO programmes risk turning officials into ‘rule takers’ rather than ‘rule makers.’” *Id.* at 45.

444. Competitiveness is the third most frequently identified area where aid for trade has been effective. As noted in the OECD/WTO report, “Belize, for example, reports that the EU-funded Banana Special Framework of Assistance, which provided technical assistance, supplies, infrastructure, schools and teacher training, played a significant part in improving the competitiveness of its banana industry.” *Id.* at 45.

445. See *id.* at 45. As noted in the OECD/WTO report in connection with export diversification, “Zambia, for instance, reports that European-Development-Fund supported

programs also differ according to partner countries' income levels, with upper middle income countries viewing competitiveness as the area where aid-for-trade had been most effective, while lower middle income countries and LDCs consider trade policy analysis, negotiation and implementation, and trade facilitation as the three areas where aid-for-trade has worked best.⁴⁴⁶ The OECD/WTO report issued the following cautionary note:

While network infrastructure is identified as a priority by many partner countries, they do not see it as an area where aid for trade has been most effective. Given the likelihood of increased resources being channeled to network infrastructure in the future, this should be a cause for concern. These less positive assessments of the effectiveness of network infrastructure projects also contrast sharply with the generally positive view of regional infrastructure projects. The disconnect between priorities and aid effectiveness merits further study and shows the need to go to the country level.⁴⁴⁷

From the perspective of donors, the OECD/WTO reported in 2009 that (1) most donors had developed aid-for-trade strategies, (2) "a healthy momentum to keep this initiative in the forefront of donors' development strategies" was solidly in place,⁴⁴⁸ and (3) that aid-for-trade holds growing importance in donor countries' programs and is likely to be maintained, or even expanded, over the medium term.⁴⁴⁹ As summarized by the OECD/WTO in 2009:

[T]he Aid-for-Trade Initiative has so far been successful in galvanising political support and additional financial resources in the donor community. Progress, too, has been achieved in the delivery of aid for trade. More importantly, despite the current financial and economic crisis, donors have reaffirmed their commitment to sustaining aid flows and maintaining this momentum.⁴⁵⁰

projects were instrumental in helping to increase the export capacity of its horticulture and floriculture sectors." *Id.* at 46.

446. See AID FOR TRADE AT A GLANCE 2009, *supra* note 441.

447. *Id.* at 45.

448. AID FOR TRADE AT A GLANCE 2009, *supra* note 441, at 65. "The largest donors of aid for trade (*i.e.* the United States, Japan, the EC and the World Bank) all have operational guidance in place to step up their efforts." *Id.* at 66.

449. *Id.* ("Today most donors either have operational strategies that are specifically focused on aid for trade or have made trade a core component of their overarching development policy or strategy documents.").

450. *Id.* at 65.

Regional aid-for-trade flows for the period 2002-2008 (as reported by the OECD in a 2010 report to the WTO) went primarily to Asia.⁴⁵¹ In 2008 Asia remained the largest recipient of aid-for-trade with India, Iraq, Vietnam, and Afghanistan being among the major individual recipients. Asia obtained an additional \$5.3 billion compared to 2007 and reached \$18.5 billion. Most of the growth took place in support to economic infrastructure projects, which received an additional \$4.5 billion. In addition, donors supported productive capacity building with an additional \$465 million and trade policy and regulation with \$221 million.⁴⁵² Flows to Africa remained stable between the 2002-05 baseline and 2006. In 2007, there was a large increase that has continued through 2008 when aid-for-trade reached \$13 billion up from just over \$10 billion in 2007. The majority of the increase went to productive capacity building (up \$1.3 billion or 52 percent) followed by economic infrastructure (up \$1 billion or 44 percent). The large increase in Europe of \$2.5 billion went mostly to economic infrastructure (up 67 percent). There was a 20 percent increase in aid-for-trade to Oceania (now at \$377 million), while support to the Americas declined in 2008 by 16 percent to just under \$2 billion.⁴⁵³

At the country level, in 2008 the top 20 recipients obtained over 70 percent of the allocated flows.⁴⁵⁴ That percentage declined to roughly 50 percent in 2009.⁴⁵⁵ Countries from all income groups were represented, with ten from Asia, nine from Africa, and one from Europe. In 2008, there were six LDCs (Afghanistan, Ethiopia, Mali, Tanzania, Mozambique, Bangladesh), six Other Low Income Countries (Ghana, India, Mongolia, Nigeria, Vietnam, Pakistan), seven Low Middle Income Countries (China, Egypt, Indonesia, Morocco, Thailand, Tunisia, Iraq), and one Upper Middle Income Country (Turkey).⁴⁵⁶ In 2009, the top 20 aid-for-trade recipients remained basically the same, although there was some shuffling of the deck, with Burkina Faso, Georgia, Tanzania, and the Philippines joining the ranks of the top 20 recipients and Egypt, Mozambique, Tunisia, and Iraq dropping out.⁴⁵⁷

451. WTO Comm. on Trade & Dev., *Communication from the Organisation for Economic Cooperation and Development: Aid for Trade Flows in 2008*, at 3, WT/COMTD/AFT/W/21 (July 13, 2010) [hereinafter *Aid for Trade Flows in 2008*].

452. *See id.* at 8.

453. *See id.* at 9.

454. *See id.* at 10.

455. OECD & WTO, *AID FOR TRADE AT A GLANCE 2011: SHOWING RESULTS 51* (2011), available at http://www.wto.org/english/res_e/booksp_e/a4t11_2_chap_e.pdf.

456. *See Aid for Trade Flows in 2008, supra* note 451, at 10. For a list of the recipients of aid for trade during the period 2002-2008, *see id.* annex 4.

457. *See AID FOR TRADE AT A GLANCE 2011, supra* note 455, at 52, 60, table 2.1. The relative ranking of aid-for-trade recipients in 2009 also changed from 2008. Vietnam was the largest recipient in 2009 with \$2.6 billion, up 27 percent from 2008 with increases to energy (up \$560 million), and industry (up \$230 million). India was the second largest recipient, but its flows declined substantially from 2008 mostly because of over \$1 billion less to transport

Who are the main aid-for-trade donors? According to the OECD, in 2008 the top 5 donors, accounting for 70 percent of total flows, were Japan, the United States, the EU, the World Bank Group, and Germany. Japan was the largest aid-for-trade donor in 2008 (\$8.7 billion), followed by the United States (\$6.4 billion), the European Union (\$5.9 billion), the World Bank Group (\$5.2 billion), and Germany (\$2.9 billion).⁴⁵⁸ Japan provided an increase of \$3.8 billion to \$8.7 billion in 2008 and gave 20 percent of total aid-for-trade. This represents a 79 percent increase of Japanese aid-for-trade flows. Most of the additional flows (almost \$3 billion) went to transport and storage, while there were also large rises for industry (up \$454 million) and mineral resources/mining (up \$479 million).⁴⁵⁹

The United States channeled almost 80 percent of its aid-for-trade to three sectors: energy (25.8 percent), transport and storage (28.4 percent), and agriculture (23.3 percent). This distribution was almost the same as 2007 but with US flows increasing by \$1.5 billion to \$6.4 billion (15 percent of total aid-for-trade).⁴⁶⁰ The EU increased its aid-for-trade by \$2.7 billion to \$5.9 billion, \$2.3 billion of this for transport and storage.⁴⁶¹ The World Bank Group doubled its support to trade policy and regulation, but flows to energy and transport and storage declined by 40 percent and 18 percent respectively. Germany increased its aid-for-trade by \$1.2 billion or 65 percent to reach \$2.9 billion. Germany allocated a growing share of its aid-for-trade to energy (43.4 percent in 2008 compared to 31 percent in 2007). It rose by \$727 million to \$1.3 billion in 2008. In addition, Germany channeled a large share of its aid-for-trade through multilateral agencies.⁴⁶² Encouragingly, donors have increased their disbursements. In 2008, Japan had the largest disbursements (\$5.3 billion), an increase of 21 percent on 2007, followed by the World Bank Group (\$4.3 billion), the EU (\$3.6 billion), and the United States (\$3.6 billion).⁴⁶³ In their 2011 joint report, *Aid for Trade at a Glance 2011: Showing Results*,⁴⁶⁴ the OECD and WTO reported that in 2009 aid-for-trade commitments reached approximately \$40 billion, a 60 percent increase from the 2002-05 baseline period.⁴⁶⁵ In 2009, the top 10 donors provided 74 percent of the aid-for-trade, reflecting that aid-for-trade continues to be concentrated among a small number of donors—but the rank order of donors changed.⁴⁶⁶ The EU was the largest

and storage. Afghanistan was the third largest recipient and saw its flows decrease slightly from 2008. Nigeria was the largest recipient in Africa with \$1.3 billion in commitments. *Id.* at 51.

458. See *Aid for Trade Flows in 2008*, *supra* note 451, at 12.

459. See *id.*

460. See *id.*

461. See *id.* at 13.

462. See *id.*

463. See *id.* at 14.

464. AID FOR TRADE AT A GLANCE 2011, *supra* note 455.

465. See *id.* at 15.

466. See *id.* at 53.

donor with \$14 billion annually, an increase of 70 percent in real terms compared to the 2002-05 baseline.⁴⁶⁷ Whereas the World Bank Group increased its aid-for-trade by almost 50 percent to \$8 billion, other major donors such as Japan and the United States reported significant declines of 37 percent and 31 percent respectively (down by \$5.5 billion collectively).⁴⁶⁸ In fact, of the five largest bilateral donors, four declined by an average of 28 percent.⁴⁶⁹

In 2010, the OECD offered the rather predictable conclusion that the Aid-for-Trade Initiative has succeeded in part, but that more needs to be done in terms of stabilizing aid flows, designing more effective aid-for-trade programs, and building a consensus as to what counts as aid-for-trade.⁴⁷⁰ Is

467. *See id.*

468. *See id.*

469. *See id.*

470. *Aid for Trade Flows in 2008*, *supra* note 451, at 18. As reported by the OECD and WTO in *AID FOR TRADE AT A GLANCE 2009*:

The relationship between trade, growth and poverty reduction is complex. But it is clear that openness and integration can contribute to economic development and poverty reduction.

The Aid-for-Trade Initiative has succeeded in raising awareness about these important links, but also about the binding trade-related constraints developing countries face that prevent them from benefiting from trade expansion. The initiative has also succeeded in mobilising resources to build trade capacities related to policies, institutions and infrastructure.

In order to maintain the momentum of the initiative, particularly in light of the current economic crisis, four practical steps can be envisaged:

- First, there is still a compelling need to demonstrate—and broadcast the fact—that there are large potential gains to be made from broad-based multilateral trade liberalisation and the integration of developing countries into the global economy. It needs to be shown that aid for trade is worth doing.
- Second, stakeholders need to recognise that aid for trade is part of a larger picture encompassing international co-operation, improved policy coherence and a whole-of-government approach to economic development and poverty reduction. It needs to be shown that aid for trade contributes to these wider goals of partner countries.
- Third, there needs to be case-by-case, country-by-country identification of the nature and extent of the impediments that are presently preventing the benefits of trade from being fully realised. Aid for trade needs to have identifiable targets.
- Fourth, there needs to be, again case-by-case and country-by-country, a clear identification of how aid for trade will

aid-for-trade working? In 2010, the OECD and WTO were evasive in answering this overarching question, in effect responding with a call for more studies.⁴⁷¹ In 2011, the two organizations were somewhat less diffident,⁴⁷² painting an encouraging picture of a wide variety of trade-related activities that focus on competitiveness, economic growth, and poverty reduction in a large number of developing countries that are being supported by a range of donors.⁴⁷³

In recognition of the difficulty of accurately assessing the effectiveness of aid-for-trade programs, but at the same time being fully aware of the importance of the task, the WTO Task Force recommended that increased evaluation of aid-for-trade should be promoted and funded. In particular, the Task Force suggested that

[i]n-depth country impact evaluations of Aid-for-Trade programmes should be undertaken to build knowledge and facilitate a results-based approach to delivery. Evaluation of in-country processes should focus, inter alia, on progress in mainstreaming trade in national development plans. Evaluations should adopt a results-based approach in order to ensure effectiveness of Aid-for-Trade programmes in relation to the objectives.⁴⁷⁴

address the impediments identified, how it will work with, and add value to, initiatives being taken by private firms, and how it will fit into the evolving framework of regional and multilateral co-operation. It needs to be shown that aid for trade can hit the target.

In short, the Aid-for-Trade Initiative needs to be strengthened at the country and regional levels.

AID FOR TRADE AT A GLANCE 2009, *supra* note 441, at 105.

471. OECD & WTO, AID FOR TRADE: IS IT WORKING? 3 (2010).

472. As reported in AID FOR TRADE AT A GLANCE 2011, *supra* note 455, at 17. “The great majority of the programmes and projects in the case stories reported successes. Several critical factors were commonly cited: ownership at the highest political level supported through the active engagement of all stakeholders; adequate and reliable funding; leveraging partnerships (including with providers of South–South co-operation); and combining public and private investment with technical assistance. Conversely, delays and changes caused by exogenous factors such as natural disasters, political crises and global recessions threaten successful outcomes.” *Id.* at 17.

473. *Id.* at 16-17.

474. Aid for Trade Task Force, *Recommendations of the Task Force on Aid for Trade*, WT/AFT/1 (July 27, 2006).

The OECD and the WTO seconded this proposal.⁴⁷⁵ Both organizations have stressed the importance of partner-country ownership of aid-for-trade programs and increased dialogue between partner countries and donors.⁴⁷⁶ In addition, both have underscored the following four points in the effective design and implementation of any aid-for-trade action plan. First, trade encompasses all sectors of the economy. The complexity of trade and its interdependence with a country's overall development makes mainstreaming essential. Second, aid-for-trade must be structured so that it focuses on addressing the bottlenecks that seem most likely to lift trade and boost productivity. Third, in developing their aid-for-trade strategies, reformers should include the objective of strengthening the constituency for reform. Engaging the private sector is critical in this regard.

Fourth, the principles set out in the Paris Declaration on Aid Effectiveness, such as local ownership, harmonization and alignment, management for results, and mutual accountability, should underpin the design and implementation of effective aid-for-trade projects and programs.⁴⁷⁷

475. See AID FOR TRADE AT A GLANCE 2009, *supra* note 441, at 108. In a 2011 report on the effectiveness of U.S. aid for trade, the U.S. Government Accountability Office (GAO) examined the period 2005-2010 during which 24 U.S. agencies provided more than \$9 billion in TCB assistance to more than 100 countries. U.S. GOV'T ACCOUNTABILITY OFFICE, THE UNITED STATES PROVIDES WIDE-RANGING TRADE CAPACITY BUILDING ASSISTANCE, BUT BETTER REPORTING AND EVALUATION ARE NEEDED (GAO-11-727 July 2011) [hereinafter GAO REPORT ON U.S. TCB]. GAO focused its review on the four entities that reported the most funding for TCB activities during the period, plus the Office of the U.S. Trade Representative (those four entities are the Army, State Department, the Millennium Challenge Corporation (MCC), and the U.S. Agency for International Development (USAID)). Together, these four funded more than 90 percent of total U.S. TCB assistance between 2005 and 2010. *Id.* at 2. The definition of TCB assistance is broad in scope, making some activities more directly related to trade than others, GAO said. *Id.* at 35. MCC and Army TCB assistance are indirectly related to trade, but account for 54 percent of total TCB funding. *Id.* at 16. Therefore, the GAO concludes, it is increasingly important that the government database housing the information on TCB assistance be able to distinguish the trade-related components of activities from non-trade related components (the database currently does not make such distinctions, according to GAO). *Id.* at 35. Because the database is the primary source of information on TCB funding for Congress and the public, in the GAO's view, "Clear reporting and transparent methodology and data collection are essential to understanding levels of funding and changes in the nature of TCB over time." *Id.* at 36. To gain a clear understanding on the trends and shifts in TCB funding GAO recommended that USAID, as database administrator, publicly report identified limitations and key distinctions in the categories of TCB assistance. *Id.*

476. See *id.* at 109. ("Aid and, by implication, aid-for-trade is effective only when it enables partner countries to achieve their own development goals. Consequently, the onus is on partner-country governments to enhance the ownership of their development efforts in consultation with their parliaments, citizens, civil society and the private sector. Local ownership of development efforts is fundamentally about political leadership, effective societal participation and domestic oversight and accountability.")

477. See AID FOR TRADE: IS IT WORKING?, *supra* note 471, at 3-4.

SUMMARY AND CONCLUSION: RETHINKING NONRECIPROCAL TRADE PREFERENCE PROGRAMS, INTEGRATING DEVELOPING COUNTRIES INTO THE MULTILATERAL TRADING SYSTEM

To quote an African proverb, “The best time to plant a tree is twenty years ago. The next best time is now.” It is time to move beyond conditionality in GSP programs and to come to terms with the looming shrinking margin of preference. At UNCTAD’s inaugural conference in 1964, developing countries asserted that one of the major impediments to their accelerated economic growth and development was their inability to compete with developed countries in the international trading system; the developing countries argued that preferential tariffs would allow them to increase exports and foreign exchange earnings necessary to diversify their economies and reduce dependence on foreign aid. The rationale for trade preferences was that poorer countries need to develop industrial capacity for manufacturing in order to move away from dependence on imports and production of traditional commodities that could be subject to declining prices in the long term. It was argued that poorer countries also needed time to retain some protection to develop their “infant industries,” but that increases in exports would be necessary to help countries develop economies of scale in production and earn foreign exchange. In addition, it was evident that some provision for the elimination of preferences once the industries were firmly established was necessary. The argument was that trade preferences should be temporary, introduced for a period of no less than 10 years with respect to any given industry in any developing country. At the end of the 10-year period, preferences would be withdrawn unless it could be shown that special circumstances warranted their continuation.

At the second UNCTAD conference in 1968, the United States joined other participants in supporting a resolution to establish a mutually acceptable system of preferences. In order to permit the implementation of a generalized system of preferences, in June 1971 developed countries were granted a 10-year waiver from their international legal obligations under GATT. Following the grant of this waiver, developed countries created their national GSP programs, and Congress enacted the U.S. GSP program in January 1975. The United States maintained that GSP was a temporary program to advance trade liberalization in the developing world, but it recognized the need to address the legal basis for granting these preferences in anticipation of the expiration of the waiver in 1981. An agreement was reached at the 1979 conclusion of the Tokyo Round of Multilateral Trade Negotiations, known as the “Enabling Clause,” which has no expiration date and replaced the waiver.

At the conclusion of the Uruguay Round, the Committee on Trade and Development held a session in November 1994 to debate the issue of the participation of developing countries in the international trade system. Its focus was on whether developing countries had increased their share in

world trade, and whether international trade had made a contribution to their economic growth. Ten conclusions emerged from this debate:⁴⁷⁸

- Developing countries' share in world trade has been growing.
- The growth has been uneven, with the least-developed countries of Africa experiencing a decrease in their share of world trade, on the one hand, with many Asian countries experiencing a significant increase in their share, on the other hand.
- This growth is as much a result of domestic economic policies as from the general international environment.
- The Uruguay Round represents a significant opportunity for developing countries to increase their share of world trade for at least two reasons: first, because sectors previously outside GATT disciplines, most notably agriculture and textiles, are now integrated into WTO rules; and, second, because the Uruguay Round deals with internal policies that restricted trade.
- Developing countries' future participation in world trade will be determined by the effectiveness with which the Uruguay Round agreements are implemented.
- The composition of developing countries' trade has increased in manufacturing, which has created an incentive for them to participate more fully in the world trading system. In this connection, regional trade also has become increasingly important for developing countries.
- It is not clear, but it is worth examining more closely, whether trade barriers and the elimination of trade barriers explain developing countries' share in world trade.
- Given that developing countries account for 25 percent of world trade, they can be expected to make greater future commitments in the WTO.
- The unilateral economic liberalization measures taken by many developing countries need to be integrated into the multilateral trading system.⁴⁷⁹

As the foregoing discussion has shown, developing countries receive special and differential treatment not only under WTO rules but also in trade preference programs established for them by the United States and other developed countries. In the long run, however, such special tariff treatment is of limited value to developing countries in achieving the goal of

478. See ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, *supra* note 46, at 1041.

479. Fiftieth Session of the Contracting Parties, SR.50/1, at 5 (1994), *reprinted in* GUIDE TO GATT, *supra* note 46, at 1041.

a stable, healthy economy. Tariff reductions associated with preferential treatment regimes are inherently uncertain because they depend entirely on the trade policies of the donor countries. In addition, as MFN tariff rates are progressively lowered in developed countries following successive MTN rounds, the benefit to beneficiary developing countries of preferential tariff treatment is marginalized.

Tariff preferences can have beneficial and negative effects. Among the beneficial effects the most obvious one is that they stimulate trade compared to what would exist under the MFN duty rate (assuming an MFN duty rate greater than zero), and that improved market access might enhance export-led economic development. The potential downsides of tariff preferences are that they are not cost-free (it is estimated that substantiating compliance with rules of origin, for example, impose costs of 3 to 5 percent of the value of the imported goods).⁴⁸⁰ With average MFN duty rates in the United States and the EU currently at less than 4 percent, tariff preferences are only meaningful where tariff peaks exist (which is the case on textiles, clothing, and footwear).⁴⁸¹ Restrictive rules of origin in the clothing sector are defended on the ground that they are necessary to encourage significant value-added activities within developing countries and to promote integrated production processes within individual countries.⁴⁸² However, there is no evidence that these strict rules of origin have stimulated integrated production processes within small developing countries.⁴⁸³

Not only does the small size of many developing countries, especially SSA LDCs, thwart achieving economies of scale, but the absence of harmonized rules of origin for preference-granting countries' trade preference programs further frustrates achieving scale economies. For example, under the U.S. AGOA program, clothing made in eligible LDCs from regional or third-country fabric may enter the U.S. duty free, but not so in the EU under its EBA initiative. (The EBA does not allow for cumulation among SSA countries. Even if it did, finding adequate regional fabric is an additional hurdle, which explains at least in part the AGOA third-country fabric provision.) Even under AGOA, cumulation is not permitted with regard to inputs from non-AGOA trade preference beneficiaries. The GAO reports the following case where overly rigid rules of origin and a lack of trade preference program integration seemingly worked at cross-purposes with the development goal of these programs:

In Ghana, for example, we met with a firm that decorates T-shirts with original designs, using traditional African decorative techniques. This firm had been importing plain white T-shirts from Honduras to decorate in

480. See Hoekman & Prowse, *supra* note 309, at 429.

481. See *id.*

482. See Brenton & Özden, *supra* note 42, at 420-21.

483. See *id.* at 421.

Ghana and then exporting them to the United States. We were surprised to learn that the firm had to pay duty on the finished product exported to the United States, since the inputs were exempt from tariffs under U.S. preferences programs. For example, the plain white T-shirts manufactured in Honduras would have entered the United States duty-free under CBI. The value-added through the decorative process in Ghana would also be exempt from duties under AGOA. However, because the T-shirt manufactured in Honduras did not meet the rules of origin requirements for the AGOA program this company was obliged to pay duty on the finished decorated shirts. The company is now seeking to shift its T-shirt purchases to South Africa, or another AGOA beneficiary, since this sourcing would enable them to qualify for duty-free treatment under AGOA.⁴⁸⁴

Rules of origin might also require that inputs be sourced from higher-cost suppliers in cases where cumulation rules apply. In addition, compliance with certain conditions laid down in the U.S. and EU GSP programs can entail costs, such as labor rights and intellectual property rights protection. Finally, in the drive to preserve the margin of preference, multilateral trade liberalization may be sacrificed, possibly leading to trade diversion, i.e., a comparatively more efficient producer in an exporting country subject to an MFN duty rate is unable to successfully compete against a less efficient producer in a GSP beneficiary country. On the other hand, if the MFN duty rate is prohibitively high, then a GSP program will be trade creating instead of trade diverting, provided of course that the exported product is GSP eligible, that producers in the beneficiary country have supply capacity for the product in question, and that they use the GSP tariff preference.⁴⁸⁵ For LDCs the first proviso will generally be true, but not necessarily the second or third. GSP programs were built upon the assumption that beneficiary countries already have the capacity to engage in trade in GSP-eligible products. Building supply capacity is not one of the platforms of current GSP schemes. Better-focused and more generous aid-for-trade is needed to correct this programmatic imbalance.

Even where the margin of preference is economically meaningful, i.e. that the costs of complying with rules of origin and other administrative costs are less than the margin of preference, the full benefit of the preference margin is often not passed on to the producer in the exporting country because it lacks market power. Instead, buyers in the importing country capture a significant share of the margin of preference.⁴⁸⁶ Even where the margin of preference is economically meaningful and market

484. GAO Report on Integrating U.S. Trade Preference Programs, *supra* note 125, at 77.

485. See Low, Piermartini & Richter, *supra* note 286, at 222-24; Jagdish Bhagwati, *The Poor's Best Hope*, THE ECONOMIST, June 22, 2002, at 24-26.

486. See Hoekman & Prowse, *supra* note 309, at 429.

access exists, that is only one element of the total trade equation and not the most important one: the beneficiary country has to have the capacity to engage in the manufacture of and trade in the product of export interest.⁴⁸⁷ To address these problems, I propose the following four reforms.

First, integrate U.S. trade preference programs and renew the integrated program for a minimum period of ten years. U.S. trade preference programs are neither administered nor evaluated on a cross-programmatic basis, which limits any judgment about the extent to which the programs have increased trade and fostered development in beneficiary countries. The U.S. GSP program has been allowed to expire eight times, most recently at the end of 2010. There is something deeply flawed with a trade preference program when a single U.S. Senator can hold up renewal of the GSP program over an administrative decision affecting one company and a single product. Reliance interests of foreign exporters and U.S. importers are clearly undermined by such lapses.

Second, revisit conditionality. Conditionality is superficially high-minded, but practically pointless. It should be eliminated because GSP conditions that protect U.S. commercial interests are WTO-illegal and should be removed. The U.S. GSP petition process is, at best, scattershot. Some of the countries reviewed are not necessarily those that perform the worst relative to the conditions for participation but instead are countries of most concern to particular businesses or NGOs. Considering the small number of annual petitions, coupled with the high denial rate by the USTR, it has to be seriously questioned whether the petition mechanism isn't anything more than a sop to petitioners and an irritant to the beneficiaries and to U.S. importers who rely upon imports from the target beneficiary. A comprehensive annual or biennial review is a better alternative than the petition process.

Third, harmonize preferential rules of origin at the international level.

At the international level, donor countries should adopt a harmonized rule of origin that permits cumulation of inputs from any beneficiary country, including cumulation of inputs from any developing country that is a party to an FTA with a donor country. Not only does the small size of many developing countries — especially SSA LDCs — thwart achieving economies of scale, but the absence of harmonized rules of origin in trade preference programs further frustrates achieving scale economies. A thorny issue is what to do about China and Vietnam, neither of which are U.S. GSP eligible but both of which are GSP eligible in Canada, the EU, and Japan.

Fourth, provide better-focused and coordinated aid-for-trade. Many developing countries have expressed concern about their inability to take advantage of trade preferences because they lack trade capacity, i.e., the ability to produce and trade competitively in world markets. In response the "Aid-for-Trade" Initiative was launched at the WTO's 2005 Hong Kong

487. See *id.* at 445.

Ministerial meeting. The Aid-for-Trade Initiative has so far been successful in galvanizing political support and additional financial resources in the donor community. Progress has been achieved in the delivery of aid for trade, but more and better-focused aid is needed.

Developing countries have allowed themselves to be distracted by the idea of tariff preferences as the means for offsetting trade restrictions imposed by importing countries. Nevertheless, tariff and nontariff barriers to trade in products in which developing countries enjoy a comparative advantage have blocked their full integration into the world trading system. Developed countries have introduced market distortions in areas where developing countries have historically enjoyed an advantage, such as trade in agricultural products. Part of the fallout of these distortions have been trade skirmishes between the United States and the EU over export markets for their agricultural surpluses in which developing countries have been caught in the cross-fire. Unable to compete with heavily subsidized agricultural exports from the United States or the EU, developing countries have been forced to abandon certain export markets. These EU-US agricultural trade battles not only have squeezed developing countries out of some traditional export markets, but they have also wrecked developing countries' domestic agricultural programs.

Fully integrating developing countries into the world trading system must proceed on several simultaneous tracks. The first track that developing countries should pursue is cultivating a hospitable environment for foreign direct investment (FDI). Today, developing countries treat FDI more liberally than they formerly did, but many developing countries restrict FDI by, for example, permitting only minority foreign ownership in local companies. While many developing countries complain about the restrictive businesses practices of large multinational firms that harm local firms, as this author has noted elsewhere, "another perspective is that multinational enterprises (MNEs) bring with them not only fresh capital, but they also introduce modern managerial and organizational practices that local firms in developing countries can emulate. They often bring with them the latest technologies and train indigenous populations in their use. Because of their high visibility, some evidence exists that MNEs are often better corporate citizens that pay better, do less environmental damage, and adhere closer to industrial codes of good conduct."⁴⁸⁸

488. Bhala & Kennedy, *supra* note 48, at 1569-70 (footnote omitted). See OECD, ENVIRONMENT AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: CORPORATE TOOLS AND APPROACHES (2005), available at http://www.oecd.org/document/36/0,3343,en_2649_34287_34992996_1_1_1_1,00.html; OECD, The Social Impact of Foreign Direct Investment (Policy Brief July 2008), available at <http://www.oecd.org/dataoecd/53/8/40940418.pdf>; OECD, Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs (2002), available at <http://www.oecd.org/dataoecd/47/51/1959815.pdf>. See generally OECD, The OECD Guidelines for Multinational

The second track should be to secure broader and assured access to export markets for all product groups, not just primary and unprocessed goods. Market access for all value-added products is of most help to developing countries in the long term than tariff preferences on commodities and semi-manufactured goods. The third tack is linked to the second track: integrating developing countries into the global trading system through the vehicle of regional trade arrangements as a step toward full integration into the WTO multilateral trading system. Several of the existing regional trade arrangements, such as MERCOSUR and ASEAN, have a membership comprised exclusively of developing countries. By integrating their economies on a regional basis, developing countries can pool their economic strength and better achieve scale economies. Integrating their economies on a regional basis at the least will serve as a hedge against an uncertain future in turbulent world trade markets.