

1985

Renewal of the GSP: An Explanation of the Program and Changes Made by the 1984 Legislation

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Frank A. Hirsch, Jr., *Renewal of the GSP: An Explanation of the Program and Changes Made by the 1984 Legislation*, 18 *Vanderbilt Law Review* 625 (2021)

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**RENEWAL OF THE GSP: AN EXPLANATION OF THE
PROGRAM AND CHANGES MADE BY THE 1984
LEGISLATION**

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I. HISTORICAL BACKGROUND AND ECONOMIC IMPACT

Congress recently enacted the Trade and Tariff Act of 1984¹ which renews the United States Generalized System of Preferences (GSP) until 1993 and significantly changes the program's operation. Generally defined, the GSP² applies zero tariffs against

1. See Pub. L. No. 98-573, 98 Stat. 2948. The renewal of the Generalized System of Preferences (GSP) appears as Title V of the 1984 Act. *Id.* at 3018-24.

2. For additional articles explaining GSP, see Note, *The Generalized System of Preferences: Nations More Favored than Most*, 8 L. & POL'Y INT'L BUS. 783 (1976) (explores the reasons for the enactment of the United States GSP, notes strengths and weaknesses of the program, and speculates on the GSP's impact on the United States, the BDCs and the international trading community); see also de Bouter, *Tariff Preferences Revisited*, 11 J. INT'L L. & ECON. 353 (1976)

certain products from eligible beneficiary countries to promote their trade and industrial development through increased access to markets of donor countries. The duty-free status accorded products from beneficiary countries theoretically supplies cost advantages that enable goods to sell in donor country markets at competitive prices. In 1982 total United States GSP imports amounted to \$8.4 billion. In 1983 the total amount rose to \$10.8 billion.³

Changes in the 1984 Act are intended to promote a more equitable distribution of GSP benefits among the eligible Beneficiary Developing Countries (BDCs)⁴ and to target increased benefits to the Least Less Developing Countries (LLDCs).⁵ Despite the use

(generally evaluates the legal implications of a scheme of preferential tariffs upon the GATT Most Favored Nation principle); McCulloch, *Gains to Latin America from Trade Liberalization in Developed and Developing Nations*, 21 Q. REV. ECON. & BUS. 231 (1981) (explains how the GSP scheme is one of three key developments having great effect on Latin American growth and development, and places the GSP in the larger context of other factors affecting trade between developing and developed countries); Cutler, *The United States Generalized System of Preferences: The Problem of Substantial Transformation*, 5 N.C.J. INT'L L. & COM. REG. 393 (1980) (discusses the rules of origin requirements including the value added criteria under the United States GSP and details Customs rulings and Customs and Treasury Department decisions with regard to compliance); Note, *The Renewal of the United States Generalized System of Preferences: A Legal and Economic Evaluation of the System and Proposals for Change*, 17 GEO. WASH. J. INT'L L. & ECON. 365 (1983) (evaluates proposals for reforming the GSP considered when the 1984 Trade and Tariff Act was passed, presents a legal and economic analysis of the GSP as it operates, and suggests that the dual policy objective of promoting LDC development and protecting United States domestic producers has resulted in a disjointed and weak incentive scheme).

3. See SENATE COMM. ON FINANCE, RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES, S. REP. NO. 485, 98th Cong., 2d Sess. 5 (1984) [hereinafter cited as S. REP. NO. 485].

4. Beneficiary Developing Countries (BDCs) are countries eligible to receive zero tariffs on specified goods under the GSP. See *infra* notes 61-64 and accompanying text for a discussion of how BDCs are selected. Table 1 of the Appendix lists those countries that qualify as BDCs in the United States GSP.

5. See HOUSE COMM. ON WAYS AND MEANS, GENERALIZED SYSTEM OF PREFERENCES RENEWAL ACT OF 1984, H.R. REP. NO. 1090, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 5101 [hereinafter cited as H.R. REP. NO. 1090]. Least Less Developing Countries (LLDCs) refers to the category of nations recognized by the United Nations as the most deprived economic group relative to other nations, based upon such criteria as per capita GNP. See Table 2 in the Appendix for a list of LLDCs.

of Competitive Need Limits (CNLs)⁶ and principles of "graduation,"⁷ the seven leading BDCs (Taiwan, Korea, Hong Kong, Mexico, Brazil, Singapore, and Israel) account for nearly seventy-five percent of total GSP imports.⁸ Congressional recognition of the inequitable distribution of GSP-stimulated trade and development among BDCs is reflected in the 1984 Act by attempts to modify the program and to reallocate GSP benefits.

This disparate distribution of GSP benefits was the primary factor that spurred Congress into making the 1984 changes. However, two other factors were also important: (1) the recent economic and trade success of the leading BDCs; and (2) recurrent United States trade imbalances. These factors hardened congressional sentiments toward aid programs in general and led to a desire to limit GSP benefits to LLDCs. The United States trade deficit for 1984 was a record \$123.3 billion.⁹ In July 1985, Secretary of Commerce Malcolm Baldrige estimated that the United States merchandise trade deficit would reach \$140 to \$150 billion by the end of the year.¹⁰ In marked contrast to United States trade imbalances, Taiwan posted a record overall trade surplus of \$8.5 billion for 1984 and enjoyed a \$9.8 billion surplus in trade with the United States.¹¹ Taiwan shipped 48.8% of its total exports to the United States market. Taiwan's exports increased sixteen percent in January 1985, resulting in a record one-month

6. The term Competitive Need Limits (CNLs) refers to methods whereby specific products exported by certain BDCs are excluded from GSP treatment for at least a year on the basis of economic factors that demonstrate a BDC's "competitiveness" and loss of preferential need. See *infra* text accompanying notes 99-117.

7. "Graduation" is the term used for the policy of denying further preferential access for specific products from certain BDCs, or for removing certain countries from the list of BDCs, based upon a perception that economic factors indicate an ability to compete in world markets without continued preferential trading. See *infra* notes 102-05 and accompanying text.

8. H.R. REP. NO. 1090, *supra* note 5, at 3, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5103. The other 25% of benefits are scattered among the numerous remaining eligible BDCs.

9. Auerbach, *U.S. Trade Deficit Climbs in January to \$10.3 Billion*, Wash. Post, Mar. 1, 1975, at 1A, col. 6.

10. Lawrence, *Record \$150 Billion Trade Deficit Likely*, J. COM., Jul. 1, 1985, at 3A, col. 3.

11. Shapiro, *Taiwan Posts Record Trade Surplus in '84*, J. COM., Mar. 11, 1985, at 22C, col. 1.

trade surplus with the United States of \$950 million.¹² Similarly, in 1984 Hong Kong exports to the United States were \$7.8 billion, an increase of forty percent above the 1983 level.¹³

The deteriorating economic and trade position of the United States in relation to Taiwan, Hong Kong, Korea and other so-called Newly Industrializing Countries (NICs)¹⁴ provoked Congress to qualify access to continuing trade opportunities under international incentive programs. A substantial part of the rationale underlying congressional efforts to reform the GSP was a desire to force the NICs to accept increased independence, economic responsibility and political maturity within the world trading system as an accompaniment to their increasing economic and trade successes.

This Note outlines the purpose, scope and operation of the GSP from 1976 until 1984. Both the initial authorizing legislation¹⁵ and the 1984 Trade Act are analyzed. The 1979 modifications made in the Trade Agreement Act¹⁶ are briefly discussed where they are relevant. The 1984 Trade Act changes are detailed, with commentary on the manner in which the renewed GSP differs materially from prior law, and with discussion of the underlying policies and significance of the changes. The Note concludes with comments on the diverse objectives of the United States GSP scheme, its evolving nature, and prospects for continuation of the scheme beyond 1993.

A. Origins of the GSP Concept

Argentine economist Raúl Prebisch introduced the idea for a Generalized System of Preferences at the first session of the United Nations Conference on Trade and Development

12. Bangsberg, *Taiwan's Exports Jump 16 Percent in January*, J. COM., Feb. 27, 1985, at 3B, col. 1.

13. Bangsberg, *Hong Kong's Exports to Major Markets Showed Wide Gains in 1984*, J. COM., Mar. 11, 1985, at 22C, col. 1.

14. Newly Industrializing Countries (NICs) refers to nations that have sustained substantial industrial and economic growth in recent years and that stand in the middle ground between the developed and less developed nations. Examples of NICs include Mexico, Brazil, and Taiwan.

15. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as subsequently amended in 1979 at 19 U.S.C. §§ 2461-2465 (1982)).

16. See Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at 19 U.S.C. §§ 2501-2582 (1982)). For a brief summary of this act, see A PREFACE TO TRADE, *infra* note 18, at 13-17.

(UNCTAD) in the early 1960s.¹⁷ The concept of a GSP was touted as a "logical extension of the infant industry argument."¹⁸ By granting temporary duty-free entry for LDC exports into developed country markets, policymakers hoped that a GSP would immediately increase the exports and purchasing power of LDCs and would subsequently help LDCs diversify their economies and infrastructure to produce manufactured and semimanufactured export articles.¹⁹

Implementing a GSP in the United States required United States policymakers to reverse completely their initial policy position toward the GSP idea.²⁰ Upon Prebisch's introduction of the GSP concept at UNCTAD, the United States initially opposed the idea of preferential market access on four basic grounds. First, the concept of preferential tariffs countered the GATT Most Favored Nation (MFN)²¹ principle of nondiscrimination, which is the cornerstone of GATT multilateral accords. In the early 1970s, policymakers feared that special tariff arrangements might undermine the liberalization of world trade, which had been advocated by the United States for more than twenty-five

17. See Nemmers & Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, LAW & POL'Y INT'L BUS. 855, 855 (1977) [hereinafter cited as Nemmers & Rowland]; see also United Nations Conference on Trade and Development, Report by the Secretary-General, 2 Proceedings of the United Nations Conference on Trade and Development (1st Sess.) 1, 5, U.N. Doc. E/CONF. 46/141 (1964). For a more detailed discussion of the GSP concept, see Comment, *Preferential Treatment: A New Standard for International Economic Relations*, 18 HARV. INT'L L.J. 109, 113-16 (1977).

18. United Nations Conference on Trade and Development, *supra* note 17, at 35. Essentially, the infant industry argument calls for temporary protection for an industry that has the potential to be competitive in the world market but requires insulation from existing producers in its initial phase of production. The theory recognizes that new industries realize declining costs as they expand output and acquire experience in production. See EXEC. OFFICE OF PRES. U.S. TRADE REP., A PREFACE TO TRADE 141 (1982) [hereinafter cited as A PREFACE TO TRADE].

19. See 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, 513 (1978) [hereinafter cited as Graham].

20. See generally *id.* at 514-20.

21. In general, the General Agreement on Tariffs and Trade (GATT) Most Favored Nation (MFN) clause is a "commitment that a country will extend to another country the lowest tariff rates it applies to any third country." A PREFACE TO TRADE, *supra* note 18, at 145. All GATT contracting parties agree to apply MFN treatment under Article I of the GATT codes.

years.²² Second, the Kennedy Round of Multilateral Trade Negotiations (MTN)²³ were in progress at the same time the GSP legislation was being discussed. The United States did not want concerns about preserving the margins of preferential tariffs for LDCs to hinder negotiations for what was considered a more important immediate objective—*multilateral* reduction in tariff levels. Third, the United States reasoned that if Kennedy Round Tariff negotiations were successful in reducing tariff levels, the economic basis for benefit under GSP programs would be diminished, perhaps to the point of negligible effectiveness for a GSP scheme.²⁴ Finally, United States policymakers were generally suspicious of the policy initiatives emerging from UNCTAD, and consequently harbored reservations about the quality of programs initiated in that forum.²⁵

22. See Graham, *supra* note 19, at 516.

23. The Kennedy Round was the sixth, and penultimate, round of seven rounds of negotiations held under the auspices of GATT since 1947. This round of trade negotiations occurred between 1963-67 and produced major reductions in tariff rates, an antidumping code, and a now-abandoned wheat agreement. See A PREFACE TO TRADE, *supra* note 18, at 143.

24. See generally Graham, *supra* note 19, at 516.

25. Personal interview with William E. Brock, U.S. Trade Representative, Washington, D.C. (July 13, 1982) (Transcript of interview on file at *Vanderbilt Journal of Transnational Law*) [hereinafter cited as Brock Interview]. (William E. Brock headed the USTR until March 1985 when Clayton Yeutter was named as his successor). Trade Ambassador Brock explained United States opinion:

[I]t is *extremely* difficult to be sympathetic to either UNCTAD or the UN. It is just not possible to be sympathetic in trade terms because they don't talk about trade. They talk about making political decisions that will affect trade in a negative fashion. And that's not responsible.

Id.

Insisting that the level of expertise is much higher in GATT, Brock continued: [GATT's] the proper forum. It is expert talking to expert, and it involves people with competence on the subject and *really* might achieve something very fundamental and very important to expand trading opportunities for the developing world. . . . [In GATT] you have . . . trade officials talking about a subject in which they know the subject matter. [In UNCTAD] you have diplomatic or political representatives engaged in an exercise in fairly classic demagoguery.

Id.

The political maneuvering in international negotiating contexts is reduced in a forum like the GATT. Brock explained:

You *have* to have some sort of international mechanism; otherwise, politicians will do foolish things. If there are no safeguards against doing something stupid, then governments invariably will do the stupid things. They

Subsequent international developments and substantial pressure from dependent allies caused the United States to modify its original position on GSP and to support the concept based on "political and psychological factors rather than economic criteria."²⁶ In part, the United States changed its position on GSP as a defensive response to special reverse preference trading relationships then being established between European Economic Community (EEC) countries and their former colonies, which had recently achieved independent status as nation-states.²⁷ United States opposition to the exclusive trading relationships and economic theories underlying reverse preference schemes indirectly led to support for the GSP as a more acceptable multilateral form of preferential trading. Political pressure asserted by the Latin American countries on the United States to institute a "defensive" Western Hemisphere regional preference scheme particularly influenced the United States policy reversal.²⁸ The United States reasoned that the emerging patterns of trade and special regional trading relationships would threaten the free flow of world goods and would harm the efficient allocation of resources and competitiveness of goods. United States policymakers, therefore, embraced the GSP as a mechanism to halt the cartelization of world trade.²⁹

Thus, a unique GSP scheme, reflecting both international poli-

almost are forced to by political pressure. The ultimate value of an international instrument such as the GATT . . . is that quite often the rules will give a politician within a particular country an excuse *not* to do something that he knows he shouldn't do, but is under intense political pressure to do.

Id.

26. Graham, *supra* note 19, at 517.

27. *See id.* at 516. The Yaoundé Convention originally established exclusive reverse preference trade patterns between the EEC and fifty-three associated states of Africa, the Caribbean, and the Pacific. Yaoundé was later replaced by the similar Lomé Convention in 1975 without the reverse preferences scheme. For a more detailed explanation of Yaoundé and reverse preference schemes, see de Bouter, *supra* note 2, at 368 n.70; *see also* O.E.C.D. REPORT BY THE SECRETARY-GENERAL, THE GENERALISED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE 40-41 (1983) [hereinafter cited as THE O.E.C.D. REPORT].

28. Graham, *supra* note 19, at 516 n.18. The pro-GSP views of the Latin American countries were expressed in a letter from the Inter-American Committee of the Alliance for Progress.

29. President Johnson first announced United States support for the GSP concept at the 1967 OAS meeting of the American Chiefs of State in Punte del Este. *See* 56 DEP'T ST. BULL. 709 (1967).

cymaking and domestic trade concerns, emerged in the United States. United States policymakers considered the GSP important because it represented a political symbol of concern for the problems of developing countries.³⁰ The GSP also reflected the congressional objective of encouraging LDC export earnings to stimulate trade markets for United States exporters without injuring local producers.³¹ In addition, the GSP represented the following trade policymaking goals: (1) to base trade benefits upon responsible actions within the international sphere; (2) to encourage LDC economic maturity with the expectation that LDCs will adopt a more open trading posture; and (3) to promote free-trade principles and increase world trade and development. Acceptance of the GSP as part of domestic international trade policy removed the emphasis on bilateral aid and instead shifted the focus to trade and market expansion as a primary mechanism to assist international development—a policy popularly referred to as “trade rather than aid.”³²

Preliminary multilateral negotiations toward implementation of a GSP scheme took place within the GATT. Negotiations pitted the donor nations from the Organization for Economic Cooperation and Development (OECD)³³ against the UNCTAD benefi-

30. Thomas R. Graham, former Deputy General Counsel for the Office of U.S. Trade Representative, stated in the conclusion to his article on the development of the GSP scheme: “International trade, and more specifically import competition, is *the most politically visible* and volatile component of international economic relations.” Graham, *supra* note 19, at 540 (emphasis added).

31. *Id.* at 524 n.43.

32. *See id.* at 513; *see also* R. NIXON, *THE REAL WAR* 36 (1980).

Ambassador Brock emphasized the beneficial aspects of the GSP program: Remember, though, that GSP is essentially something that operates to the advantage of Americans—not just our trading partners. What we are doing is cutting prices on products that Americans want to buy. So, that’s good for American consumers; it’s good for competition. I don’t view the GSP as something that’s just a value for our trading partners. It’s something of value to us, too.

Brock Interview, *supra* note 24.

33. The Organization for Economic Cooperation and Development (OECD) is headquartered in Paris and serves as the forum for the developed countries to discuss trade and related matters. The OECD functions through various committees and working groups to conduct both studies and negotiations on particular problems which the developing countries must jointly resolve, and to coordinate policies for purposes of other international negotiations. The OECD member countries consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxem-

ciary nations. Both sides, however, made significant compromises to reach general agreement on the early form of the program.³⁴ With ideas from these multilateral negotiations, the respective donor countries implemented their individual GSP schemes through domestic legislation.

As the twenty-first donor country to offer a GSP scheme,³⁵ the United States implemented its GSP program as part of the 1974 Trade Act.³⁶ This initial GSP legislation was influenced by three factors during the 1972-74 congressional years: domestic economic and political affairs, recent foreign policy developments, and partisan politics.³⁷ The legislation reflected the amalgamation of these trade policymaking factors, and hence, the GSP was a system born of sometimes disparate policy goals.

B. Impact of GSP on Domestic Imports and Consumption

A recent International Trade Commission (ITC) study³⁸ examined trends in GSP imports during the 1978-81 period in each

bourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. See A PREFACE TO TRADE, *supra* note 18, at 147.

34. See generally Graham, *supra* note 19, at 517-20. Implementation plans proceeded from general international forums to the level of domestic legislation. Most donor countries announced programs in advance of the United States program. The United States GSP program was not implemented until January 1976. *Id.* at 533.

35. See OECD REPORT at 11.

36. See *supra* note 15.

37. For an explanation of how the USTR office developed a fragile constituency to support the GSP scheme, how and why many domestic concerns opposed the idea, and how concurrent foreign policy developments (e.g., the dollar crisis of the early 1970s, the OPEC oil embargo, the Israeli-Arab problems, growing concerns over terrorism, and problems with nationalization/expropriation of United States investments) influenced the final form of the program, see Graham, *supra* note 19, at 520-26.

38. See U.S. INT'L TRADE COMM'N, PUB. NO. 1379, AN EVALUATION OF U.S. IMPORTS UNDER THE GENERALIZED SYSTEM OF PREFERENCES (May 1983) [hereinafter cited as ITC PUB. NO. 1379].

. . . [T]he purpose of the study is *not* to make a determination regarding industry injury; rather, it is designed to give the Congress and the Executive Branch, as well as the public, a quantitative basis for their evaluation of the impact of the GSP on important U.S. industries and to focus attention on those industries where various quantitative indicators show import penetration which is worthy of note.

Id. at ii (emphasis in original).

of the major industrial product sectors,³⁹ providing impact analysis data in preparation for changes contemplated by the 1984 Act. The ITC study compares levels and trends by using three ratios: (1) GSP imports to total United States imports; (2) total United States imports to total consumption; and (3) GSP imports to total consumption.⁴⁰ The ITC attempted to determine for each industry the extent to which GSP imports contributed to a "significant penetration of U.S. markets by imports."⁴¹

ITC data indicate that GSP imports constitute a significant amount of trade incentive without being overly burdensome to domestic producers. GSP imports steadily increased in total dollar value at an annual rate of seventeen percent between 1978 and 1981, rising from \$5.2 billion to \$8.4 billion.⁴² The total dollar amount of trade affected by the GSP is significant to the economies of the LDCs, but represents only a small percentage of overall United States import trade and consumption.

The ITC study concluded that during the last several years the scope of GSP trade has been substantial enough to act as a development incentive, yet has not seriously harmed domestic producers. Supporting this conclusion are the ITC's three ratios expressed as percentages. First, GSP imported goods account for less than five percent of total United States nonpetroleum imports.⁴³ During 1978-81, GSP imports showed only a moderate rise, from 4.1 to 4.9 percent.⁴⁴ Second, the ratio of total United States imports to total United States consumption averaged approximately ten percent during those years.⁴⁵ Third, GSP imports accounted for only 0.5 percent, or less, of total United States con-

39. The product sectors include agriculture, forest products, textiles, apparel, footwear, chemicals, minerals/metals, machinery/equipment, and miscellaneous manufactures. *Id.* at i.

40. *Id.*

41. *Id.*

42. *Id.* at v. The report found significant increases in GSP import penetration in twelve different commodity/industry groups. *Id.* at vi.

43. *Id.* at v. During this time, however, changes in both country and product eligibility could have significantly affected total values.

44. *Id.* at v.

45. *See id.*

Regarding trade stimulation, the economic affect attributable solely to GSP incentives is actually even less than five percent because many BDCs would import their goods into the United States at the higher MFN rates if GSP zero rates were not offered. *Id.*

sumption during 1978-81.⁴⁶

Six factors restrict the degree of market penetration by GSP imports, and support the conclusion that "GSP imports have not resulted in significant increases in the overall import share of the U.S. market."⁴⁷ First, GSP is restricted by product coverage.⁴⁸ Second, certain product categories are entirely exempt as "import-sensitive" from GSP.⁴⁹ Third, GSP incentive declines with lowered MFN rates, because the spread in cost advantage narrows.⁵⁰ Fourth, Competitive Need Limits (CNLs), annual product reviews, and graduation principles regulate GSP benefits and thus temper BDC gains under the program.⁵¹ Fifth, the temporary nature of the program and the recent historical pattern of declining MFN rates deters significant amounts of long-term investment.⁵² Finally, many LDCs lack the essential infrastructure, capital, and skilled labor necessary to utilize effectively manufacturing opportunities offered by the GSP.⁵³

II. BRIEF OVERVIEW OF THE UNITED STATES GSP IN OPERATION

A. Statutory Authorization and Administrative Authority

Title V of the 1974 Trade Act⁵⁴ created the GSP scheme in the United States. The 1974 Act set guidelines to determine country and product eligibility based upon specific criteria established by

46. *See id.* at x, tab. 1.

47. *Id.* at vi.

48. *Id.*

49. *Id.*; *see infra* note 71 for an explanation of "import sensitive."

50. *Id.* By way of explanation, "the spread" between an MFN rate of 6% and the GSP zero rate may not be significant enough to exploit economically. The 1981 average MFN duty on GSP eligible items was slightly greater than 8% *ad valorem*. *Id.*

51. *Id.*

52. *Id.* Producers of manufactured and semimanufactured articles in eligible BDCs will be less likely to expand export operations and undergo added financial and structural commitments if they are unsure whether their product will remain eligible for zero tariff treatment and if they are unsure whether the GATT MFN tariff rates for their products will remain significantly more than the GSP zero rate.

53. *Id.* Without the ability to raise investment capital and without the necessary elements to support industrial production for export (e.g., electricity, roads, skilled workers, transportation equipment, and dock facilities), a tariff incentive can be useless.

54. *See* 19 U.S.C. §§ 2461-2465 (1982). The GSP was implemented by Exec. Order No. 11,888, 40 Fed. Reg. 55,275 (1975).

Congress as preconditions to GSP treatment. The Office of the United States Trade Representative⁵⁵ (USTR) implements executive authority and makes discretionary decisions regarding GSP. The USTR works through the Trade Policy Committee⁵⁶ (TPC)

55. A USTR publication defines clearly the responsibilities of the Trade Representative office:

The United States Trade Representative is a Cabinet-level official with the rank of Ambassador who is the President's principal advisor on international trade and commodity policy. The primary international policy responsibilities include (1) expansion of U.S. exports; (2) matters concerning the General Agreement on Tariffs and Trade (GATT), including implementation of agreements negotiated in the MTN; U.S. Government positions on trade and commodity matters dealing with multilateral organizations and the protection of U.S. rights under international trade and commodity agreements; (3) to the extent permitted by law, overall U.S. policy with regard to unfair trade practices, including enforcement of countervailing measures and antidumping functions; (4) bilateral trade and commodity issues, including East-West Trade matters; (5) international trade issues, involving energy; (6) direct investment matters to the extent they are trade related; and (7) policy research on international trade, commodity, and direct investment matters. USTR also has lead responsibility for conducting all international trade negotiations.

A PREFACE TO TRADE, *supra* note 18, at 159.

56. The Trade Policy Committee (TPC), the highest level trade policymaking group within the federal government, is the internal decisionmaking structure used by the USTR to develop trade policy. Trade Ambassador Clayton Yeutter is the present chairman of the TPC, which is composed of secretaries of the various cabinet level departments. Yeutter is also chairman of the smaller Trade Negotiating Committee (TNC), consisting of secretaries from Commerce, State, Treasury, Labor, and Agriculture. The TNC advises the President on all specific trade matters. The Trade Policy Review Group (TPRG) is the second-tier policymaking group consisting of representatives from the assistant secretarial level of agencies included in the higher TPC. The USTR office coordinates the TPRG, which is chaired by the Deputy-USTR. The third tier of policymakers is the Trade Policy Staff Committee (TPSC) which consists of representatives from all the agencies on the TPC and an additional representative from the International Trade Commission. The following explains the TPC decision-making structure:

The TPSC is the first-line operating group, with representation at the senior civil-servant level. Supporting the TPSC are 32 subcommittees responsible for specialized areas and several task forces that work on particular issues. If agreement is not reached in the TPSC, or if particularly significant policy questions are being considered, issues are taken up by the TPRG (Assistant-Secretary level). The TPC provides for Cabinet-level review to resolve agency disagreements. When Presidential trade policy decisions are needed, the Chairman of the TPC (the USTR) submits recommendations and advice . . . to the President.

to make GSP recommendations to the President based on official consultation with other executive agencies, including the Departments of Commerce, State, Treasury, Agriculture, and Labor, as well as the independent International Trade Commission (ITC).⁵⁷ The GSP Subcommittee of the TPC⁵⁸ oversees the daily operations of the program, but directs consideration of politically sensitive matters or disagreements to higher TPC levels.⁵⁹ Generally, however, GSP Subcommittee recommendations are rarely overturned.⁶⁰

B. Designation of Beneficiary Developing Countries

Currently 114 independent countries, twenty-six nonindependent countries and three trade associations participate in the United States GSP scheme.⁶¹ The 1974 Trade Act gives the executive discretion to designate BDCs.⁶² Provisions of the 1974 Act, however, enumerate general criteria the President must consider when designating BDCs.⁶³

See A PREFACE TO TRADE, *supra* note 18, at 78-79.

57. The ITC is an independent factfinding agency whose members and staff make determinations of injury and recommendations for relief from increasing export competition for industries or workers. At the request of the President or Congress, or on its own initiative, the ITC may conduct comprehensive studies of the possible economic effects to specific United States industries resulting from proposed tariff cuts or reduced nontariff trade barriers. See A PREFACE TO TRADE, *supra* note 18, at 158-59.

58. The GSP Subcommittee handles the daily administration of the GSP; it is chaired by Deputy-USTR David Shark (formerly chaired by Tom St. Maxens). The Subcommittee plays the major role in administering the GSP program and maintaining the GSP information center within the USTR. The information center releases updates on GSP changes, prints annual GSP reports and maintains necessary data on all GSP operations.

The TPC structure, and the GSP Subcommittee, are important in light of the changes called for in the 1984 Act because this structure will be used to implement the new standards and to apply the new criteria in future GSP decisionmaking.

59. Interview with Tom St. Maxens, former Deputy Assistant Trade Representative for GSP, Washington, D.C. (Feb. 10, 1983) [hereinafter cited as St. Maxens Interview].

60. *Id.*

61. See A GUIDE TO GSP, *infra* note 66, at 3-4. See generally Table 1 of the Appendix to this Note for a list of BDCs.

62. See 19 U.S.C. §§ 2461-2465 (1982) (implemented by Exec. Order No. 11,888, 40 Fed. Reg. 55,275 (1975)).

63. General criteria required by § 502(c) of the 1974 Act include:

Furthermore, certain conditions can cause the denial or removal of a BDC from the list of eligible designees. For example, BDC status is denied to the following countries: (1) Communist countries, unless the products from the country receive nondiscriminatory treatment from the United States, the country is a member of both the International Monetary Fund and the GATT, and the country is not dominated by international Communism; (2) OPEC countries and other countries withholding supplies of vital resources from the international market or disrupting the international market by their resource pricing policies; (3) countries granting preferential treatment to the products of a developed country, other than the United States, where such preferential treatment may substantially harm United States commerce; (4) countries that have effectively nationalized or expropriated United States property, without entering into compensation negotiations under the International Convention for the Settlement of Investment Disputes arbitration; (5) countries that do not cooperate adequately with United States efforts to prevent the importation of narcotics and other controlled substances into the United States; (6) countries that fail to recognize or enforce legitimate arbitral awards in favor of United States citizens, corporations, partnerships or associations; and (7) countries that aid or abet terrorism by granting sanctuary from prosecution to any individual or terrorist group.⁶⁴ The President may, in his discretion, waive application of factors (4) through (7), but only if the President determines that granting BDC status will be "in the national economic interest of the United States."⁶⁵

(1) an expression by such country of its desire to be so designated;

(2) the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which [the President] deems appropriate;

(3) whether or not the other major developed countries are extending generalized preferential tariff treatment to such country; and

(4) 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.

Trade Act of 1974, 19 U.S.C. § 2462(c) (1982).

64. *Id.*

65. *See id.*

C. Product Coverage and Designation of Eligible Articles

The United States GSP currently includes approximately 3,000 eligible articles designated by the five-digit classification scheme for the Tariff Schedules of the United States (TSUS).⁶⁶ The list of eligible articles primarily includes semimanufactured and manufactured goods.⁶⁷ The President has authority to designate eligible articles upon advice of the USTR. Product coverage decisions are made after consulting the ITC and other government agencies concerning the likely impact that designation of eligible articles will have on both the United States domestic market as well as markets of BDCs.⁶⁸ Developing countries uniformly request increased product coverage⁶⁹ but often disagree on which specific product sectors are crucial to fostering internal development.⁷⁰

66. See ITC PUB. NO. 1379, *supra* note 38, at i; see also OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF PRES., A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) (September 1984) (which also lists all GSP eligible articles by the Tariff Schedules of the United States (TSUS) item number) [hereinafter cited as A GUIDE TO GSP]. For an excellent explanation of the Tariff Schedule of the United States, see Feller, *Introduction to Tariff Classification*, 8 L. & POL'Y INT'L BUS. 991 (1976).

As a result of the 1983 GSP product review, 22 new items were designated, representing \$7 million in newly-eligible trade (compared to \$10 million added in 1982). Thirteen petitions for product additions were denied—principally on grounds of import sensitivity. See GSP INFORMATION CENTER, OFFICE OF THE U.S. TRADE REP., SUMMARY OF CHANGES IN THE GENERALIZED SYSTEM OF PREFERENCES EFFECTIVE MARCH 30, 1984, 1 (1984).

67. See A GUIDE TO GSP, *supra* note 66, at i-ii. GSP product coverage includes the following general TSUS sectors: agriculture, forest products, textiles, apparel, footwear, chemicals, minerals/metals, machinery/equipment, and miscellaneous manufactures. See ITC PUB. NO. 1379, *supra* note 38, at i. Imports within two product sectors, machinery/equipment and miscellaneous manufactures, together accounted for approximately one-half of all GSP imports during 1978-1981. *Id.* at x.

68. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, REPORT TO THE CONGRESS ON THE FIRST FIVE YEARS' OPERATION OF THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) 96th Cong., 2d Sess., 20-21 (Comm. Print 1980) [hereinafter cited as HOUSE REPORT ON FIRST FIVE YEARS' OPERATION OF THE GSP].

69. St. Maxens Interview, *supra* note 59.

70. There has been an ongoing debate over whether more agricultural products should be added to the GSP list. Proponents for adding more agricultural items argue that this would benefit the LLDCs because of their natural competitiveness in this area. Others contend that this would be inconsistent with the primary GSP goal of encouraging development in infant industries and would also hurt American farmers. Opponents of adding more agricultural items to GSP see no rationale for providing further incentive for LLDCs to perpetuate a

Articles that are statutorily categorized as "import-sensitive" because they are regarded as essential to national security, or articles that are discretionarily protected, may not be designated as eligible for GSP treatment.⁷¹ The original list of import sensitive articles under section 503(c)(1) of the 1974 Trade Act contained the following items: (1) textile and apparel articles subject to textile agreements; (2) watches;⁷² (3) certain electronic articles; (4) specific steel articles; (5) specific footwear articles; and (6) certain types of semimanufactured and manufactured glass products.⁷³ The President has general discretion to characterize other articles as import-sensitive, thus removing them from GSP eligibility.⁷⁴ In addition to the import-sensitive exclusion, articles may not be designated as GSP eligible if the President determines (1) that an elimination or decrease in tariff duties would threaten national security,⁷⁵ (2) that discretionary import relief should be granted

historical pattern of dependent trade.

71. See § 503(c)(1) of the 1974 Trade Act; 19 U.S.C. § 2463(c)(1) (1982). The USTR generally defines import-sensitivity:

[This phrase] . . . in the context of the GSP implies that domestic injury or threat of injury results, at least to a substantial degree, from the provision of duty-free treatment under the GSP.

Nemmers & Rowland, *supra* note 17, at 865.

The President's Five Year Review of the GSP states that "employment, production, capital investment, capacity utilization, and profits in the U.S. industry are taken into account" when determining import-sensitivity. Other relevant factors include "the level and growth of imports from developed and developing countries, the extent to which the item traditionally has been excluded from trade negotiations, and whether the U.S. industry has been injured by dumping." HOUSE REPORT ON FIRST FIVE YEARS' OPERATION OF THE GSP, *supra* note 68, at 21.

72. *But see* Serko, *Swaying the GSP*, AM. IMPORT EXPORT BULL. 4 (Aug. 1982) (explains how United States Customs classification decisions will greatly affect GSP product coverage). Serko discusses *Texas Instruments, Inc. v. United States* (C.C.P.A. Mar. 23, 1981) (CIT, slip. op. 81-31 (Apr. 17, 1981)). This case presented the issue of whether assembled solid state electronic watches and watch modules were timepieces excluded from GSP treatment under Customs classification. Both the Court of International Trade and the United States Court of Customs and Patent Appeals held that because "watches" are described in tariff categories with respect to their movements, electronic digital watches did not fall within the classification. Therefore, Hong Kong was entitled to duty-free treatment under GSP for these timepieces.

73. 1974 Act § 503(c)(1); 19 U.S.C. § 2463(c)(1) (1982).

74. *Id.* § 503(c)(1)(G); 19 U.S.C. § 2463(c)(1)(G) (1982).

75. See 19 U.S.C. § 1862 (1982).

to domestic producers,⁷⁶ or (3) that tariff adjustments should be made pursuant to general tariff setting authority.⁷⁷

The GSP Subcommittee of the TPSC makes recommendations to the President concerning product coverage.⁷⁸ Annual product coverage changes are made pursuant to a petition review process.⁷⁹ The USTR has promulgated regulations explaining the petitioning process to either add or subtract GSP eligible articles.⁸⁰ Generally, any "interested party"⁸¹ may privately petition the GSP Subcommittee for article changes. To qualify as an "interested party," the petitioner must have either a "significant economic interest in the subject matter of the request"⁸² or an interest that would be "materially affected" by the trade action requested.⁸³ The GSP Subcommittee may also initiate product coverage changes without a specific request from an interested party.⁸⁴

The petitioning party carries a substantial burden of proof to demonstrate the merits of a requested product change.⁸⁵ Each petitioner is responsible for providing a "detailed economic analy-

76. See 19 U.S.C. § 2253 (1982). The President can grant general import relief in the form of increased duties, tariff-rate quotas, quantitative restrictions on imports and orderly marketing agreements.

77. See 19 U.S.C. § 1981 (1982).

78. See PREFACE TO TRADE, *supra* note 18, at 79.

79. *Id.*

80. See 15 C.F.R. § 2007 (1985).

81. The following groups are invited to comment under the "interested parties" definition:

domestic or foreign manufacturers, importers, consumer groups, labor unions, domestic trade associations, or foreign governments, shippers and trade associations . . . state or local government agencies in the U.S. where, for example, such agencies were involved with regional or community development programs that were materially affected by the granting or withholding of GSP benefits for one or more articles. . . .

Nemmers & Rowland, *supra* note 17, at 861.

82. See 15 C.F.R. § 2007.0(c) (1985).

83. *Id.*

84. See 15 C.F.R. § 2007.0(e) (1985). The GSP Subcommittee is nonpartisan in its consideration of the many different product change petitions brought by interested parties. BDCs, domestic and foreign manufacturers, importer-exporters, and labor associations are sources of product change petitions.

85. St. Maxens Interview, *supra* note 59. The Regulations specify generally what a petition must include, but some discretion remains to build a strong economic argument for the particular action desired.

sis" to support the petition.⁸⁶ A petition normally must contain specific information on both domestic and BDC production, employment data, and cost and profit analyses in the applicable product category.⁸⁷ The ITC also provides the GSP Subcommittee with impact analyses concerning the probable effects of a product change petition on United States industries.⁸⁸

The two most common reasons for rejecting interested party petitions for product changes are insufficient documentation by the petitioning party and repeated requests by a petitioner after prior consideration and denial of a petition.⁸⁹ If a petitioner does not commit these two errors, the Subcommittee then carefully assesses the request and renders a recommendation.

D. Rules-of-Origin Requirements

The United States GSP scheme requires all eligible products to originate entirely from an approved BDC. When eligible products contain imported materials, the imported materials must undergo a "substantial transformation" so that the final export product is distinguishable from the assembly materials.⁹⁰ The rules-of-origin

86. *Id.*

87. *Id.*

88. Consultation with the ITC was not *required* until the 1984 Act changes, see *infra* notes 191-92 and accompanying text.

89. St. Maxens Interview, *supra* note 59. The recommendation is reported according to a set calendar schedule. Public hearings are held concerning petitions to be considered by the GSP Subcommittee and the date of the hearings are announced in the Federal Register. The GSP calendar for product reviews is contained in regulations section 2007.3:

(1) June 1, announcement of review,(2) July 15, deadline for receiving petitions;(3) August 1, announcement of accepted petitions;(4) September 15, public hearings;(5) March 1, effective date of changes. If the date specified is on, or immediately follows, a weekend or holiday, the effective date will be on the second working day following such weekend or holiday date.

15 C.F.R. § 2007.3 (1985).

90. See Trade Act of 1974 § 503(b), 19 U.S.C. § 2463(b) (1982); 19 C.F.R. § 10.176-.178 (1985). The measure of the required transformation is generally the amount of processing that will cause a change in Customs classification. Nemmers & Rowland, *supra* note 17, at 870 n.81. Thus, for articles not entirely produced in BDCs, Customs requires two transformations. First, any materials imported into a BDC for assembly into an eligible product must undergo transformation substantial enough to change the Customs classification. Second, the final product must also be changed into "a new and different article of commerce." See 19 C.F.R. § 10.176-10.177 (1985). For a detailed analysis of GSP rules-of-origin, see Nemmers & Rowland, *supra* note 17, at 869-80 (the analysis

requirements are designed to prevent countries which are ineligible for preferential treatment from merely routing their goods through eligible BDCs to receive duty-free treatment.⁹¹

Rules-of-origin not only require that goods originate from certain countries but also require that the value added to the goods when processed or assembled in these countries meets a specified minimum level. The value added by the BDC must equal or exceed thirty-five percent of the value of the good based on the appraisal by United States Customs.⁹² Ambiguity arises over exactly which BDC production "costs" will be included as "value added" to the goods for purposes of the thirty-five percent requirement.⁹³ Nevertheless, failure to meet the requirement clearly results in the loss of GSP status for the article. The thirty-five percent rule applies to all individual BDCs. As a result of an amendment to the Trade Agreement Act of 1979,⁹⁴ the rule also applies to any of three eligible "country associations."⁹⁵ For purposes of the thirty-five percent value-added rule, these privileged associations are treated as one country. Thus, the individual countries within an association may cumulate their value added to the product so as to qualify for the thirty-five percent threshold.

is outdated with respect to 1979 changes). *See also generally*, Customs Regulations and Other Procedures for the Application of GSP, 19 C.F.R. §§ 10.171-.178 (1985).

91. *See* United Nations Conference on Trade and Development, Compendium of Rules of Origin Applied Under the GSP, at 9-12, U.N. Doc. TD/B/626 (1976).

92. 19 U.S.C. § 2463(b)(2)(A) (1982).

93. *See, e.g.*, Nemmers & Rowland, *supra* note 17, at 870; *see also* Orton, *The Profit Limitation in the GSP*, 91 AM. IMPORT EXPORT BULL. 12 (Oct. 1979). United States Customs officials have discretion to allocate costs for purposes of the value-added requirement.

94. *See* 19 U.S.C. § 2461-2465 (1982). The original value-added requirement for associations was set at 50%. *See* 19 C.F.R. § 10.176(b) (1977).

95. "Country Associations" refers to favored groups of trading nations which are treated as one country for purposes of meeting the rules of origin requirements such that their cumulative value added to a product need constitute only 35%. The three country associations are: (1) member countries of the Caribbean Common Market (CARICOM) including: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Christopher-Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago; (2) member countries of the Cartagena Agreement (Andean Group) including: Bolivia, Columbia, Ecuador, Peru, and Venezuela; and (3) the Association of South East Asian Nations (ASEAN) including: Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand.

Valuation under the thirty-five percent rule is generally limited to the BDCs' direct processing costs such as actual labor costs, materials, tools and depreciation, freight, insurance, packaging, taxes and duties on materials, and the costs of inspecting and testing merchandise.⁹⁶ All indirect expenses are excluded from valuation.⁹⁷ The United States Customs Office administers and enforces the thirty-five percent rule. To ensure GSP eligibility for a product, producers should obtain a definitive ruling from Customs to avert problems resulting from attempts to comply with the rules-of-origin.⁹⁸

E. The CNLs and the Graduation Concept

Procedures for removal of certain products from continued GSP treatment are incorporated into the United States GSP scheme through the application of either of two separate Competitive Need Limits (CNLs). One CNL is mandated by statute, based upon rigid statistical data; the Executive may determine the other CNL based upon a petitioning process. Mandatory removal of a product occurs when a BDC's shipment of a particular article into the United States in any one year exceeds either of two values: (1) the indexed monetary CNL (\$57.7 million in 1983); or (2) the fixed limit of fifty percent of the value of total United States imports of the article.⁹⁹ Discretionary removal of

96. 19 C.F.R. § 10.177 and 10.178 (1985). See also, Nemmers & Rowland, *supra* note 17, at 869-80 for a more detailed analysis.

97. 19 C.F.R. § 10.178(4)(b) (1985). These include profit and general expenses such as administrative salaries, casualty and liability insurance, advertising and salespersons' salaries, commissions or expenses.

For an intriguing argument that *normal profit* should be included in the calculation of the 35% value-added requirement, see Orton, *supra* note 93, at 12, 14.

98. See Nemmers & Rowland, *supra* note 17, at 880 & n.113 (authors recommend obtaining internal advice from Customs and explain procedures for granting policy statements).

99. See Trade Act of 1974, 19 U.S.C. § 2464(c)(1)(A), (B) (1982). The 50% CNL accounted for the exclusion of \$10.7 billion in 1983 trade (compared to \$7.1 billion in 1982). The petition review process removed from GSP treatment three articles which had accounted for \$33.5 million in 1983 trade. Any BDC product removed under any form of CNL is eligible for redesignation after one year pursuant to the petitioning process and a requisite showing of changed circumstances, such that the CNLs no longer apply or a Presidential waiver is deserved. See Pub. L. No. 98-573, § 505(c)(5), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3022. Table 3 of the Appendix shows the amount of

products occurs on the basis of annual petition reviews by "interested parties"¹⁰⁰ and before either of the two statutory CNLs are met.¹⁰¹

The United States limitations on the volume of preferential trade under the GSP are based upon a policy referred to as "graduation."¹⁰² In 1981 graduation was introduced as the underlying basis for the discretionary removal from GSP eligibility of certain *products* from specific BDCs before the statutorily specified limits on tariff-free trade were surpassed.¹⁰³ The 1984 Act expanded the graduation concept to include the complete removal of *countries* from continued GSP eligibility for all their products.¹⁰⁴ Graduation is designed to ensure the continuation and focus upon the GSP's primary goal of encouraging growth of infant industries by the least developed of the developing nations. Graduation, in particular, emphasizes that GSP benefits are temporary and reminds LDCs that they must someday become mature members of the international trading system.¹⁰⁵

The United States scheme is unique in its combined use of mandatory CNLs and discretionary removal through the petition review process. Most other donor nations use quotas to protect domestic producers from excessive GSP imports.¹⁰⁶ The United

trade affected by the CNLs and discretionary petition removals for the 1981-83 period.

100. See *supra* note 52 for explanation of the annual product reviews. The GSP Subcommittee of the USTR coordinates the review process. See also Reviews Pertaining to Eligibility of Articles for the GSP, 15 C.F.R. § 2007 (1985) (explaining information required in USTR petition review process).

Based upon petitions filed by United States producers and labor unions, certain products from Taiwan, Korea and Hong Kong were removed from GSP eligibility. The excluded trade was valued at \$183 million (compared to \$95 million granted in 1982). See SUMMARY OF CHANGES IN THE GENERALIZED SYSTEM OF PREFERENCES EFFECTIVE MARCH 30, 1984, *supra* note 66, at 1.

Increased rigor in enforcing removal of products through the petition review process is clear: the total dollar value of removed GSP trade almost doubled between 1982 and 1983.

101. See S. REP. No. 485, *supra* note 3, at 4.

102. See generally Frank, *The "Graduation" Issue for LDCs*, 13 J. WORLD TRADE L. 289 (1979) (explains development of the concept, details both sides of the problem, and supports establishment of a new Committee on Graduation in the GATT).

103. See 46 Fed. Reg. 37,115-16 (1981).

104. See *infra* notes 184-88 and accompanying text.

105. See 46 Fed. Reg. 37,115-16 (1981).

106. OECD REPORT, *supra* note 27, at 40.

States approach has met with much criticism.¹⁰⁷ Generally, domestic producers contend that graduation is not applied vigorously enough or is insufficient to meet their protection needs.¹⁰⁸ Domestic importers argue that the petition review process is unpredictable and dependent upon the exercise of too much executive discretion.¹⁰⁹ BDCs object to the arbitrary product removal processes, claiming they undermine the economic incentive of the entire GSP program.¹¹⁰ Finally, LLDCs assert that CNLs and graduation will not have the redistribution effects desired. A report by the Korean Traders' Association argues that statistical data indicate that other *developed* countries benefit from GSP trade excluded by imposing CNLs—not the developing countries.¹¹¹

Participants on various sides of the GSP scheme debate the ability of CNLs to redistribute GSP benefits to the LLDCs, but the fact remains that CNLs have been used increasingly as protection for domestic producers. In 1983, for the first time under

107. For example, the EEC has objected generally to the concept of graduation as a harbinger of increasing United States protectionism. See Wall St. J. Mar. 13, 1985, at 38, cols. 1-2; see also OECD REPORT, *supra* note 27, at 59 (noting that the divergent views on the issue of "graduation" at least in part reflect the apparent economic success of the GSP program since some BDCs have used preferential access to the point of perceived damage to donor country markets).

Criticism of the CNLs and the petition review process has come from developing countries seeking GSP benefits, domestic import/exporters and interested parties seeking to gain discretionary application of the limits. See, e.g., Nemmers & Rowland, *supra* note 17, at 905-07.

108. See, e.g., *Proposed Renewal of the Generalized System of Preferences, 1984: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 2d Sess. 240-41 (1984)* [hereinafter cited as *Proposed Renewal of the GSP, 1984*] (statement of Myron T. Foueaux of the Chemical Manufacturers Association).

109. *Id.* at 239-40.

110. For example, representatives from UNCTAD argue that the LLDCs are not capable of capitalizing on the graduation of major beneficiary countries from certain product categories because the LLDCs lack the industrial capacity to switch to immediate production of sophisticated products and because most of the products in which the LLDCs have great production potential are excluded from GSP eligibility. If BDCs are immediately graduated for products in which they prove competitive, the incentive to switch available production capacity is diminished. See *Proposed Renewal of the GSP, 1984, supra* note 108, at 334-36 (statement from the Office of the Secretary General of UNCTAD).

111. See, e.g., *Proposed Renewal of the GSP, 1984, supra* note 108, at 334-35 (prepared statement by the Deputy Secretary General of UNCTAD).

the CNL system, the ratio of the dollar value of CNL-excluded GSP goods to GSP imports surpassed a ratio of one to one. More than \$11.8 billion of GSP trade was excluded by the CNLs in 1983 alone.¹¹² In the early 1980s, and despite the touted redistributive goals of the CNL system, the LLDCs appear to be disproportionately unable to take advantage of GSP economic and developmental benefits.¹¹³ Recent studies indicate that from January to November 1983, the top five BDCs (Taiwan, Korea, Hong Kong, Mexico and Brazil) enjoyed sixty-five percent of all GSP benefits which totaled \$9.87 billion for that period.¹¹⁴ In contrast, the LLDCs received less than one percent of total GSP benefits.¹¹⁵ Early studies showed that after CNLs are applied, the resulting gains in imports usually accrue to the developed or to the advanced developing countries rather than to the LLDCs.¹¹⁶ Because of this skewed distribution of GSP benefits, Congress refined the CNL system with the expectation that more rigorous application would provide tangible redistributions of GSP benefits. Toward this objective, Congress also recommended clarified administrative procedures to enhance the effectiveness of the CNLs and to encourage input from the private sector.¹¹⁷

112. See S. REP. NO. 485, *supra* note 3, at 5; see also Table 2 of the Appendix.

113. See generally, Lahoud, *The "Non-Discriminatory" United States Generalized System of Preferences: De Facto Discrimination Against the Least Developed Developing Countries*, 23 HARV. INT'L L.J. 1 (1982) [hereinafter cited as Lahoud]; see also INTERNATIONAL TRADE COMM., PUB. NO. 1384, CHANGES IN IMPORT TRENDS RESULTING FROM EXCLUDING SELECTED IMPORTS FROM CERTAIN COUNTRIES FROM THE GENERALIZED SYSTEM OF PREFERENCES, 26-28 (1983) [hereinafter cited as ITC PUB. NO. 1384] (concluding that preliminary data indicates only weak redistribution effects can be attributable to exercising the CNLs: "Imports of similar products from associated countries did not seem to increase in the year after exclusions were established." *Id.* at 28.)

114. See *Proposed Renewal of the GSP, 1984*, *supra* note 108, at 13.

115. See H.R. REP. NO. 1090, *supra* note 5, at 3, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5103; see also generally Table 4 of the Appendix which shows 1983 GSP imports from the leading BDCs in comparison with 1982 data indicating per capita GNP of the beneficiary countries.

116. *Id.*

117. For example, the House Subcommittee on Trade recently noted that six primary aspects of the petition process need attention: (1) the President should develop a standard petition explaining information required to be submitted; (2) the President should propose regulatory changes to prohibit reconsideration for three years of petitions requesting additions to the list of eligible items absent a showing of significant changed circumstances; (3) the petition decisionmaking

III. RECENT GSP CHANGES: THE TRADE AND TARIFF ACT OF 1984

Recent GSP changes codified in the Trade and Tariff Act of 1984¹¹⁸ could significantly alter the program's developmental impact. However, the effect of these changes on the daily operations of the GSP is presently unclear. Most of the 1984 changes affect the discretionary and procedural operation of the program, leaving the basic organization and underlying principles of the GSP scheme intact. Presently, Congress seems satisfied with the general GSP scheme but it could not resist the opportunity provided by the need for renewal legislation in 1984 to further refine the operation of the program.¹¹⁹

This section traces the major amendments found in the 1984 legislation (the 1984 Act), comments on how the changes differ materially from prior law, and explains the underlying policies as well as the potential significance of the new congressional directives.

process should be exposed to more scrutiny by granting private review of information used to formulate decisions and by requiring a statement of the reasons for conclusions reached; (4) parties interested in the petition process should be given additional opportunities to submit information and comments, including the chance to submit input to the ITC before preparation of the ITC report on the probable economic effects of a petition review decision; (5) the President should promulgate additional regulations clarifying and detailing requirements for obtaining product modifications; and finally (6) parties interested in the implementation and protection of worker rights should be given the same participation privileges as other "interested parties" heard in the petition review process. See H.R. REP. No. 1090, *supra* note 5, at 24-26, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 5124-26.

118. See Pub. L. No. 98-573, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3018.

119. The Senate Finance Subcommittee on International Trade expressed basic approval of the GSP:

The Committee is satisfied that the GSP is operating as the Congress intended; that it poses for U.S. industries . . . no significant threat of injurious import competition; and that the program remains a viable development tool and is important to the economic and foreign policy interests of the United States.

S. REP. No. 485, *supra* note 3, at 8.

A. Extension of the GSP Until 1993

The 1984 Act extends the GSP until July 4, 1993, a period of eight and one-half years.¹²⁰ The United States GSP renewal period is two and one-half years less than that of other major OECD countries.¹²¹ This shorter extension period for the United States means that the GSP schemes of all OECD countries will terminate at approximately the same time. Thus, in future multilateral negotiations concerning GSP, in either the UNCTAD, GATT, or OECD forums, all donor countries will be re-examining their systems at the same time. The original GSP concept was intended only as a temporary program.¹²² Consequently, the question of whether to extend the scheme a second time likely will be a major issue in the 1990s.

B. The Competitiveness Factor as an Amendment to the President's Basic Authority to Extend Preferences

The Trade Act of 1974 required the President to consider three general factors when deciding generally whether to extend preferences under the GSP: (1) the effect such action would have on furthering developing countries' economies; (2) the extent to which other developed countries were comparably granting preferential access for products from developing countries; and (3) the anticipated impact of extending preferences on United States

120. See Pub. L. No. 98-573, § 505(a), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3023. The length of the extension represents a compromise between the Senate and House versions of the 1984 Act. The Senate bill (S. 1718), see S. REP. No. 485, *supra* note 3, at 8, and the Reagan Administration, see USTR News Release at 1, favored a ten year extension, but the House bill (H.R. 6023), see H.R. REP. No. 1090, *supra* note 5 at 22, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5122, called for a five-year extension period. The resulting compromise, though not arithmetically exact, reflects the mutual desire that future negotiations on possible reimplementations of the GSP not coincide with a presidential election year. See USTR News Release at 1 (this release, like subsequently cited news releases or white papers, is available from the author or from the USTR).

121. See OECD REPORT, *supra* note 27, at 62-63, 65. Most noteworthy are the ten-year extensions by the EEC, Japan and Canada.

Also, the United States was the last major donor country to implement its GSP scheme, beginning January 1, 1976. Most of the other major GSP countries passed initial legislation between 1971 and 1974. For example, the EEC scheme came into force July 1, 1971, *id.* at 62, followed by Japan's on August 1, 1971, *id.* at 64, and Canada's in July 1974, *id.* at 62.

122. See *supra* notes 17-19 and accompanying text.

producers of like or directly competitive products.¹²³ The 1984 Act adds a fourth consideration: "The extent of the beneficiary developing country's competitiveness with respect to eligible articles."¹²⁴ This "competitiveness" factor was added to Section 501 of the 1974 Act to emphasize congressional desire for a more rigorous application of graduation principles.¹²⁵ The House Report indicates that the new factor should be considered when evaluating the general economic progress of a BDC and when comparing a BDC's competitive ability to that of both the United States and other BDCs.¹²⁶ The 1984 Act also adds the phrase "through an expansion of their exports"¹²⁷ to Section 501(1) of the original legislation,¹²⁸ clarifying the way in which the executive determines whether the grant of GSP benefits will expand the economy of a BDC. This language indicates that the primary economic goal of the GSP is the encouragement of exports from a

123. See § 501(1)-(3) of the 1974 Trade Act, 19 U.S.C. § 2461 (1982).

124. See Pub. L. No. 98-573, § 502(4), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3019.

125. The Senate Finance Subcommittee on International Trade stated: The amendment . . . will serve to emphasize Congress' concern that the current policy of discretionary graduation will be maintained . . . [T]he Committee expects these factors to play *a considerable role* in the President's general review of eligible articles . . . [and they] will also be important to . . . consideration of a waiver of the competitive need limitations. . . . [T]he Committee intends that the President apply this new fourth factor as an estimate of the general economic progress in the beneficiary country, and not as a strict measure of comparability to a competitive U.S. industry.

S. REP. NO. 485, *supra* note 3, at 10 (emphasis added). The House Bill tracks similar language and places the same emphasis on the application of this new standard: "[T]he Committee expects these factors to play *a major role* in the general review of eligible articles . . . [and also] with respect to waivers of competitive need limitations." H.R. REP. NO. 1090, *supra* note 5, at 8 (emphasis added).

126. See *id.*

127. See *id.* The criteria relevant to applying this factor include: (1) worldwide and United States market shares enjoyed by the BDC for certain products; (2) total volume and value of BDC exports; and (3) ability of the BDC to penetrate foreign markets if regular MFN rates were applied rather than duty-free rates under the GSP. *Id.*

128. See Section 501(1) of the 1974 Trade Act, 19 U.S.C. § 2461 (1982) (directs the President to consider whether granting GSP benefits will further the development of the BDC); for a complete list of changes in the designation of BDC since the GSP was implemented, see A GUIDE TO GSP, *supra* note 66, at 85-86.

developing country.

C. Additional Limitations on Country Eligibility

Both the Senate and House included additional BDC criteria in the 1984 Act.¹²⁹ The Senate expressed concern about abusing intellectual property rights¹³⁰ and trading in counterfeit goods by GSP beneficiary countries. The Senate also criticized the increasing use of nontariff barriers (NTBs),¹³¹ particularly those barriers that affect United States investment practices. The House, expressing similar concern about NTBs,¹³² called for the elimination of trade barriers in the services industries.¹³³ The House also insisted that before designating BDCs, the President must inquire whether a country has taken or is taking steps to offer "internationally recognized worker rights."¹³⁴ Finally, the House added to the list of BDC criteria under Section 502(c)(4) of the 1974 Trade Act the requirement that the President consider the extent to which a country "has assured the United States that it will refrain from engaging in unreasonable export practices."¹³⁵

1. *NTBs and Barriers to Trade in Services*

Many countries increasingly are employing nontariff barriers (NTBs) to trade in order to distort world trade patterns to their advantage. The most recent Tokyo Round of Multilateral Trade

129. See generally S. REP. NO. 485, *supra* note 3; H.R. REP. NO. 1090, *supra* note 5, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 5101.

130. See S. REP. NO. 485, *supra* note 3, at 10-11. For a brief general discussion by the Secretary for International Trade at the Dept. of Commerce of the trade distortion problems of NTBs as they affect United States investment abroad, see Olmer, *Barriers to U.S. Foreign Investment*, 1983 PRIVATE INVESTORS ABROAD 63. See also Murray & Walter, *Quantitative Restrictions, Developing Countries, and GATT*, 11 J. WORLD TRADE L. 391 (1977) (an excellent commentary on quantitative restrictions); Ewing, *Non-Tariff Barriers and Non-Adjustment or International Trade: Review Article*, 18 J. WORLD TRADE L. 63 (1984); de Bouter, *supra* note 2, at 364-68; see generally, Fontheim & Gadbow, *Trade Related Performance Requirements Under the GATT-MTN System and U.S. Law*, 14 L. & POL'Y INT'L BUS. 129 (1982).

131. See S. REP. NO. 485, *supra* note 3, at 11.

132. See H.R. REP. NO. 1090, *supra* note 5, at 12, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5112.

133. *Id.*

134. See Pub. L. No. 98-573, reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3019.

135. See *infra* text accompanying note 143.

Negotiations focused GATT discussions on the growing problems of NTBs.¹³⁶ The United States also continues to press for new international accords on the use of these nontariff trade distorting mechanisms. The 1984 Act specifies that before designating eligible BDCs, the President must consider a country's use of NTBs, particularly trade barriers to services. The general language of the provision appears to give the President great flexibility in regulating country eligibility. This discretion should prove important to enforcement both because NTBs and services are difficult to define and because NTBs exist in various forms.¹³⁷

The new anti-NTB criteria could augment presidential power to designate eligible BDCs. On the other hand, the breadth and vagueness of the anti-NTB criteria could alternatively prove to be cumbersome to implement. If congressional intent is to be put into practical form, then the anti-NTB criteria should be more clearly defined and mechanisms should be established for their application. Suggestions for improvement might include: (1) guidelines specifying which types of NTBs will disqualify a country and the volume of trade that must be affected before punishment will attach; (2) adequate monitoring mechanisms within an agency responsive to public input; and (3) substantive international agreements on NTB standards. The anti-NTB criteria now serve only as a political statement disapproving NTBs and indicating possible future congressional resolve to act on this issue if multilateral regulation and cooperation is not forthcoming.

The 1984 Act specifically prohibits BDCs from using trade distorting barriers in service industries.¹³⁸ The services industry sec-

136. See Ewing, *supra* note 130, at 64.

137. The various forms of NTBs include: outright prohibitions on certain imports, voluntary export restraints, import licensing procedures, export subsidiaries, countervailing duties on imports, export performance requirements, government procurement practices, standards and packaging requirements, quantitative restrictions and escape-clause relief measures. NTBs also include complex customs practices such as labeling and marks of origin requirements, import documentation, customs nomenclature, and valuation practices and procedures. See *id.* at 65.

138. "Service industry" is difficult to define. Generally, services include all output not resulting from typical production sectors, such as agriculture, mining, manufacturing and construction. See *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 *FORDHAM INT'L L.J.* 371, 371 n.2 (1982). A more precise definition of services reveals the potential magnitude of the expanding trade growth in this area:

tor is the leading growth area of United States trade. In 1980, services trade accounted for approximately twenty-six percent of private sector trade and produced a \$38 billion net trade surplus.¹³⁹ The services sector now accounts for an estimated seven out of ten American jobs and approximately sixty-five percent of the United States Gross National Product.¹⁴⁰ Services sector trade comprises approximately one quarter of total world trade and has grown at a rate of seventeen percent over the last decade compared to a growth rate of about six percent for world trade as a whole.¹⁴¹ The United States is urging that international negotiations on trade in services be included in expected future rounds of GATT negotiations.¹⁴²

As with NTBs, the ultimate policy objective of Congress in making this change appears to be a desire to prompt international discussions and agreements regarding the regulation of services trade. Criteria that simply condemn the use of barriers to trade in services by a BDC seeking GSP benefits, similar to the anti-NTB criteria, could prove ineffective, absent further implementation decisions by the executive branch agencies. If practical results are to be achieved, regulations must be drafted to explain how this new criteria is to be defined, monitored and applied. Despite the immediate impracticality of this new criteria, it represents a strong political statement aimed at the developing nations, indicating that Congress has taken special notice of the important area of services trade and that the President now has authority to withdraw or withhold BDC status based upon a country's openness to such trade.

[S]ervices means economic outputs which are tangible goods or structures, including, but not limited to, transportation, communications, retail and wholesale trade, advertising, construction, design and engineering, utilities, finance, insurance, real estate, professional services, entertainment, and tourism, and overseas investments which are necessary for the export and sale of such services.

Id. at 377-78 n.38 (quoting S.1233, 97th Cong., 1st Sess. § 4(4), 127 CONG. REC. S5371 (daily ed. May 20, 1981)).

139. See *Liberalization of International Trade in the Services Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 *FORDHAM INT'L L.J.* 371, 376 (1982); see generally, H. Gray, *A Negotiating Strategy for Trade in Services*, 17 *J. WORLD TRADE L.* 377 (1983).

140. See *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 *INT'L TRADE L.J.* 281, 282 n.9 (1982-83).

141. *Id.* at 282.

142. *Id.* at 284.

2. *Unreasonable Export Practices*

As a precondition to GSP benefits, the 1984 Act requires the President to consider a BDC's assurances that it will refrain from engaging in "unreasonable export practices."¹⁴³ Because the legislative history of the GSP renewal act contains no implementation guidelines, the executive should have much discretion to determine which export practices are "unreasonable." The legislative history lacks substantive discussion of this particular amendment. Presumably, Congress seeks to prohibit the BDCs' use of export subsidies in any of their many various forms as another way to distort the normal flow of trade to the advantage of the country employing such practices. The USTR should publish more detailed regulations specifying the application and interpretation of this criteria as applied to existing BDCs and potential future BDC applicants.

3. *Protection of Worker Rights*

The 1984 Act requires BDCs to respect internationally recognized worker rights.¹⁴⁴ This section of the 1984 Act generally refers to worker rights adopted in the 1948 Universal Declaration of Human Rights.¹⁴⁵ In particular, the 1984 Act defines worker rights as:

- (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, and occupational safety and health.¹⁴⁶

The specificity with which worker rights are defined in the 1984 Act, coupled with international consensus in this area, should render this criteria more useful than the previous two BDC criteria. The worker rights criteria may still prove difficult to monitor. However, previous legislation unrelated to the GSP may partially solve monitoring problems. Pursuant to Section 116(d) of the 1961 Foreign Assistance Act, the President must submit to Con-

143. See Pub. L. No. 98-573, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3018.

144. See *id.*

145. See H.R. REP. No. 1090, *supra* note 5, at 12, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 5112 (1984).

146. See *id.* at 11, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 5111.

gress an annual report on worker rights.¹⁴⁷ This report is prepared jointly by the Human Rights sections of the Departments of State and Labor.¹⁴⁸ The House Subcommittee on Trade intended that the review required for GSP purposes will be included as a separate section within this annual report.¹⁴⁹ The review specifically must address the progress of all BDCs in each category of the statutory definition of worker rights.¹⁵⁰ The House Subcommittee recommends that the USTR establish formal procedures to apply the new worker rights standard. These procedures should allow for at least one annual public hearing at which parties can either offer testimony or submit written comments on BDC eligibility based on regard for internationally recognized worker rights.¹⁵¹

The scope of the standard for testing a BDC's progress in protecting internationally recognized worker rights appears broad and reflects the concerns of powerful domestic labor organizations such as the AFL-CIO.¹⁵² The House Subcommittee expressed support for organized labor's concerns, but tempered their support with realism about the level of worker rights that BDCs are expected to achieve:

It is not the expectation of the Committee that developing countries come up to the prevailing labor standards of the United States. . . . However, the Committee does expect the President . . . to require that any developing country specifically demonstrate respect for the internationally recognized rights of its workers. . . .¹⁵³

The Congressional goal of the worker rights criteria is to prevent negative incidental effects resulting from the denial of worker rights, such as perpetual poverty, limited benefits of economic growth, continued existence of privileged elites and a foundation

147. *Id.* at 22, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5122.

148. *Id.*

149. *See id.*

150. *See id.* at 26, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5126.

151. *Id.* at 25-26, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5125-26.

152. *Id.* at 26, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5126.

153. At Committee hearings, the AFL-CIO strongly advocated either not renewing the GSP or at least graduating Taiwan, Korea, and Hong Kong as well as narrowing CNLs. The AFL-CIO only secondarily supported the worker rights criteria as a fallback position. *See Proposed Renewal of the Generalized System of Preferences: Hearings Before Subcomm. on Int'l Trade of the Senate Finance Comm.*, 98th Cong., 2d Sess. at 87-90, 90-97 (Jan. 27, 1984) [hereinafter cited as *Hearings Before Subcomm. on Int'l Trade*].

for social instability and political rebellion.¹⁵⁴

The office of USTR, however, opposed the addition of this worker rights criteria to the list of other BDC criteria.¹⁵⁵ The USTR has not publically explained its opposition to the worker rights criteria; however, the USTR may disapprove because this criteria necessitates increased administrative burdens. The USTR may also be reluctant to impose standards on an aid and incentive program that seek to influence the domestic labor situations of foreign sovereigns when a predominant motive is arguably to regulate internal social behavior rather than to protect United States and worldwide economic interests.

4. *Protection of Intellectual Property Rights*

When designating BDCs, the President must also consider "the extent to which such country is providing *adequate and effective means* under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights."¹⁵⁶ The "adequate and effective means" test requires examination of the following five factors: (1) extent, scope and duration of statutory protection; (2) remedies afforded aggrieved parties; (3) governmental willingness and ability to enforce rights on behalf of foreign nationals; (4) ability of foreign nationals to enforce their own rights; and (5) absence of legal formalities or similar requirements that present practical obstacles to meaningful protection.¹⁵⁷ Using this broad statutory test, the President is directed to consult with both the Copyright and Patent and Trademark Offices as well as other "appropriate parties" to fashion a more specific set of criteria "to be applied consistently and objectively."¹⁵⁸

Intellectual property rights are an important source of United States commerce, yet these rights are increasingly abused by ma-

154. H.R. REP. No. 1090, *supra* note 5, at 11, 1984 U.S. CODE CONG. & AD. NEWS at 5111.

155. See USTR white-paper, *supra* note 120 (summarizing the Generalized System of Preferences Renewal Act of 1984).

156. See Pub. L. No. 98-573, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3019 (emphasis added).

157. S. REP. No. 485, *supra* note 3, at 11. Congress used the broader term "foreign nationals" rather than "United States" to protect non-United States licensees of rights held by United States nationals. See *id.*

158. See *id.*

for trading nations in general, and by certain GSP beneficiary countries in particular.¹⁵⁹ The International Trade Commission (ITC) estimated that in 1982 alone, United States firms lost between six to eight billion dollars in both domestic and export sales as a result of foreign product counterfeiting and similar trade practices.¹⁶⁰ The United States lost an estimated 131,000 jobs in just five product sector areas from the abuse of intellectual property rights.¹⁶¹ East Asian countries are most often the primary sources of counterfeit products.¹⁶² Other countries, however, with the necessary skill and equipment to pirate goods (for example, Mexico and Brazil) are also known as violators of intellectual property rights.¹⁶³ Many countries violating intellectual property rights to the detriment of United States industry and employment are also GSP beneficiary countries.¹⁶⁴ Proponents of the intellectual property amendment to the 1984 Trade Act insist the new criteria is equitable and promotes a more responsible international trading system.¹⁶⁵

159. For an excellent general discussion of the importance of intellectual property rights by the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, see Mossinghoff, *The Importance of Intellectual Property Protection in International Trade*, 7 B.C. INT'L & COMP. L. REV. 235 (1984); see generally, PATENTS AND TRADEMARKS OFFICE, U.S. DEP'T OF COMMERCE, 1983 COMMISSION OF PATENTS AND TRADEMARKS ANNUAL REPORT 21 (1984).

160. S. REP. No. 485, *supra* note 3, at 10.

161. *Id.*

162. *Id.*

163. Concerns of United States private industry were expressed at recent Senate hearings on GSP, where representatives of domestic recording companies cited Singapore, India and Taiwan as frequent sources of counterfeit records and tapes. See *Hearings Before the Subcomm. on Int'l Trade, supra* note 153, at 193-94 (prepared testimony of Stanley M. Gortikov, Pres., Recording Industry Assoc. of America).

164. S. REP. No. 485, *supra* note 3, at 10.

165. Statements by representatives of the recording industry reveal the goal of the intellectual property rights criteria:

Significant proposals for reform are already under consideration in Taiwan and in the Philippines, and the government of Singapore is in the process of drafting new copyright legislation. An intellectual property amendment to the GSP legislation would send a timely message to these governments encouraging the passage of new and effective copyright measures. It would encourage other nations to follow suit, and would provide an incentive for vigorous enforcement of copyright laws in all developing countries.

See *Hearings Before Subcomm. on Int'l Trade, supra* note 153, at 197.

The United States is dedicated to seeking increased protection for intellectual property rights at the multilateral and bilateral negotiating levels¹⁶⁶ as well as through domestic legislation. On a multilateral level, strong United States support at the General Assembly of the World Intellectual Property Organization has generated concerted efforts to establish and improve protections which other nations afford intellectual property rights.¹⁶⁷ Additionally, the United States Patent and Trademark Office (PTO) is working closely with the USTR to draft an effective anticounterfeiting code under the GATT.¹⁶⁸ On a bilateral level, the PTO, along with USTR, the Department of State, and the ITC, have raised intellectual property issues in recent trade discussions with officials from Mexico, Hungary, Romania and Yugoslavia.¹⁶⁹ Finally, recently proposed domestic legislation would apply strict criminal sanctions and increased civil remedies for counterfeiting patented goods.¹⁷⁰

5. *Other Modifications of BDC Criteria*

The 1984 Act also makes two minor changes regarding designation of BDCs. First, the Act adds the phrase "including patents, trademarks, or copyrights," to section 502(b)(4) subparagraphs (A),(B) and (C), emphasizing that intangible intellectual property is to be considered in the same manner as other forms of tangible property when evaluating BDC eligibility under the specified criteria.¹⁷¹ Second, Hungary is deleted from the original list of developed donor countries previously excluded from GSP benefits under the section 502(b) list.¹⁷² This change makes Hungary eligible for BDC status pending future application and approval.

166. See generally *The Outlook for Trade Talks Brightens*, FORTUNE, Mar. 18, 1985, at 139.

167. See Mossinghoff, *supra* note 159, at 247 (1984).

168. *Id.* at 248.

169. *Id.*

170. *Id.* See H.R. 2447, 98th Cong., 1st Sess., 129 CONG. REC. H.1861 (daily ed. Apr. 7, 1983); S. 875, 98th Cong., 1st Sess., 129 CONG. REC. S.3646 (daily ed. Mar. 22, 1983).

171. See S. REP. No. 485, *supra* note 3, at 11.

172. This action recognizes that although Hungary once considered itself a developed country and was one of the first donor countries to implement its own GSP scheme in 1971, Hungary's per capita GNP in 1982 (\$2,270) was less than the per capita GNP of several present BDCs named under the United States scheme.

D. Congressional Guidelines for Graduation and Restrictions on Presidential Waiver of CNLs

In an effort to ensure administration of the GSP program consistent with the goals discussed earlier, Congress delineated guidelines for strengthening CNLs and graduation while also placing specific limits on executive waiver discretion. Without these directives, the President has considerable flexibility while implementing the broad rules of the GSP scheme. Since Congressional response is slow by nature, and since other important matters compete for Congressional attention, the 1984 Act changes build in parameters to Executive decisionmaking and establish procedures for continuing Congressional input into the GSP program. The new changes continue to reflect policy decisions to assist LLDCs, to entice or coerce the NICs into playing a more mature role within the international trading system, and to enhance market growth opportunities of United States exporters that occur incidentally to increased GSP stimulated trade ties.¹⁷³

1. *The Required General Review and Report to Congress*

The 1984 Act requires the President to conduct a General Review of all countries and products under the GSP, to be completed no later than January 4, 1987, and repeated periodically thereafter.¹⁷⁴ The Review must determine whether a BDC "has demonstrated a sufficient degree of competitiveness (relative to other beneficiary developing countries) with respect to any eligible article."¹⁷⁵ In making this crucial determination, the President presumably will apply the several criteria currently used in ad-

173. See S. REP. No. 485, *supra* note 3, at 14, where the Subcommittee on International Trade states:

In practice, these more stringent competitive need limits will most affect products from the advanced developing countries that are the major program beneficiaries. These countries offer the greatest opportunity for U.S. export growth, but in many cases have been slow to adopt in this regard the obligations and responsibilities of the international trading system. . . .

[The] waiver authority is intended to encourage advanced developing countries to adopt policies commensurate with increasing development—a goal of GSP programs.

174. See Pub. L. No. 98-573, § 505(c)(2)(A), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3020.

175. *Id.* § 505(c)(2)(B), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3020-21.

ministrative decision making plus the two new criteria regarding intellectual property rights and equitable and reasonable market access.¹⁷⁶ Using these criteria, the President must decide whether to apply the old competitive need limits or the new limits, which essentially reduce the old limits by one-half.¹⁷⁷

The 1984 Act also requires the President to submit a report to Congress, no later than January 4, 1988, advising legislators on the actions taken "to withdraw, to suspend, or to limit the application of duty free treatment with respect to any country which has failed to adequately take the actions described in section 502(c)" (the mandatory BDC criteria).¹⁷⁸ Thus, Congress intends to monitor closely future administrative application of the new criteria.

2. *Presidential Discretion to Impose Stricter CNLs*

(a) The New Limits

Section 504(c)(2)(B) of the 1984 Act gives the President authority to apply stricter CNLs to eligible articles from BDCs based upon the forthcoming General Review.¹⁷⁹ Included in those

176. The seven criteria already established in law and administrative procedure are:

- (1) the developmental level of individual beneficiaries;
- (2) the beneficiary country's competitiveness in a particular product;
- (3) the overall interests of the United States;
- (4) the effect such action will have on furthering the economic development of developing countries;
- (5) whether or not other major developed countries are extending generalized preferential tariff treatment to such product or products;
- (6) the anticipated impact of such action on United States producers of like or competitive products; and
- (7) the extent to which the beneficiary country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country.

S. REP. No. 485, *supra* note 3, at 13.

The two new factors include: (1) effective recognition of intellectual property rights; and (2) the extent to which a country employs trade distorting investment practices and other non-tariff barriers to trade. *Id.*

177. See USTR white-paper, *supra* note 120 (summarizing the GSP renewal Act changes).

178. See Pub. L. No. 98-573, § 505(a)(2), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3020.

179. *Id.* § 505(c)(2)(B), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3020-21.

stricter CNLs are a lowered \$25 million ceiling, to be indexed to future changes in the nominal Gross National Product (GNP) of the United States, and a reduced twenty-five percent limit on total GSP market share for any particular good.¹⁸⁰ Application of these stricter CNLs would decrease the GSP opportunities for products from countries deemed sufficiently competitive under the General Review. The purpose of applying these lower CNLs is to encourage a redistributive effect of GSP benefits to less efficient BDCs.¹⁸¹

(b) Categorical Exemption of LLDCs and the President's Waiver Discretion

The 1984 Act unconditionally exempts all United Nations designated LLDCs from application of the stricter CNLs.¹⁸² The Senate Subcommittee on International Trade explains that this policy attempts to "encourage a greater dispersion of the GSP program's benefits among the 140 countries potentially eligible to take part in it."¹⁸³ The President has no authority to deny any of the LLDCs this special status granted by Congress.

(c) Mandatory Graduation

The 1984 Act also implements a new concept of *total country* graduation when a BDC attains a specified "applicable limit" of development, based upon per capita GNP.¹⁸⁴ The applicable per capita GNP limit, above which a BDC must be graduated, is

180. The previous limit on total GSP market share for any good was 50%. See *id.* § 504(c)(2)(B)(i) and (ii), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3021.

181. The effectiveness of stricter CNLs for redistributing GSP benefits is debated. See Lahoud, *supra* note 113, at 15 & n.78 (for commentary that most LLDCs will not be able to take advantage of market opportunities vacated by graduated products from NICs); cf. Frank, *The "Graduation" Issue for LDCs*, 13 J. WORLD TRADE L. 289 (1979) (on the effectiveness of graduation as a policy).

182. Pub. L. No. 98-573, § 505(c)(6)(A), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3022. The countries recognized by the U.N. as least less developing countries are listed in Table 2 of the Appendix.

183. S. REP. No. 485, *supra* note 3, at 15-16.

184. This limit on the applicable per capita GNP limit is indexed to one-half the increase in nominal United States GNP. See Pub. L. No. 98-573, § 505(f)(2)(A)(i) and (ii), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3023-24.

\$8,500.¹⁸⁵

Although the per capita GNP limit places a ceiling on development for GSP countries, the limit probably will not affect any present BDCs during the extended GSP program. Singapore is the only country near the limit, with a \$5,910 GNP in 1982.¹⁸⁶ Two BDCs that may approach the limit in the next decade are Hong Kong and Israel, with GNPs of \$5,340 and \$5,090 respectively.¹⁸⁷ If a BDC reaches the applicable limit, the BDC will be graduated for a two year period during which the lower-tier CNLs will apply. After two years, BDCs with per capita GNPs above \$8,500 would be excluded completely from the GSP program.¹⁸⁸ This mandatory country graduation reflects congressional intent to limit GSP benefits solely to developing countries and to limit presidential discretion when applying existing CNLs.

3. *Changes in the President's Waiver Authority*

(a) Waiver Authority for the New Stricter CNLs

Despite a determination that a BDC is already competitive in the export of a particular item, section 505(c)(3)(A) grants the President the authority to waive the applications of the stricter CNLs with respect to any GSP eligible article.¹⁸⁹ Nonetheless, this authority is subject to certain procedures and is conditioned upon advice from the International Trade Commission (ITC)¹⁹⁰

185. *Id.* Per capita GNP is to be measured by the "best available information, including that of the World Bank." *Id.*

186. See USTR news release at 2.

187. See H.R. REP. No. 1090, *supra* note 5, at 4, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 5104 (1984). Table 4 of the Appendix gives United States total imports and GSP imports in 1983 from leading BDCs and 1982 per capita GNP.

188. Pub. L. No. 98-573, § 505(f)(2)(B), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3023.

189. See *id.* § 505(c)(3)(A), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3021.

190. The independent International Trade Commission assists the President and Congress by conducting quantitative impact analyses on various aspects of the GSP program. Before presidential waiver decisions are made, the ITC should advise the President by reporting the degree of injurious effects on U.S. industries likely to result from a proposed waiver. The ITC has also published general economic and data impact analyses of the GSP program. See U.S. INT'L TRADE COMM'N, CHANGES IN IMPORT TRENDS RESULTING FROM EXCLUDING SELECTED IMPORTS FROM CERTAIN COUNTRIES FROM THE GENERALIZED SYSTEM OF PREFERENCES, PUB. NO. 1384 (May 1983); INT'L TRADE COMM'N, PRESIDENT'S LIST

that no United States industry would be "adversely affected by such waiver."¹⁹¹ The "adversely affected" standard is intended to test for "any likely detrimental impact on U.S. industries without regard to whether a firm or an industry would be considered injured under standards elsewhere promulgated in U.S. trade laws."¹⁹² Therefore, this standard calls for a lesser degree of "injury" than required for actions under section 301, which governs import relief from unfair trade practices.¹⁹³

When deciding whether to waive the stricter CNL under Section 505(c)(3)(A), the President must give due consideration to the extent to which a BDC: (a) has assured equitable and reasonable access to its markets and commodity resources; and (b) provides adequate and effective means under its laws for foreign nationals to secure, exercise, and enforce intellectual property rights including patent, trademark, and copyright.¹⁹⁴

(b) Specific Maximum Limits on Presidential BDC Product Waiver Discretion

In order to ensure that its reform goals for GSP are not thwarted, Congress limited the President's section 505(c)(3)(A) discretionary waiver authority in two ways. First, the President's 505(c)(3)(A) waiver authority in any given year is limited to thirty percent of the total value of all GSP articles entering the United States duty free during the preceding calendar year.¹⁹⁵

OF ARTICLES WHICH MAY BE DESIGNATED OR MODIFIED AS ELIGIBLE ARTICLES FOR PURPOSES OF THE U.S. GENERALIZED SYSTEM OF PREFERENCES, PUB. NO. 1620 (Dec. 1984).

191. Pub. L. No. 98-573, § 504(c)(3)(A)(i), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3021. The three required procedures include: (1) ITC advice about whether any United States industry is "likely to be adversely affected by such waiver;" (2) presidential determination that a waiver is "in the national economic interest of the United States;" and (3) publication of the presidential determination in the Federal Register. *Id.*

192. S. REP. NO. 485, *supra* note 3, at 14.

193. *Id.* at 15. Under Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411) the President is authorized to take all appropriate action to end any trade practice by a foreign government that: (1) violates international trade agreements or is unjustifiable and (2) injuriously burdens or restricts United States commerce under section 301. The burden of proving injury can be substantial at times. *See* A PREFACE TO TRADE, *supra* note 18, at 115.

194. 19 U.S.C.A. § 2464(c)(3)(B) (West Supp. 1985).

195. Pub. L. No. 98-573, § 505(c)(3)(D)(i), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3021. In 1983 GSP free imports totaled \$10.8

Second, if the BDC either had a per capita GNP of \$5,000 or more, not indexed, or exported GSP articles valued at ten percent or more of the total GSP imports for the calendar year,¹⁹⁶ then the President may not exercise waiver authority over a quantity of eligible articles from a BDC that exceeds fifteen percent of the total value of all GSP articles entering the United States for that year.¹⁹⁷

(c) Retention of Presidential Waiver Authority

The 1984 Act extends the grant of presidential waiver authority over the CNLs originally made in the 1974 Trade Act.¹⁹⁸ This authority is limited by specific congressional criteria and procedures to guide executive decision making. The 1984 Act continues the procedures under the 1974 Act allowing the President to waive application of CNLs when the new provisions do not prohibit waiver and when three determinations are made about the country. First, the President must determine that an historical preferential trade relationship with the United States exists. Second, a treaty or trade agreement covering economic relations must exist. Finally, the country must not discriminate against or impose unjustifiable or unreasonable barriers to United States commerce.¹⁹⁹

This holdover executive waiver authority over CNLs has never been used. The waiver was originally intended to apply only to the Philippines.²⁰⁰ In the legislative history of the 1984 Act, Con-

billion. See USTR News Release, *supra* note 120. Thus, the 30% limit for 1983 would have equaled \$3.24 billion.

196. See USTR News Release, *supra* note 120.

197. Pub. L. No. 98-573, § 505(c)(3)(D)(ii), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3021. In 1983, for example, this 15% ceiling would equal \$1.62 billion.

These general limits on presidential waiver authority track the changes implemented by the Senate bill. The House bill would have structured BDCs into three economic categories and *mandated* applicable CNLs depending upon categorization. Thus, presidential discretion would have been reduced further under the House bill. See *generally*, H.R. REP. NO. 1090, *supra* note 5, at 18-21, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 5118-21.

198. S. REP. NO. 485, *supra* note 3, at 15.

199. *Id.*

200. This special waiver provision for the Philippines arose out of unique historical circumstances. At the time the original GSP legislation was enacted in 1974, the United States sought reciprocal economic relations with this island country of key military importance. The United States and the Philippines were negotiating a treaty that was expected to call for reciprocal conditions for trade

gress expressed hope that the Philippines would negotiate for future waiver status.²⁰¹ Congress stated, however, that the waiver "should not be exercised absent clear commitments [by the Philippines] regarding better treatment for U.S. exporters and investors."²⁰²

E. Other 1984 Modifications of the GSP Laws

1. *Extension of the No-Domestic-Producer Waiver*

Under the United States GSP system, there is an automatic waiver of the fifty percent CNL for a particular article of commerce if a like or directly competitive good was not produced in the United States as of January 3, 1975.²⁰³ The policy behind the no-domestic-producer waiver is a lack of economic concern for the fifty percent CNL for certain articles when no domestic producers are affected. The statutory dollar value CNL, however, continues to apply.²⁰⁴ A significant amount of GSP trade is allowed by this waiver provision.²⁰⁵ Most of the items waived into eligibility consist of specialty agricultural products, such as chickpeas, garbanzos, water chestnuts, and lentils, or special minerals and oils, such as thorium nitrate and salts, as well as shark, eucalyptus and sesame oils.²⁰⁶

The 1984 Act extends the policy of automatic waiver of the fifty percent CNL for articles which are not produced domestically as of the changed date of January 3, 1984.²⁰⁷ By moving the test date forward ten years, Congress preserved the waiver, but

and investment. The waiver authority was originally implemented to avoid conflict with these ongoing treaty negotiations. Because no treaty agreement was ever reached, the waiver has never been exercised, although the authority theoretically still exists. *Id.*

201. *Id.*

202. *Id.*

203. The no-domestic-producer waiver is contained in section 504(d) of the 1974 Trade Act, 19 U.S.C. § 2464 (1982).

204. See A GUIDE TO GSP, *supra* note 66, at 63-66 (includes brief descriptions and TSUS numbers for all articles eligible for the no-domestic-producer waiver). The Trade Policy Staff Committee of the USTR makes all decisions as to whether an article is eligible for the waiver. *Id.* at 63.

205. See A GUIDE TO GSP, *supra* note 66, at 63-66.

206. *Id.*

207. See Pub. L. No. 98-573, § 505(c)(1)(B), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3020 (amending the 1974 Trade Act § 504(c)(1)(B)).

granted CNL protection for any domestic producer of articles that originated production in the interim ten year period. The extension of the no-domestic-producer waiver benefits all participants in the United States GSP: the BDCs benefit from the amelioration of the effects of the CNLs on specialty goods; USTR benefits from simplified procedures in the administration of the program; and finally, United States consumers benefit from lower import prices for specialty goods.

2. *Raised De Minimus Waiver Limit*

Section 504(d) of the 1974 Trade Act authorized the President to automatically waive the fifty percent CNL with respect to any article from a BDC if the total dollar value of the article from that country did not exceed a yearly de minimus figure.²⁰⁸ The annually changing de minimus figure is that which does not exceed the amount which bears the same ratio to \$1 million as the United States GNP for that next year bears to the United States GNP for 1979.²⁰⁹ The policy underlying the de minimus waiver provision is similar to that for the no-domestic-producer waiver. The goal is to ameliorate the harsh application of the fifty percent CNL which would exclude certain BDC products from continued preferential treatment when only a small dollar volume of trade in a specialty item is at issue.

The new legislation raises the indexed de minimus limit from approximately \$1 million to approximately \$5 million, thus allowing more specialty products from BDCs to enter the market without being foreclosed by the fifty percent CNL.²¹⁰ Whenever the total value of GSP imports of a product falls below the de minimus dollar figure, the President automatically waives application of CNLs without exercising the formal waiver procedures otherwise required. The de minimus limit is indexed annually using 1979 as the base year; therefore, the actual 1984 limit was \$6.8 million.²¹¹ Many BDCs and GSP importers have advocated a raised de minimus provision.²¹² The rationale supporting the de

208. See Trade Act of 1974, 19 U.S.C. § 2464(d) (1982).

209. See S. REP. NO. 485, *supra* note 3, at 16.

210. See Pub. L. No. 98-573, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3022.

211. See USTR News Release at 2-3.

212. See, e.g., Truett & Truett, *Mexico and the GSP: Problems and Prospects*, 34 INTER-AM. ECON. AFF. 67 (Summer 1980).

minimus provision is that it reduces the administrative burdens on both USTR and Customs and also assures United States exporters and importers of the acceptance of specialty articles that could otherwise be subject to the fifty percent competitive need limit.²¹³

3. Calendar Changes

The 1974 Trade Act required the President to implement annual changes in GSP product coverage, resulting from application of the competitive need limits, within ninety days of the close of the calendar year.²¹⁴ As a result of this procedure under the 1974 Act, executive orders announcing proposed changes typically were issued too near to the actual implementation date. Lack of sufficient notice caused planning problems for both BDC exporters and United States importers.²¹⁵ The complex nature of international commercial transactions requires deals to be negotiated sometimes months in advance. The schedule for GSP product changes under the 1974 Act often surprised dealers and foreclosed any opportunity to adjust arrangements.²¹⁶ This uncertainty surrounding application of the CNLs frustrated United States importers who could not plan on an article's continued eligibility from year to year.²¹⁷ The 1984 Trade Act requires that CNL changes in product coverage be implemented by July 1 of the succeeding year.²¹⁸ This extends the implementation date by ninety days. Assuming the changes are announced on or near the previous deadline, the new implementation deadline gives both BDCs and importers more notice as to which articles are duty free.²¹⁹

213. See S. REP. No. 485, *supra* note 3, at 16.

214. See Trade Act of 1974, § 504(b), 19 U.S.C. § 2461 et. seq. The close of the calendar year is March 31.

215. Serko, *Swaying the GSP*, AM. IMPORT EXPORT BULL. at 6 (Aug. 1982).

216. United States importers may have purchased goods from foreign suppliers months before the GSP product changes, and in turn, may have sold the goods before delivery with the sales price based on the assumption that the goods were duty free. Since the date the goods enter United States Customs is determinative of GSP eligibility—rather than the date of export or the date of purchase order—importers are annually faced with duty payments that are virtually unavoidable by foresight or planning. *Id.*

217. *Id.*

218. See Pub. L. No. 98-573, § 505(c)(3)(A), reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3021.

219. The House Report clearly states that the purpose of the calendar

4. *Articles Which May not be Designated as GSP Eligible*

The 1984 Act amends the "import-sensitive" category of articles by specifying that footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel *may not* be made GSP eligible in the future.²²⁰ Thus, these articles are prohibited from discretionary executive grant as GSP eligible. The executive had not decided to grant eligibility status to these articles, but the Committee determined that a statutory exception similar to that given certain other products was necessary to prevent their possible designation in the future.²²¹ This amendment merely represents congressional desire to revoke executive authority to redesignate products considered import sensitive. The footwear specification is largely repetitive, as virtually all footwear articles were excluded from eligibility under the initial GSP product lists in 1974.²²² The absolute exclusion of these products from GSP eligibility aligns GSP product coverage of these articles with the Caribbean Basin Economic Recovery Act, a program which is similar to GSP in some respects and also is administered by the office of USTR.²²³

change is to facilitate planning decisions for persons using the GSP and not to grant more time for administering decisionmakers:

This change is intended to allow U.S. Customs Service and the trading public sufficient time to adjust to modifications in product eligibility. . . and for the ITC to publish such changes in the tariff schedules. . . . The purpose . . . is to provide advance notice . . . it is not intended to extend the time period for the President to make and announce his decisions. . . . The Committee expects . . . the President will publish . . . by April 1 of each year so that the remaining 3-month period to July 1 may be used by all parties to prepare for the implementation. . . .

H.R. REP. No. 1090, *supra* note 5, at 22, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 5122.

220. S. REP. No. 485, *supra* note 3, at 12.

221. *Id.*

222. *See* USTR News Release at 1.

223. *See id.* The Caribbean Basin Initiative (CBI) is a United States aid initiative to help Central American and Caribbean island countries strengthen their economics with the hope that economic stability will lead to political stability in the region. The CBI was passed on August 5, 1984 as part of the Interest and Dividend Tax Compliance Act of 1983. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, §§ 201-231, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 384-98. One aspect of the CBI directly parallels the GSP in that zero tariffs are granted for certain eligible products originating from select countries within the region. Since the office of USTR administers both programs, it is important for purposes of applying the rules of origin requirements

5. *Procedural Clarification of Rules-of-Origin Determinations*

The 1984 Act further amends section 503 of the 1974 Trade Act by clarifying that the Secretary of the Treasury must prescribe regulations governing GSP rules-of-origin requirements after consultation with the USTR.²²⁴ Congress agreed that the USTR deserved to participate in rules-of-origin regulations since the USTR is responsible for administering both the GSP and the Caribbean Basin Initiative (CBI) tariff preference schemes.²²⁵ Congress, although intending for the rules-of-origin requirements to be administered jointly, noted that the ultimate responsibility for the final content of the regulations will rest with the Treasury Department.²²⁶

6. *Required Agricultural Assistance Planning for LDCs*

A completely new requirement added in 1984 directs executive branch agencies to assist BDCs in ensuring that emphasis on agricultural exports under the GSP does not undermine a country's food production for domestic consumption.²²⁷ This amendment was apparently part of a "Bread for the World" proposal to add another criteria to be considered before designating BDCs: the extent to which a country is attempting to meet the nutritional needs of its population and is not simply using its resources to produce agricultural commodities for GSP export.²²⁸ The Bread for the World organization suggested that the GSP amendment be patterned after the Caribbean Basin Economic Recovery Act,

that product eligibility remain similar.

224. This amendment was made at the USTR's request. See Pub. L. No. 98-573, § 504(a), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3020; see also *supra* notes and accompanying text (for general discussion of rules-of-origin requirements).

225. See *supra* notes 90-98 and accompanying text.

226. *Id.*

227. See Pub. L. No. 98-573, § 506, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 3023. Section reads:

The appropriate agencies of the United States shall assist beneficiary developing countries to develop and implement measures designed to assure that the agricultural sectors of their economies are not directed to export markets to the detriment of the production of foodstuffs for their citizenry.

Id. at 3023.

228. See *Hearings Before the Subcomm. on Int'l Trade, supra* note 153, at 295-96 (statement of Bread for the World).

which includes a Stable Food Production Plan to ensure that duty free treatment granted sugar and beef does not harm the nutritional status of persons in countries exporting such products.²²⁹

Although the issue is hotly debated, the displacement of domestic food production due to export incentives offered by GSP may not be substantial enough to merit this additional criteria or the accompanying procedural and supervisory responsibilities which naturally would follow. First, agricultural trade under the GSP is limited in scope. Department of Agriculture figures for 1980 indicate that agricultural imports accounted for only approximately seventeen percent of GSP.²³⁰ Second, while the displacement effects of GSP incentives on agriculture could be significant within certain regions of individual countries, countries with efficient domestic distribution programs arguably could use export earnings from their sales of fruit and vegetables to purchase, on the world market, badly needed wheat, corn, rice, and other staple products.²³¹

Whether or not one agrees with the policies behind this amendment, clarifications are needed for its implementation. The legislative history of the 1984 Act fails to specify agency actions required pursuant to this agricultural assistance amendment. The Reagan Administration opposed the assistance provision,²³² presumably because of the added procedural burdens to the USTR and other agencies. If this proposed criteria is to be effective, the Administration should clarify: (1) the nature of assistance to be offered; (2) the operation of the program; and (3) the manner in which BDCs are to be selected for assistance.

229. *Id.* The Bread for the World organization noted that it was not logical to increase incentives for LLDCs to *export* crops, even though valuable foreign exchange may be earned, because the effect is to deter production of basic subsistence crops that provide for domestic needs. The Philippines, for example, has a highly developed export sector (coconut products, sugar, bananas, pineapples). Yet in 1973, it was estimated that 70% of the Filipino population was malnourished and in 1982 more than 2.5 million Filipinos were recipients of U.S. food assistance. *Id.*

230. *Id.* at 295.

231. *See, e.g., id.* at 79 (statement by Sen. Danforth).

232. *See* USTR white-paper, *supra* note 120 (summarizing the Generalized System of Preferences Renewal Act of 1984).

IV. POLICY CONSIDERATIONS OF THE UNITED STATES GSP

The GSP attempts to serve broad purposes simultaneously, which causes a healthy amount of conflict in the functioning of the United States program. First, the GSP acts as a political symbol to the UNCTAD nations of United States concern for the industrial development needs of LDCs. Second, the GSP uses tariff differentials to encourage BDCs' economic development, increased export earnings and strengthened trade ties with the United States. Third, import control mechanisms are maintained to protect domestic producers and the GSP program is promoted domestically as both practical foreign policy, and as sensible economics with benefits for United States consumers. To effectuate these goals, political sensitivity is necessary to placate domestic producers angered by the grant of preferences to foreign competitors to sell in United States markets. Fourth, the GSP qualifies or conditions the grant of preferential trading status upon demonstrated participation in international trade forums and respect for established GATT rules. Thus, the GSP is both an incentive program, within established limits, and a subtle means of coercing desired action from BDCs. The present form of the United States GSP merely reflects compromises necessary to implement these sometimes disparate goals within the scheme.

The 1984 Act changes generally reflect four trends in the evolution of the United States GSP program. These trends originate from the continuing need for political, economic, and procedural refinement of the program. The first trend is an increased desire for the GSP to produce tangible economic results in the poorest BDCs.²³³ The central policy being used to address this first trend is an expanded use of the graduation concept. The primary economic concern of the 1984 Act is the redistribution of GSP benefits among the LLDCs by removal of competitive products from BDCs or by removal of certain BDCs from the GSP program altogether. Whether the method chosen will effectuate the desired ends remains to be seen. Some doubt exists whether the LLDCs actually will be helped by use of the existing two-tier CNLs, or by the use of discretionary product graduation and mandatory country graduation based on per capita GNP.²³⁴ Preliminary ITC data indicates that the desired redistribution may never occur solely as

233. See *supra* notes 173-81 and accompanying text.

234. See *supra* note 181 and accompanying text.

a result of the 1984 Act changes. Many LLDCs simply lack the skills, capital, and internal structure to fill vacant market demands for manufactured and semimanufactured goods once leading BDCs are graduated.²³⁵ Certainly, more intense scrutiny of the problem and reliable data will aid in the further refinement of the GSP program to meet the desired redistribution goals. As a step in this direction, the ITC should conduct a targeted economic study measuring the redistribution effects on LLDCs of strengthened graduation principles.

The United States GSP will probably maintain graduation principles even if the desired redistribution to LLDCs proves minimal. This is predictably so because the policy supporting graduation also includes the desire to coerce the NICs into trading under multilateral GATT principles and not those of a preferential grant.²³⁶ Both congressional and executive trade policymakers seem intent on making the competitive BDCs accept a more mature role in the world trading system. Abandoning reliance upon preferential tariff schemes is an important first step. Graduation concepts in the 1984 Act also emphasize that the GSP was originally intended to be both temporary and conditional upon demonstrated foreign need and domestic discretion.

The second general trend is the recognition that the BDC criteria in the 1984 Act should reflect greater political emphasis on secondary-level trade concerns. Earlier GSP legislation contained BDC criteria reflecting historical first-level trade concerns, such as national security, anti-Communism, and required participation in multilateral negotiating forums.²³⁷ Because the GSP program as it existed prior to 1984 already dealt adequately with most first-level trade concerns, Congress decided to address the next level—foremost of which is the use of subtle trade barriers not specifically governed by the multilateral rules on tariffs. By its requirement of specific standards with regard to worker rights, prohibition of NTBs, barriers to trade in services, and abuses of intellectual property rights, Congress has signaled that it is ready to act on secondary-level trade concerns.²³⁸ These concerns are now of primary importance to the United States and take precedence over concerted future efforts to procure multilateral agree-

235. See *supra* notes 101-10 and accompanying text.

236. See *supra* note 173 and accompanying text.

237. See *supra* notes 61-65 and accompanying text.

238. See *supra* notes 136-70 and accompanying text.

ment on the reduction of trade barriers within the GATT forum.

Despite congressional desire to influence the future course of multilateral negotiations, a more vexing question with regard to the 1984 changes is over the practical extent to which these secondary-level concerns can be incorporated into the United States GSP scheme. The answer to this question depends upon the ability of the executive branch to formulate procedural changes necessary to implement congressional policy. Therefore, the third trend is the growing importance of the work of statisticians, bureaucrats, and planners necessary to transform the vague congressional directives into a clear and effective tariff incentive program.

The fourth and final trend is the more active congressional role in the operations of the GSP program. Increasing volumes of GSP trade, rising concern for the protection of domestic producers, increasing BDC dependence upon GSP trade, and documented inadequacies of the program have attracted congressional attention. Many 1984 Act changes also reflect Congress' desire to dictate, restrict, or remove executive branch authority over the operations of certain aspects of the GSP. The 1984 Act also evidences congressional desire for more opportunity to oversee the program's operation through a General Review, periodic reports, and more public hearings.

V. CONCLUSION

Although Congress curbed executive discretion in some areas, the major responsibility for GSP operation and decisionmaking remains with the President through the GSP Subcommittee at the USTR. In most instances the 1984 Act provides only general guidelines. The executive branch will have to formulate specific procedures and possibly expand its staff to accommodate the growing administrative, regulatory, and monitoring responsibilities. The GSP Subcommittee will need to rely, even more than at present, upon the private sector to participate in the GSP program and to help monitor such problems as BDC uses of NTBs and abuses of intellectual property and worker rights. Thus, it is increasingly important that the private sector understand the GSP problems at issue as well as the regulations and procedures of the program. The new BDC criteria will be of little practical significance unless the USTR develops detailed regulations and announces specific plans for implementing the 1984 Act changes.

The future of the United States GSP will reflect the interrela-

tionship of the program's major goals. GSP benefits will continue until at least 1993 under the present system of eligibility conditioned upon satisfying specified congressional criteria and increased graduation of competitive products. Extension of the GSP scheme on a multilateral scale past 1993 most likely will depend upon the economic and political exigencies at that future date. Certainly, for the United States scheme, any future extension will continue to reflect the identified policy goals and trends. Complete country graduation is now statutorily possible, but is not an immediate threat. The new BDC criteria are currently more valuable as political statements than as guidelines for practical action. The BDC criteria will become useful only after further clarification of regulations, standards, and procedures and after greater multilateral cooperation, consensus, and compliance. For now, Congress is apparently content to demonstrate its desire to use the GSP as a political sounding board with the hopes of prompting action on leading matters of trade concern.

Frank A. Hirsch, Jr.

APPENDIX

TABLE 1

BENEFICIARY COUNTRIES IN THE U.S. GENERALIZED SYSTEM OF PREFERENCES

Independent Countries

Angola	Guinea	Philippines
Antigua and Barbuda	Guinea Bissau	Portugal
Argentina	Guyana	Romania
Bahamas, The	Haiti	Rwanda
Bahrain	Honduras	Saint Lucia
Bangladesh	India	Saint Vincent and the Grenadines
Barbados	Indonesia	Sao Tome and Principe
Belize	Israel	Senegal
Benin	Ivory Coast	Seychelles
Bhutan	Jamaica	Sierra Leone
Bolivia	Jordan	Singapore
Botswana	Kenya	Solomon Islands
Brazil	Kiribati	Somalia
Brunei	Korea, Republic of	Sri Lanka
Burma	Lebanon	Sudan
Burundi	Lesotho	Suriname
Cameroon	Liberia	Swaziland
Cape Verde	Madagascar	Syria
Central African Republic	Malawi	Taiwan
Chad	Malaysia	Tanzania
Chile	Maldives	Thailand
Colombia	Mali	Togo
Comoros	Malta	Tonga
Congo	Mauritania	Trinidad and Tobago
Costa Rica	Mauritius	Tunisia
Cyprus	Mexico	Turkey
Djibouti	Morocco	Tuvalu
Dominica	Mozambique	Uganda
Dominican Republic	Nauru	Upper Volta
Ecuador	Nepal	Uruguay
Egypt	Nicaragua	Vanatu
El Salvador	Niger	Venezuela
Equatorial Guinea	Oman	Western Samoa
Fiji	Pakistan	Yemen (Sanaa)
Gambia, The	Panama	Yugoslavia
Ghana	Papua New Guinea	Zaire
Grenada	Paraguay	Zambia
Guatemala	Peru	Zimbabwe

Non-Independent Countries and Territories

Bermuda	Gibraltar	Saint Helena
British Indian Ocean Territory	Heard Island and McDonald Islands	Tokelau
Cayman Islands	Hong Kong	Trust Territory of the Pacific Islands
Christmas Island (Australia)	Macau	Turks and Caicos Islands
Cocos (Keeling) Islands	Montserrat	Virgin Islands, British
Cook Islands	Netherlands Antilles	Wallis and Futuna
Falkland Islands (Islas Malvinas)	New Caledonia	Western Sahara
French Polynesia	Niue	
	Norfolk Island	
	Pitcairn Islands	
	Saint Christopher-Nevis	

Source: OFFICE OF THE U.S. TRADE REPRESENTATIVE — EXEC. OFFICE OF PRES., A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES 3 (1984).

TABLE 2

COUNTRIES DESIGNATED AS LEAST LESS DEVELOPING COUNTRIES BY THE UNITED NATIONS

Afghanistan	Ethiopia	Rwanda
Bangladesh	Gambia	Sao Tome and Principe
Benin	Guinea	Sierra Leone
Bhutan	Guinea-Bissau	Somalia
Botswana	Haiti	Sudan
Burundi	Laos	Tanzania
Cape Verde	Lesotho	Togo
Central African Republic	Malawi	Uganda
Chad	Maldives	Upper Volta
Comoras	Mali	Western Somoa
Djibouti	Nepal	Yemen (PDR)
Equatorial Guinea	Niger	Yeman (Sanaâ)

Source: SENATE COMM. ON FINANCE, RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES, S. REP. NO. 485, 98th Cong., 2d Sess. at 16 (1984).

TABLE 3

PRODUCT GRADUATION UNDER THE GSP

[In millions]

Year	Discretionary graduation	Competitive need exclusions	Total exclusions	GSP free imports	Ratio exclusions to GSP imports
1980	\$ 443	\$ 5,600	\$ 6,043	\$ 7,328	0.82
1981	651	6,782	7,433	8,395	0.89
1982	900	7,108	8,008	8,426	0.95
1983	1,211	10,661	11,872	10,765	1.11

Note: Data shown for graduation and competitive need exclusion pertain to actions implemented in March of the following year. Source: U.S. TRADE REP.

TABLE 4

U.S. TOTAL IMPORTS AND GSP IMPORTS IN 1983 FROM LEADING
BENEFICIARY DEVELOPING COUNTRIES AND 1982 PER CAPITA GNP

[Dollar amounts in millions]

	U.S. imports	GSP eligible	GSP free	Share of GSP free total (percent)	1982 GNP per capita
15 leading beneficiaries					
Taiwan	\$11,204	\$ 5,757	\$ 2,981	27.7	\$2,640
Korea	7,148	2,365	1,524	14.1	1,910
Hong Kong	6,394	3,036	1,102	10.2	5,340
Mexico	16,776	3,859	725	6.7	2,270
Brazil	4,946	1,170	633	5.9	2,240
Singapore	2,868	1,394	512	4.8	5,910
Israel	1,255	512	474	4.4	5,090
Philippines	2,001	386	258	2.4	820
Venezuela	4,938	258	239	2.2	4,140
Argentina	853	315	225	2.1	2,620
India	2,191	227	181	1.7	260
Yugoslavia	386	196	162	1.5	2,800
Peru	1,151	156	142	1.3	1,310
Thailand	967	142	118	1.1	790
Portugal	280	134	107	1.0	2,450
Subtotal of top 15	\$63,358	\$19,907	\$ 9,383	87.2
Other beneficiaries	431	2,676	1,382	12.7
Total beneficiaries	\$63,789	\$22,583	\$10,765	100.0

Source: HOUSE COMM. ON WAYS AND MEANS, GENERALIZED SYSTEM OF PREFERENCES RE-
NEWAL ACT OF 1984, H.R. REP. NO. 1090, 98th Cong., 2d Sess. 4, *reprinted in* 1984
U.S. CODE CONG. & AD. NEWS 5104.