

NOTES

THE VERY SPECIALIZED UNITED STATES GENERALIZED SYSTEM OF PREFERENCES: AN EXAMINATION OF RENEWAL CHANGES AND ANALYSIS OF THEIR LEGAL EFFECT

I. INTRODUCTION

The concept of utilizing preferential tariff treatment to promote development in lesser developed countries (LDCs) originated¹ over twenty years ago at the first session of the United Nations Conference on Trade and Development (UNCTAD I) in 1964.² In his keynote report to UNCTAD I, Argentine economist Raul Prebisch suggested, as a logical extension of the infant-industry argument,³ that temporary preferential tariff treatment would help developing countries avoid the high initial costs of market penetration that make entry into foreign developed economies difficult.⁴ This

¹ Isolated cases of special tariff preferences have existed for many years. Britain and France had special trading relationships with their former colonies. This concept was continued by the Yaounde Convention signed in 1963 by a group of 18 former African colonies and the European Economic Community. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE* 9 (1983) [hereinafter cited as *OECD*]. The United States gave Cuban products preferred duty rates until 1961 and gave Phillipine products duty-rate cuts until 1975. Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513, 514 n.4 (1978). Alexander Hamilton, more than a century ago recognized in his "Report on Manufacturers" that developing countries should be granted preferential treatment to promote growth against firmly established foreign competition. He argued for protection of the developing country's infant industries until such growth occurred. Behnam, *Development and Structure of the Generalized System of Preferences*, 9 J. WORLD TRADE L. 442, 442 (1975).

² Proceedings of The United Nations Conference on Trade and Development (1st Sess.), U.N. Doc. E/Conf. 46/141 (1964).

³ The central argument in favor of the General System of Preferences (GSP) was for a pattern of temporary preferences which could enable infant-industries in developing countries to become competitive in the world market. See H. JOHNSON, *ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES* 181 (1967).

⁴ Prebisch, "Toward a New Trade Policy for Development," 2 Proceedings of The United Nations Conference on Trade and Development (1st Sess.) at 35, U.N. Doc. E/Conf. 46/141 (1964). Not only were start-up costs high, but developing countries were also discouraged from industrializing since tariff rates increased with the degree of product processing. As a result, it was much easier to continue to export raw materials and less sophisticated manu-

UNCTAD I initiative sparked passage of Resolution 21 (II),⁵ which recognized "the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences."⁶ Following the lead of several other developed countries,⁷ the United States under the authority of Title V of the Trade Act of 1974⁸ extended duty free treatment⁹ to imports from LDCs. The United States Generalized System of Preferences (US-GSP), similar to other countries' programs¹⁰ and in line with the infant-industry rationale,¹¹ was scheduled to terminate after a designated number of years.¹²

factured goods. The preferences being proposed would solve this cycle by targeting manufactured and semi-manufactured products for preferential treatment. Behnam, *supra* note 1, at 443.

⁵ Resolution 21 (II) was adopted at the second conference of UNCTAD in 1968. United Nations Conference on Trade and Development, Review and Evaluation of the Generalized System of Preferences, Report by the UNCTAD Secretariat, para. 5, U.N. DOC. TD/232 (1979), reprinted in 3 Proceedings of The United Nations Conference on Trade and Development (5th Sess.) U.N. DOC. TD/269 (1981). The three specific aims outlined by UNCTAD concerning the GSP were: (1) to increase export earnings; (2) to promote industrialization; and (3) to accelerate economic growth rates. *Id.*

⁶ See *id.* at para. 10.

⁷ Countries which implemented GSP programs before the United States were Australia, Austria, Canada, the original six member states of the European Economic Community (EEC) (the United Kingdom, Denmark, and Ireland later incorporated into the EEC scheme their separate GSP programs), Finland, Japan, New Zealand, Norway, Sweden, Switzerland, Bulgaria, Czechoslovakia, Hungary, and the USSR. Poland implemented its plan on the same day as the United States. Graham, *supra* note 1, at 513 n.1.

⁸ Trade Act of 1974, 19 U.S.C. §§ 2461-2465 (1982).

⁹ Duty-free treatment is preferential since generally all goods imported into the United States are subject to a duty unless specifically exempted. 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, n.6 (1983).

¹⁰ For a general description of the GSP programs of other countries see *OECD*, *supra* note 1. The European Economic Community (EEC) recently renewed and revised a program similar to the US-GSP by completing the "Third ACP-EEC Convention Signed at Lome on 8 December 1984." For a complete text of the Lome III Convention see 89 THE COURIER, Jan.-Feb. 1985. The EEC's preferential trade arrangements are extended to 65 developing countries in Africa, the Caribbean, and the Pacific (ACP). Duty-free treatment to ACP exports by the EEC is just a part of the total economic and technical assistance coordinated through the Lome Conventions. *Id.* at 22-32. The United States should adopt its own comprehensive package by combining the GSP program with other aid and trade arrangements benefiting the developing countries. Such a coordinated effort is the best way of providing a structured foundation of development to the LDCs.

¹¹ Preferences were intended only to aid temporarily the infant industries of developing countries until such industries became competitive in the foreign markets of developed countries. See Prebisch, *supra* note 4, at 37-38.

¹² Trade Act of 1974, 19 U.S.C. § 2465(a) (1982). The program of preferences was scheduled to expire in 10 years. *Id.*

In response to the planned expiration date of January 3, 1985,¹³ President Reagan signed into law on October 30, 1984, a proposal which renewed and revised the US-GSP.¹⁴ This legislation, attached to an omnibus trade bill to expedite passage, is the culmination of congressional effort and special interest group lobbying. The final plan for renewal reflects a labored compromise of the Senate and House bills carefully integrated by a joint-conference committee.¹⁵

This Note examines the changes embodied in the legislation renewing and revising the US-GSP. Emphasis is placed on assessing the impact of these changes on both the case law that has evolved under the earlier system and the legal infrastructure of the General Agreement on Tariffs and Trade (GATT).¹⁶ Part II presents a brief background on how the US-GSP evolved, how the earlier system operated, and how the new legislation changes the existing scheme. Part III surveys the case law that has arisen due to the operation of the US-GSP and attempts to give the practitioner guidelines for avoiding or utilizing the legal system under the renewal plan. To supplement this practical approach, Part IV discusses the theoretical legal implications of these changes upon the most-favored-nation (MFN) provisions of the GATT.

This Note concludes with the suggestion that traders turn to the judicial system more to challenge unfavorable actions by the President or Customs regarding operation of the US-GSP. Congress should make additional modifications in the program to enable more efficient use of the judicial option. The Executive should strive to deemphasize the reciprocal nature of the US-GSP as revised. If the President insists on stressing reciprocity, developing countries should refuse to participate in the program. Nonparticipation might not be too disadvantageous if accompanied by further reduction in the overall tariff structure and relaxation of non-tariff trade barriers to LDC's exports.

¹³ *Id.* The US-GSP was signed into law on January 3, 1975 (see *infra* notes 32-33 and accompanying text) making the 10 year deadline for expiration January 3, 1985.

¹⁴ Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 501-508, 98 Stat. 2948, 3018-24 (to be codified at 19 U.S.C. §§ 2461-2465). See *infra* notes 107-08 and accompanying text.

¹⁵ See *infra* notes 92-106 and accompanying text.

¹⁶ General Agreement on Tariffs and Trade, done Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

II. EVOLUTION, OPERATION, AND CHANGES

A. *Brief Evolution of US-GSP*¹⁷

In the wake of the UNCTAD I discussions, the United States emerged as the leader of a group of countries opposed to the concept of preferential treatment.¹⁸ Opposition by the United States stemmed from skepticism that a preference scheme for developing countries would provide worthwhile benefit in light of the Kennedy Round of trade negotiations for overall tariff reductions.¹⁹ The United States also feared that LDCs would hamper future MFN tariff reductions in efforts to preserve their margins of preference.²⁰

Eventually, however, the United States altered its isolated position due to increased pressure from Latin American countries that were not benefiting from European preference systems.²¹ Similarly, the United States changed its position after realizing that a Generalized System of Preferences (GSP) program could thwart the trend toward world trade cartels through preference arrangements to which it was not privy.²² President Johnson clearly marked the reversal of the opposing position by the United States in his statement on April 14, 1967, that "[w]e (the United States) are ready to explore with other industrialized countries — and with our own people — the possibility of temporary preferential tariff advantages for all developing countries in the markets of all the industri-

¹⁷ For a detailed discussion of how the US-GSP originally evolved, see generally Graham, *supra* note 1.

¹⁸ *Id.* at 516.

¹⁹ *Id.* The economic benefit from GSP schemes has been reduced due to overall cuts in tariff rates. See *infra* notes 289-91 and accompanying text. The contracting parties to the GATT have held periodic rounds of negotiations designed to decrease the various restrictions on the flow of international goods. The "Kennedy Round" of multilateral trade negotiations marked the last such multination negotiation round directed primarily at the reciprocal reduction of tariffs. Later rounds, like the Tokyo Round, began to shift focus to eliminating non-tariff trade barriers "such as the exclusion of (or other discrimination against) foreign suppliers in bidding for government contracts; failure to certify foreign products as meeting domestic product standards; or the appraising of imports in a way that artificially inflates their value and thus increases the duties payable on them." See Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 156-57.

²⁰ Graham, *supra* note 1, at 516.

²¹ *Id.* at 516-17. This motive was especially evident in President Johnson's statement of April 14, 1967, which emphasized that the United States would pursue a preferential scheme "with a view to improving the condition of the Latin American export trade." *American Chiefs of State Meet at Punta del Este*, 56 DEP'T ST. BULL. 706, 717 (1967).

²² Graham, *supra* note 1, at 516-17.

alized countries.”²³

Despite its reversal in position, the United States was not among the original countries to adopt a GSP scheme.²⁴ Most countries implemented their GSP programs very quickly through administrative regulations.²⁵ The US-GSP was slower in developing because it required legislative action due to the Commerce Clause of the United States Constitution.²⁶ Political complications²⁷ and protracted congressional negotiation²⁸ also hampered the development of the US-GSP. The trade bill implementing the US-GSP²⁹ was not officially signed into law by President Ford until January 3, 1975.³⁰

B. Operation of the US-GSP

A basic explanation³¹ of the existing program's design is a prerequisite to detailing fully the changes brought about by the legislation renewing and revising the US-GSP. The initial section of Title V of the Trade Act grants to the President the authority to extend any preferences allowed under this title of the Trade Act of 1974.³² In making his decision, the President is limited to assessing

²³ *American Chiefs of State Meet at Punta del Este*, *supra* note 21, at 709.

²⁴ See *supra* note 7 and accompanying text.

²⁵ Graham, *supra* note 1, at 520.

²⁶ Legislation was necessary because only Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

²⁷ Congress was distracted from debating the GSP program due to strained United States-Soviet Union relations over the Jewish immigration problem and a new energy crisis due to the Organization of Petroleum Exporting Countries (OPEC). Intense congressional concern over the usurpation of its power by the President also made Congress, due to the Watergate Crisis, hesitant to accept the GSP proposal designed to give the Executive broad discretionary powers over its operation. T. MURRAY, *TRADE PREFERENCES FOR DEVELOPING COUNTRIES* 78-79 (1977).

²⁸ The President submitted his GSP proposal as Title VI of H.R. 6767, the widely supported Trade Reform Act of 1973, on April 10, 1973. The House passed GSP provisions in December 1973 as Title V of the Trade Reform Act of 1973. These GSP provisions were almost identical to the Administration's proposal. The Senate changed the bill's name to the Trade Act of 1974 and passed it on December 13, 1974. The Congressional Conference Report was accepted on December 20, 1974. Graham, *supra* note 1, at 523 n. 37, 524.

²⁹ Trade Act of 1974, 19 U.S.C. §§ 2461-2465 (1982).

³⁰ 11 WEEKLY COMP. PRES. DOC. (Jan. 10, 1975).

³¹ For a detailed examination of the intricate and complex operation of the US-GSP see Nemmers & Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, 9 LAW & POL'Y INT'L BUS. 855 (1977).

³² Trade Act of 1974, 19 U.S.C. § 2461 (1982). The statute provides that “[t]he President may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this subchapter.” *Id.*

the impact on the beneficiary developing country's (BDC's) development, the extent to which other developed countries are making a comparable effort to assist the BDC by preferential tariff treatment, and the expected effect preference designation might have on domestic United States producers of like or directly competitive products.³³

1. Designation of BDCs

The President has discretion to designate BDCs primarily because of the difficulty Congress had in finding a workable definition of a developing country.³⁴ The statutory criteria governing the President's discretionary designation of BDCs are: an expression by the applying country of some interest to be designated as a BDC, the degree of economic development present in the country, whether the proposed BDC is preference-eligible in other developed countries, and some assurance to the United States of equitable and reasonable access to the applying country's markets and commodity resources.³⁵ Congress, however, has specifically denied BDC eligibility to the member states of the European Economic Community and seventeen other countries.³⁶

Congress also detailed seven restrictive prohibitions governing the President's discretion in designating a country as eligible for GSP treatment.³⁷ Included in the Trade Act of 1974 is a general prohibition against GSP treatment for communist countries³⁸ with only a few exceptions.³⁹ Developing countries that grant reverse preferences to developed countries other than the United States are also prohibited from the President's consideration.⁴⁰ Congress

³³ *Id.*

³⁴ Congress realized that a list would quickly become outdated due to changes in circumstances and that statistical criteria such as per capita income only crudely distinguishes between income levels. Consequently, Congress intentionally granted the President discretionary power in designating BDCs. See S. REP. No. 1298, 93d Cong., 2d Sess. 219, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7349 [hereinafter cited as *Senate Report*].

³⁵ Trade Act of 1974, 19 U.S.C. § 2462(c) (1982).

³⁶ *Id.* § 2462(b). The seventeen countries originally excluded were: Australia, Austria, Canada, Czechoslovakia, Finland, East Germany, Hungary, Iceland, Japan, Monaco, New Zealand, Norway, Poland, Republic of South Africa, Sweden, Switzerland, and the Union of Soviet Socialist Republics. *Id.*

³⁷ Trade Act of 1974, 19 U.S.C. § 2462(b) (1982); see also *infra* note 45.

³⁸ *Id.* § 2462(b)(1).

³⁹ A communist country may be designated a BDC if its products receive nondiscriminatory treatment, it is a contracting party to GATT and a member of the International Monetary Fund (IMF), and it is not dominated or controlled by international communism. *Id.*

⁴⁰ *Id.* § 2462(b)(3). One goal of the US-GSP was to avoid or discourage limited preferen-

excluded members of the Organization of Petroleum Exporting Countries (OPEC) and any other parties to foreign cartels from preferential treatment.⁴¹ As amended in 1979, the OPEC provisions allow the President to designate as beneficiaries OPEC members which entered a bilateral trade agreement with the United States before January 3, 1980.⁴² Unless the President determines that designation as a BDC is in the national economic interest of the United States,⁴³ countries which have expropriated United States property without quick and sufficient compensation or an agreement to submit to binding arbitration on the matter of compensation are excluded from consideration.⁴⁴ Countries which fail to honor arbitral awards in favor of the United States, refuse to cooperate with the United States on the prevention of illegal drug smuggling, or intentionally aid or harbor persons who have committed an international act of terrorism are also excluded unless the President decides exclusion is not economically sound.⁴⁵

tial trade agreements such as those between the EEC and Mediterranean developing countries. *Senate Report, supra* note 34, at 221; *see also supra* notes 21-22 and accompanying text. This provision does not apply if such reverse preferences do not have a significant adverse impact on United States commerce. Cyprus, Israel, and Turkey, therefore, were found to be eligible for GSP designation despite the granting of some reverse preferential treatment. Nemmers & Rowland, *supra* note 31, at 858-59.

⁴¹ Trade Act of 1974, 19 U.S.C. § 2462(b)(2) (1982). President Ford specifically singled out this OPEC exclusion for criticism when signing the Trade Act of 1974 into law. Gerald R. Ford, Remarks Upon Signing the Trade Act of 1974, 1975 PUB. PAPERS 3. There were subsequently several unsuccessful congressional attempts to provide BDC status to such countries as Venezuela and Ecuador which, though members of OPEC, did not participate in the 1973 oil boycott against the United States. *See Graham, supra* note 1, at 529; Nemmers & Rowland, *supra* note 31, at 858.

⁴² Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1111(a)(2), 93 Stat. 144, 315-16 (amending 19 U.S.C. §§ 2461-2465 (1976)). Following this amendment, the President designated Ecuador, Indonesia, and Venezuela as BDCs effective 30 March 1980. COMM. ON WAYS & MEANS, 96TH CONG., 2D SESS., REPORT TO THE CONGRESS ON THE FIRST FIVE YEARS' OPERATION OF THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) 25 (Comm. Print 1980) (transmitted by the President) [hereinafter cited as *President's Report*].

⁴³ The statute provides that paragraphs (4), (5), (6) and (7) shall not prohibit a country's designation as a BDC if the President determines such designation is in the economic interest of the United States. The President must also report his findings and reasons supporting such a determination to Congress. Trade Act of 1974, 19 U.S.C. § 2462(b) (1982).

⁴⁴ *Id.* § 2462(b)(4). The statute provides an exception from this provision if the President determines that the expropriated property is being restored or good faith steps toward restoration or arbitration of the dispute are underway. *Id.*

⁴⁵ *Id.* § 2462(b)(5)-(b)(7). Paragraph (7) was not in the original statute. It was implemented by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1802, 90 Stat. 1520, 1763-64 (codified at 19 U.S.C. § 2462(b)(7) (1976)). Following the Israeli commando raid on Entebbe Airport, Uganda was struck from the list of BDCs for harboring the terrorists involved in this raid. Nemmers & Rowland, *supra* note 31, at 859.

In an effort to encourage regionally integrated economies among developing country groups, Congress amended the Title V provisions regarding the GSP eligibility of customs unions.⁴⁶ The original provisions restricted regional groupings by requiring a higher value-added percentage⁴⁷ than that for products shipped from a single BDC. Under the broader definition provided in 1979, associated countries contributing to comprehensive regional economic integration are treated as a single country.⁴⁸ Now such regional economic groups as ASEAN,⁴⁹ the Andean Pact,⁵⁰ CACM,⁵¹ and Caricom⁵² may be treated as individual BDCs.

2. Designation of Eligible Articles

Before designating a particular article as eligible for GSP treatment, the President is required to receive advice from the International Trade Commission (ITC).⁵³ The Office of the United States Trade Representative (USTR) coordinates the President's determination of eligible articles.⁵⁴ In composing the list to be submitted for review by the ITC, the President may receive petitions from any interested party.⁵⁵ Those articles finally designated ap-

⁴⁶ Trade Agreements Act of 1979, § 1111(a) (1979).

⁴⁷ *President's Report*, *supra* note 42, at 24. Under the original statute, 50 percent of the value of the product had to be added from within a region before such product could be eligible for GSP from this regional grouping. The 1979 amendment reduced such cumulative value-added requirements for regional groupings to 35 percent (the same as the value-added requirements of individual countries). For a more detailed discussion of value-added requirements, see *infra* notes 58-60 and accompanying text.

⁴⁸ Trade Act of 1974, 19 U.S.C. § 2462(a)(3) (1982). To further promote such associations, the competitive-need limits are applied to the individual BDC of a qualifying association rather than to the entire association. *President's Report*, *supra* note 42, at 24. For an explanation of competitive-need limits, see *infra* notes 71-81 and accompanying text.

⁴⁹ (Indonesia, Malaysia, the Philippines, Singapore, and Thailand). *President's Report*, *supra* note 42, at 24 n.1.

⁵⁰ (Bolivia, Colombia, Ecuador, Peru, and Venezuela). *Id.*

⁵¹ (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua). *Id.*

⁵² (Antigua, Barbados, Guyana, Jamaica, Trinidad, and Tobago). *Id.*

⁵³ Trade Act of 1974, 19 U.S.C. § 2462(a) (1982). In seeking the advice of the ITC, the President submits a list of potential articles from designated BDCs. *Id.*

⁵⁴ Nemmers & Rowland, *supra* note 31, at 860-62.

⁵⁵ *Id.* at 861. Potential interested parties range from domestic or foreign manufacturers, importers, consumer groups, labor unions, and domestic trade associations, to foreign governments, shippers and trade associations. Even state or local government agencies of the United States may act as interested parties. *Id.* at n.39. The petition and review process for eligible articles under 15 C.F.R. § 2007.0 (1976) is not applicable to decisions concerning BDC designations since these delegations are "normally made by the Federal government on its own motion and frequently on the basis of information not available to the general public." Nemmers & Rowland, *supra* note 31, at 860 n.32.

propriate for GSP eligibility must be indicated by Executive Order.⁵⁶

Only articles imported into the customs territory of the United States directly from a BDC are potential candidates for GSP eligibility.⁵⁷ Indeed, all countries specifically limit GSP treatment to products of designated BDCs according to stated rules of origin. For products not wholly of BDC origin, most countries require that at least a single substantial transformation of the imported goods used in the product occur within the BDC.⁵⁸ The United States, on the other hand, requires a substantial transformation of both the imported material used in making the product in the BDC and the final product itself.⁵⁹ The Trade Act of 1974 requires that the sum of (i) the cost or value of the materials produced in the BDC and (ii) the direct cost of processing operations performed in substantially transforming imported goods or the final product exceed or equal thirty-five percent of the value of the product as appraised by United States Customs.⁶⁰

Congress specifically elected to exclude the following articles from GSP-treatment: (1) textiles subject to textile agreements; (2) watches; (3) import-sensitive electronics, steel articles and glass products; (4) certain footwear; and (5) other import-sensitive articles as determined by the President in the context of GSP.⁶¹ Further, duty-free treatment cannot be extended to any article subject to import relief or national security import measures.⁶² The focus of most of these *per se* exclusions is the test of import-sensitivity,⁶³ even though such a criterion has not been clearly defined.⁶⁴ The USTR, therefore, generally applies the import-sensitivity test on a

⁵⁶ Trade Act of 1974, 19 U.S.C. § 2463(a) (1982).

⁵⁷ *Id.* § 2463(b)(1). The only exception to this direct shipment requirement is if some labeling, marking, testing, packing or repacking, or purchase and resale for export other than at retail occurs within the free trade zone of another BDC. The most significant of such free trade zones is Singapore. Nemmers & Rowland, *supra* note 31, at 881.

⁵⁸ United Nations Conference on Trade and Development, Compendium of rules of origin applied under the generalized system of preferences by OECD preference-giving countries at 9-12, U.N. Doc. TD/B/626 (1976). Rules of origin provide criteria to determine if a particular eligible article originated in a BDC so as to be capable of receiving GSP treatment. The purpose of the rules of origin is to prevent non-BDCs from merely routing their goods through BDCs, and thereby receiving duty-free treatment. *Id.*

⁵⁹ Nemmers & Rowland, *supra* note 31, at 870.

⁶⁰ Trade Act of 1974, 19 U.S.C. § 2463(b)(2) (1982).

⁶¹ *Id.* § 2463(c)(1).

⁶² *Id.* § 2463(c)(2).

⁶³ Note, *supra* note 9, at 372-73.

⁶⁴ *Id.* at 372 n.60.

case-by-case basis.⁶⁶ Finally, if the President invokes quotas or increased tariffs as a remedy through an escape clause,⁶⁶ imported articles implicated may not be designated for GSP treatment during the time such remedies are in force.⁶⁷

3. Withdrawal from GSP Designation

Preferential treatment is not permanently guaranteed since a country or eligible article may be removed from the US-GSP.⁶⁸ The President can revoke the designation of a BDC if he determines that altered circumstances render the country ineligible pursuant to the statutory criteria.⁶⁹ If any article is withdrawn or suspended from duty-free treatment, it then becomes subject to the normal rate which would apply absent GSP treatment.⁷⁰

The methods for policing GSP benefits to ensure that special preferences are not granted to undeserving countries are called "competitive-need limits."⁷¹ These limits are designed to remove GSP treatment from a particular BDC for a specific product while preserving the preferential treatment of that article for other BDCs.⁷²

The first of two competitive-need limits empowers the President to remove the GSP status of an item from a BDC if he determines that the country has shipped, either directly or indirectly, more than a Custom's-appraised value of \$25 million worth of the article into the United States in one calendar year.⁷³ This removal is not a

⁶⁶ Nemmers & Rowland, *supra* note 31, at 864.

⁶⁶ Escape clauses provide import relief when a domestic industry is seriously threatened by foreign imports into the United States. The Trade Act of 1974, 19 U.S.C. § 2463(c)(2) (1982) provides that "[n]o article shall be an eligible article for purposes of this subchapter for any period during which such article is the subject of any action proclaimed pursuant to section 2253 of this Title section 1862 or 1981 of this title."

⁶⁷ *Id.*

⁶⁸ Trade Act of 1974, 19 U.S.C. § 2464(a) (1982).

⁶⁹ The statute gives the President authority to bar a BDC from the US-GSP if "as a result of changed circumstances" such country should no longer qualify for tariff preferences. *Id.* § 2464(b) (1982). Under § 2462(a)(2), the President is not permitted to terminate a BDC's designation of eligibility unless he notifies Congress 60 days in advance of both his decision and his justification. On the day the President issues an executive order revoking designation, however, that country immediately ceases to be a BDC. *Id.* § 2464(b).

⁷⁰ *Id.* § 2464(a).

⁷¹ See T. MURRAY, *supra* note 27, at 79-81.

⁷² Nemmers & Rowland, *supra* note 31, at 867.

⁷³ Every year the \$25 million limit is raised in proportion to the prior year's growth in the United States GNP. Thus, this growth factor provides a hedge against inflation in addition to an increase in relation to actual growth in United States production. T. MURRAY, *supra* note 27, at 79.

quota barrier to further entries after imports reach a set ceiling;⁷⁴ rather, exceeding this competitive-need limit results in the loss of GSP eligibility for the particular article from the violating BDC in the following GSP year.⁷⁵

The second competitive-need limit withdraws GSP eligibility for an article from a particular BDC if that country ships, in a single year, fifty percent or more of all United States imports of that article.⁷⁶ As with the \$25 million limit, the changes required by this fifty percent rule must take effect ninety days before the close of the calendar year,⁷⁷ subject only to a very narrow exception.⁷⁸ If an article is removed due to one of these two competitive-need limits, the article may still be eligible for preferential treatment if the imports from the BDC did not exceed either competitive-need limit in the preceding calendar year.⁷⁹

The fifty percent competitive-need limit does not apply to any eligible article if a similar or directly competitive article was not produced in the United States on the date the US-GSP was implemented.⁸⁰ Under the Trade Agreement Act of 1979, the President also has discretion to waive the fifty percent competitive-need limit in certain instances when the United States imports of an article in 1979 were less than \$1 million.⁸¹ This *de minimis* provi-

⁷⁴ Nemmers & Rowland, *supra* note 31, at 867-68.

⁷⁵ Trade Act of 1974, 19 U.S.C. § 2464(c)(1) (1982). Originally the statute provided that changes based on competitive-need limits would take effect within 60 days of the close of a calendar year. Because the GSP year runs from when the executive orders making such changes are issued, typically March 1 to February 28, some changes have been announced only a few days before their effective date since most appraisal statistics are not available until mid-February. Nemmers & Rowland, *supra* note 31, at 868. Partially in response to the short period of notice received by importers and exporters, Congress in 1979 changed the implementation period from 60 to 90 days. See *President's Report*, *supra* note 43, at 25.

⁷⁶ Trade Act of 1974, 19 U.S.C. § 2464(c)(1)(B) (1982).

⁷⁷ See *supra* note 75.

⁷⁸ The President may waive the competitive-need limits if the BDC has (1) an historical preferential trade relationship with the United States; (2) a trade agreement covering economic relations with the United States; and (3) an absence of discrimination against or unjustifiable barriers to United States commerce. Trade Act of 1974, 19 U.S.C. § 2464(c)(1) (1982). This provision is generally known as the "Philippine Waiver" since only the Philippines can meet the first requirement. The only other country able to satisfy all three criteria is Cuba, which is currently excluded from eligibility because of the prohibition against communist countries that do not have MFN status. Graham, *supra* note 1, at 525 n.51.

⁷⁹ Trade Act of 1974, 19 U.S.C. § 2464(c)(2) (1982).

⁸⁰ *Id.* § 2464(d).

⁸¹ Trade Agreement Act of 1979, § 1111(a)(4) (1979) (codified at 19 U.S.C. 2464(d) (1982)). The President may waive the 50% competitive-need limit when the total imports of an article are less than "an amount which bears the same ratio to \$1,000,000 as the gross national product of the United States for that calendar year . . . bears to the gross national

sion allows for an annual adjustment reflecting the United States growth in Gross National Product (GNP),⁸² thereby enhancing the US-GSP's benefit for small trade items while decreasing the administrative burden of tracking insignificant articles, and reducing importers' and exporters' uncertainty over these lesser items.⁸³

In addition to competitive-need limits, the President may "graduate" countries from the program with respect to certain articles.⁸⁴ A Senate Finance Committee report concerning the 1979 amendments urged the President to graduate countries in order to promote an equitable distribution of GSP benefits among beneficiaries and to encourage successful developing countries to accept their economic obligations in the international trading system.⁸⁵ In 1980, President Carter issued a mandatory five-year report to Congress on the status of the GSP⁸⁶ which indicated a general reluctance to graduate successful developing countries' eligible articles.⁸⁷ The President's reluctance to administer an automatic graduation system stemmed from fear that forced graduation would alienate these successful developing countries and jeopardize long-term United States trade policy goals.⁸⁸

Graduation did not officially begin until 1981.⁸⁹ The three controlling factors for invoking graduation are: (1) overall level of de-

product of the United States for calendar year 1979." *Id.*

⁸² *President's Report*, *supra* note 42, at 25.

⁸³ *Id.*

⁸⁴ No formal definition of graduation exists. It is, however, simply a term used to refer to the use of the President's discretionary powers to deny duty-free status to what normally would be an eligible product from an eligible country. U.S. INT'L TRADE COMM'N, PUB. NO. 1535, OPERATION OF THE TRADE AGREEMENTS PROGRAM 19 (1984) (35th Report, covering 1983) [hereinafter cited as *ITC Report 1535*].

⁸⁵ The Finance Committee specifically addressed this issue in its report on the Senate proposal for reforming the US-GSP. See S. REP. No. 485, 98th Cong., 2d Sess. 3 (1984) [hereinafter cited as *Report 485*]. The committee was aware, at that time, of the ITC's finding that seven countries (Brazil, Hong Kong, Israel, Republic of Korea, Mexico, Singapore and Taiwan) accounted for 73.9 percent of the imports entering the United States under the US-GSP in 1983.

⁸⁶ *President's Report*, *supra* note 42. This report is required pursuant to the Trade Act of 1974, 19 U.S.C. § 2465(b) (1982).

⁸⁷ *President's Report*, *supra* note 42, at 70-75. The President did support, however, a carefully constructed world-wide graduation scheme. *Id.* For a general discussion of a global graduation scheme see Frank, *The "Graduation" Issue for LDCs*, 13 J. WORLD TRADE L. 289 (1979).

⁸⁸ *President's Report*, *supra* note 42, at 70-75.

⁸⁹ U.S. INT'L TRADE COMM'N, PUB. NO. 1384, CHANGES IN IMPORT TRENDS RESULTING FROM EXCLUDING SELECTED IMPORTS FROM CERTAIN COUNTRIES FROM THE GENERALIZED SYSTEM OF PREFERENCES: REPORT ON INVESTIGATION NO. 332-47 UNDER SECTION 332 OF THE TARIFF ACT OF 1930 16 (1983) [hereinafter cited as *ITC Report 1384*].

velopment in the BDC; (2) competitiveness with regard to the specific product presently receiving preferential treatment; and (3) general United States economic interest (including evaluations of import-sensitivity).⁹⁰ Current data indicates a trend toward increasing the number of discretionary graduations.⁹¹

C. *Renewal Changes in the US-GSP*

The legislation renewing the US-GSP makes a comprehensive overhaul of the existing program. These changes are embodied in Title V of the Trade and Tariff Act of 1984.⁹² Details of this widely supported omnibus trade package,⁹³ particularly the provisions for the US-GSP, were finally hammered out by a joint-conference committee of the Congress.⁹⁴

S. 1718 embodied the Senate's position during these joint negotiations.⁹⁵ Senator Danforth (R-Missouri) introduced the bill on behalf of the Reagan Administration on August 1, 1983,⁹⁶ igniting the renewal process.⁹⁷ After evaluation by the Senate Finance Committee,⁹⁸ the substance of S. 1718 was incorporated into H.R. 3398,⁹⁹

⁹⁰ *Report 485, supra* note 85, at 4. Import-sensitivity is described in *supra* notes 62-67 and accompanying text.

⁹¹ The Finance Committee relied upon the following table [in millions]:

Year	Discretionary Graduation	Competitive Need Exclusions	Total Exclusions	GSP Free Imports	Ratio of Exclusions to GSP Imports
1980	\$ 443	5,600	6,043	7,328	0.82
1981	662	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

Report 485, supra note 85, at 5.

⁹² Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 501-508, 98 Stat. 2948, 3018-24 (1984).

⁹³ The Senate approved the omnibus bill by a simple voice vote. The House adopted the final version of the bill on a 386-1 vote. Green, *Wide Ranging Trade Package Clears Congress*, 42 CONG. Q. 2671 (1984).

⁹⁴ The efforts by the joint-conference committee are detailed in H.R. REP. No. 1156, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Report 1156*].

⁹⁵ S. 1718, 98th Cong., 2d Sess. (1983).

⁹⁶ 129 CONG. REC. S11276 (daily ed. Aug. 1, 1983) (statement of Senator Danforth).

⁹⁷ Introduction of S. 1718 marked the true beginning of the legislative process. *But cf. USTR Announces April Hearing Dates in Washington, New York, San Francisco*, 7 U.S. IMPORT WEEKLY 609 (1983). These hearings, held by the USTR in April 1983, signaled the first public initiative to obtain critical evaluations of the US-GSP's operation and garnered support for its modified renewal.

⁹⁸ The bill was referred to the Senate Finance Committee for consideration. 129 CONG. REC. S11276 (daily ed. Aug. 1, 1983) (statement of Senator Danforth). The Committee held hearings to discuss and evaluate this new proposal. *Renewal of The Generalized System of*

an omnibus tariff and trade bill, on July 31, 1984.¹⁰⁰

H.R. 6023 provided the framework for the House's stand during the negotiations of the joint-conference committee.¹⁰¹ Representative Frenzel (R-Minnesota) introduced this bill, which was referred to the House Ways and Means Committee for consideration, on July 25, 1984.¹⁰² A similar bill, H.R. 5136, introduced by Representative Pease (D-Ohio) three months earlier had already been sent to the Ways and Means Committee for review.¹⁰³ After rejecting an amendment to H.R. 6023,¹⁰⁴ the House passed this bill by voice

Preferences: Hearings on S.1718 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 1st Sess. (1983) [hereinafter cited as August Senate Hearings]; Proposed Renewal of the Generalized System of Preferences — 1984: Hearings on S.1718 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 2d Sess. (1984) [hereinafter cited as January Senate Hearings].

Following committee hearings, Senator Dole re-introduced S. 1718 in the Senate on May 24, 1984 with support from the Finance Committee for its passage as amended. 130 CONG. REC. S6450 (daily ed. May 24, 1984) (Report from Finance Committee by Senator Dole). For an overview of amendments, see *Senate Finance Committee Officially Reports Generalized System of Preferences Measure*, 9 U.S. IMPORT WEEKLY 1086-87 (1984). For the full text of the Finance Committee's report see *Report 485, supra* note 85.

⁹⁹ H.R. 3398, 98th Cong., 1st Sess., 130 CONG. REC. H11531-61 (1984). The bill was first introduced on June 23, 1983 by Representative Gibbons by request and referred to the Committee on Ways and Means. 129 CONG. REC. H4473 (daily ed. June 23, 1983) (introduction of bill by Representative Gibbons).

¹⁰⁰ COMM. ON FINANCE, UNITED STATES SENATE, 98TH CONG., 2D SESS., OMNIBUS TARIFF AND TRADE MEASURES: EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE ON JULY 31, 1984: TO BE OFFERED AS A COMMITTEE AMENDMENT TO H.R. 3398 (Comm. Print 219, 1984) [hereinafter cited as *Print 219*].

¹⁰¹ H.R. 6023, 98th Cong., 2d Sess., 130 CONG. REC. H11000-03 (1984).

¹⁰² 130 CONG. REC. H7842 (daily ed. July 25, 1984) (introduction made by Representative Frenzel). Following recommendations from the Trade Subcommittee, the Ways and Means Committee favorably reported H.R. 6023 as amended to the House on September 27, 1984. *Id.* at H10418 (daily ed. Sept. 28, 1984) (report submitted by Rep. Rostenkowski). For the full text of the report, see H.R. REP. No. 1090, 98th Cong., 2d Sess. (1984) [hereinafter cited as *Report 1090*].

¹⁰³ H.R. 5136, 98th Cong., 2d Sess., 130 CONG. REC. E979 (1984). Presumably, the Pease bill remains in Committee and shall never be reported. Both bills were introduced in the wake of hearings on the possible renewal of the US-GSP held by the Ways and Means Subcommittee on Trade on August 3, 1983 and on February 8-9, 1984. See generally *Possible Renewal of the Generalized System of Preferences — Part 1: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. (1983) [hereinafter cited as August House Hearings]; Possible Renewal of the Generalized System of Preferences — Part 2: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 2d Sess. (1984) [hereinafter cited as February House Hearings].*

¹⁰⁴ The amendment as proposed by Representative Gephardt (D-Mo) was designed to immediately graduate the "big-three users" of the US-GSP — Taiwan, Hong Kong, and South Korea. See 130 CONG. REC. H11004 (daily ed. October 3, 1984) (amendment offered by Representative Gephardt); *Rules Committee Sets Guidelines for Full House Consideration of Omnibus Trade Bill*, 1 INT'L TRADE REP. 362 (1984). Opponents of the amendment stressed

vote on October 3, 1984.¹⁰⁵ On that same day, the substantive text of H.R. 6023 was incorporated into H.R. 3398.¹⁰⁶ This legislative maneuver ensured that a joint-conference committee would be necessary to resolve the conflicts between S. 1718 and H.R. 6023 before Congress could pass H.R. 3398.

1. Changes in Basic Authority

Title V of the Trade and Tariff Act of 1984 is entitled the "Generalized System of Preferences Renewal Act of 1984" (Renewal Act),¹⁰⁷ and took effect on January 4, 1985.¹⁰⁸ The Senate, content with the success of the original US-GSP, had planned for a continuation of the program for another ten years.¹⁰⁹ The House, in contrast, only wanted a five-year extension and called for the President to submit to Congress a report on the operation of the program before January 3, 1990.¹¹⁰ The House also wanted annual reports from the President on the status of internationally recognized workers' rights within each BDC.¹¹¹ Congress finally compromised on an eight and one-half year extension of the US-GSP.¹¹² The House further succeeded in getting the requirement for proposed Presidential reports put in the new legislation.¹¹³

Under the Renewal Act, the basic authority for administering

that graduating these three countries would make the United States appear anti-Asian and would take away the leverage necessary to liberalize the trading markets in these countries. See generally 130 CONG. REC. H100997 - H11011 (daily ed. October 3, 1984) (statements of Representatives Gibbons and Glickman). The amendment was defeated by a vote of 233 to 174. 130 CONG. REC. H11012 (daily ed. October 3, 1984) (Recorded Vote Roll No. 440).

¹⁰⁵ 130 CONG. REC. H11012 (daily ed. October 3, 1984).

¹⁰⁶ 130 CONG. REC. H11026 (daily ed. October 3, 1984) (The motion to incorporate was made by Representative Rostenkowski pursuant to House Resolution 598).

¹⁰⁷ Trade and Tariff Act of 1984, § 501(a) (1984).

¹⁰⁸ *Id.* § 508 (1984).

¹⁰⁹ *Report 485, supra* note 85, at 8.

¹¹⁰ *Report 1090, supra* note 102, at 22. Originally H.R. 6023 called for a 10 year extension. The Ways and Means Committee, however, elected to extend it only 5 years. The Committee reasoned that Congress could evaluate the program as modified during this time and decide later whether a further extension was warranted. 130 CONG. REC. H10995 (daily ed. October 3, 1984) (statement of Representative Rostenkowski).

¹¹¹ *Report 1090, supra* note 102, at 22. The House realized that the President already submits annual reports to Congress pursuant to § 116(d) of the Foreign Assistance Act of 1961. The House intends for the requested information concerning the status of internationally recognized workers' rights in BDCs to be a separate section in that report.

¹¹² § 505(a) of the Trade and Tariff Act of 1984 schedules the US-GSP to terminate on July 4, 1993.

¹¹³ *Id.* § 505(b), (c) (1984). The Presidential report on the operation of the US-GSP must be submitted on or before January 4, 1990 to Congress.

the US-GSP program still rests in the President.¹¹⁴ A fourth factor, however, was added to the three criteria which the President must first consider before extending duty-free treatment.¹¹⁵ Both the House and Senate agreed that the President should consider the extent of a BDC's "competitiveness with respect to eligible articles."¹¹⁶ The primary thrust of this competitiveness consideration is to focus the President's attention on his power of discretionary graduation.¹¹⁷ According to the Senate, this fourth factor is not designed to measure a BDC's conflict with a competitive United States industry but to evaluate the overall economic progress of the BDC.¹¹⁸ The House stressed, on the other hand, that since a BDC should have articles graduated when it has demonstrated competitiveness, this fourth factor is to be applied in evaluating both a BDC's general economic progress and its degree of competitiveness with regard to industries producing like products in the United States and other countries.¹¹⁹

2. Adjustments in Designation of BDCs

The Renewal Act makes several changes in the limits of the President's authority to designate BDCs and in the factors he must consider in making such decisions. The simplest adjustment accomplished by the renewal legislation is deletion of Hungary from the list of developed countries specifically excluded from GSP eligibility.¹²⁰ The House called for this deletion in recognition of Hungary's per capita GNP which is lower than several BDCs enjoying preferential treatment under the US-GSP.¹²¹ Hungary is also a member in good standing of both the GATT and the International Monetary Fund (IMF), and is a current recipient of MFN treatment on its exports to the United States.¹²² The House clarified this deletion by noting that Hungary would not automatically receive GSP status but rather must still apply pursuant to the re-

¹¹⁴ The original three criteria governing the President's authority, *see supra* notes 32-33 and accompanying text, remain intact except for one minor addition. The House added to the first criterion the phrase "through the expansion of their exports." Trade and Tariff Act of 1984, § 502(1) (1984).

¹¹⁵ Trade and Tariff Act of 1984, § 501(4) (1984).

¹¹⁶ *Report 1156, supra* note 94, at 156.

¹¹⁷ *Report 485, supra* note 85, at 10.

¹¹⁸ *Id.*

¹¹⁹ *Report 1090, supra* note 102, at 8.

¹²⁰ Trade and Tariff Act of 1984, § 503(b)(1) (1984).

¹²¹ *Report 1090, supra* note 102, at 10.

¹²² *Id.*

quirements outlined under the modified GSP program.¹²³

The former GSP program barred a country from GSP eligibility if that country had taken actions which effectively nationalized, expropriated or otherwise seized control of a United States citizen's property without providing adequate compensation.¹²⁴ Both houses of Congress agreed that this provision suffered from lack of specificity.¹²⁵ The renewal legislation, therefore, makes explicit that these provisions are to include intangible intellectual property rights such as patents, trademarks, and copyrights.¹²⁶ Under the modified GSP program a foreign government which repudiates or nullifies a patent, trademark, or other intellectual property right through legislation or administrative means may lose its BDC status or be denied eligibility as a BDC. The President, however, may override a denial of eligibility if he determines that designation as a BDC in a particular case is in the national economic interest of the United States.¹²⁷

Congress also gave the President authority to consider whether the BDC's government is providing satisfactory protection against any private acts infringing on intellectual property rights.¹²⁸ In addition to the factors governing his discretionary designation power,¹²⁹ the President must also consider "the extent to which such country is providing adequate and effective means under its laws for foreign nationals¹³⁰ to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights."¹³¹ The House and Senate committees realized when drafting the US-GSP renewal that there was no standard test for determining whether the law of a foreign country provides adequate and successful protection for intellectual prop-

¹²³ *Id.* at 10-11.

¹²⁴ See *supra* note 43-44 and accompanying text.

¹²⁵ The House specifically suggested that, even though intangible property rights should naturally be considered a type of "property" within the meaning of the section, it wished to clarify the broader term of property. *Report 1090, supra* note 102, at 11.

¹²⁶ Trade and Tariff Act of 1984, § 503(b)(2)-(b)(3) (1984).

¹²⁷ *Report 1156, supra* note 94, at 158-59.

¹²⁸ Compare Trade and Tariff Act of 1984, § 503(b)(2)-(b)(3) (1984) (directed at acts of a BDC's government) with Trade and Tariff Act of 1984, § 503(c)(3)(1984) (covering private acts of citizens of a BDC). See also *Report 1090, supra* note 102, at 11-13.

¹²⁹ See *supra* note 35 and accompanying text.

¹³⁰ The term "foreign nationals" is intended to include United States "nationals and nationals of other countries with whom U.S. nationals have a contractual or similar relationship with respect to the sale or licensing of intellectual property; for example, a non-U.S. license of the rights owned by a U.S. national." *Report 485, supra* note 85, at 11.

¹³¹ Trade and Tariff Act of 1984, § 503(c)(3) (1984).

erty.¹³² Both committees under the present law, therefore, expect the President to establish general guidelines for this determination after consulting parties such as the United States Copyright Office and the Patent and Trademark Office.¹³³

Congress was motivated to include explicit provisions regarding intellectual property due to the growth and prevalence of international counterfeiting,¹³⁴ which causes lost sales, ruins product reputation, and hampers marketing networks.¹³⁵ The ITC recently estimated that in 1982 alone United States firms lost six to eight billion dollars in domestic and export sales and 131,000 domestic jobs due to foreign product counterfeiting and similar practices.¹³⁶ The ITC concluded that certain countries in East Asia, many of which are GSP beneficiaries, were the most prevalent sources of counterfeit products.¹³⁷

The House unilaterally pushed for an eighth criterion involving international workers' rights to be added to the original list of seven which control the President's designation of BDCs.¹³⁸ This eighth criterion is subject to waiver if the President determines that designation of a country as a BDC would be in the United States' economic interest.¹³⁹ Under this condition, a country is ineligible as a BDC "if such country has not taken or is not taking

¹³² *Report 1090, supra* note 102, at 13; *Report 485, supra* note 85, at 11.

¹³³ *Report 1090, supra* note 102, at 13; *Report 485, supra* note 85, at 11. Among potential factors for the President to consider are the scope and duration of statutory protections for intellectual property rights, remedies possible for injured parties, the government's desire and capacity to enforce such rights on behalf of foreign nationals, the ability of these foreign nationals to enforce such rights on their own, and whether there is a disparity between the government's protection of such rights as between domestic corporations and foreign nationals. *Report 1090, supra* note 102, at 12-13.

¹³⁴ The House was primarily made aware of the problem by a recent subcommittee report entitled SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG. 2D SESS., UNFAIR FOREIGN TRADE PRACTICES & STEALING AMERICAN INTELLECTUAL PROPERTY: IMITATION IS NOT FLATTERY (Comm. Print 1984). The Senate was made aware by an ITC report: U.S. INT'L TRADE COMM'N, PUB. NO. 1479, THE EFFECTS OF FOREIGN PRODUCT COUNTERFEITING ON U.S. INDUSTRY: FINAL REPORT ON INVESTIGATION NO. 332-158 UNDER SECTION 332(B) OF THE TARIFF ACT 1930 (1984) [hereinafter cited as *ITC 1479*]. For a brief summary of congressional action on counterfeits, including actions relating to GSP, see generally Huser, *Lawmakers Seek Crackdown on Phony Goods*, 42 CONG. Q. 1423-27 (1984).

¹³⁵ *Report 485, supra* note 85, at 10.

¹³⁶ *ITC 1479, supra* note 134, at xiv-xvii.

¹³⁷ *Id.* at xiii.

¹³⁸ Trade and Tariff Act of 1984, § 503(b)(6) (1984). Unlike the House, the Senate originally included no provision in its version relating to international workers' rights. *Report 1156, supra* note 94, at 159.

¹³⁹ See *supra* notes 43-44 and accompanying text.

steps to afford internationally recognized workers' rights to workers in the country (including any designated zone in that country)."¹⁴⁰

This same phrase is also in the list of factors the President must consider before designating a country a BDC.¹⁴¹ Congress consistently referred to "any designated zone in the particular country"¹⁴² in order to ensure that such designated zones are not utilized by the BDC as a means of circumventing the new criteria on workers' rights and that these criteria are applied to the country as a whole.¹⁴³

The House noted three basic arguments in favor of linking labor rights to GSP eligibility. The first is that, historically in its foreign assistance programs, the United States has denied aid or loans to LDCs that violated political rights.¹⁴⁴ Ensuring basic rights of workers within BDCs under the GSP benefits is a logical extension of such policies.¹⁴⁵ The second argument theorizes that forcing BDCs to uphold workers' rights will raise living standards and thereby help countries overcome hunger and poverty.¹⁴⁶ The House contended that the ability to create unions and to bargain collectively for higher pay and better working standards is fundamental to other economic and social improvements. Finally, the House suggested that the lack of workers' rights encouraged United

¹⁴⁰ Trade and Tariff Act of 1984, § 503(b)(6) (1984). The phrase "internationally recognized workers' rights" is clearly defined when the Trade and Tariff Act of 1984, § 503(a) (1984), amends the Trade Act of 1974, 19 U.S.C. § 2462(a) (1982) by adding:

(4) For purposes of this title, the term 'internationally recognized worker rights' includes —

- (A) the right of association;
- (B) the right to organize and bargain collectively;
- (C) a prohibition on the use of any form of forced or compulsory labor;
- (D) a minimum age for the employment of children; and
- (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

¹⁴¹ Trade and Tariff Act of 1984, § 503(c)(3) (1984).

¹⁴² In the Trade and Tariff Act of 1984 at §§ 503(b)(6), 503(c)(3) (1984), this phrase "including any designated zone in that country" is included in parentheses.

¹⁴³ Representative Pease pointed out when introducing his bill, *see supra* note 103 and accompanying text, that such a provision was necessary "to ensure that beneficiary LDCs do not use the designation of export zones as a means of circumventing laws that extend internationally-recognized rights to workers in those countries." 130 CONG. REC. E977, E979 (daily ed. March 14, 1984) (extended remarks of Rep. Pease).

¹⁴⁴ *Report 1090, supra* note 102, at 12.

¹⁴⁵ *Id.* For a discussion of organized labor's involvement in fashioning trade policies, see generally Bosckor, *The Tokyo Round: A Labor View*, 9 GA. J. INT'L & COMP. L. 219 (1979).

¹⁴⁶ *Report 1090, supra* note 102, at 11.

States industries to invest in overseas production¹⁴⁷ to avoid employing higher paid or unionized American workers.¹⁴⁸

The last addition to the factors the President must consider before designating a country as a BDC has raised considerable controversy.¹⁴⁹ The Congress recommended that the President, in making BDC determinations, consider the extent to which a country has taken action to "reduce distorting investment practices and policies (including export performance requirements)."¹⁵⁰ The primary concern of Congress was that United States export opportunities were being blocked by less conventional trade barriers.¹⁵¹ Specifically, export opportunities generated by United States investments abroad have often been reduced by host country requirements that United States firms limit their exports or that investment approval be conditioned on performance requirements such as the production of a certain level of exports.¹⁵² The House also added a section requiring prospective BDCs to reduce or eliminate any restrictions to trade in services¹⁵³ such as barriers to the operation or establishment of service-oriented enterprises or the rejection of national treatment for such businesses.¹⁵⁴ The Senate further added the requirement that a potential BDC provide assurances "that it will refrain from engaging in unreasonable export practices,"¹⁵⁵ to the President's assessment of whether a country has provided adequate access to its markets.¹⁵⁶ Both houses agreed that these factors, which connect GSP eligibility to trade concessions by the potential BDC, are appropriate prerequisites to extending preferential treatment.¹⁵⁷

3. Alterations in Rules for Designating Eligible Articles

Congress did not make many changes in the original US-GSP section governing ineligible articles.¹⁵⁸ At the urging of the House,

¹⁴⁷ *Id.* at 11-12.

¹⁴⁸ This concern was the greatest fear behind the introduction of the Pease bill. See Shorrock, *New Bill Links Imports with Labor Rights*, MULTINATIONAL MONITOR 6 (April 1984).

¹⁴⁹ See *infra* notes 286-91 and accompanying text.

¹⁵⁰ Trade and Tariff Act of 1984, § 503(c)(3) (1984).

¹⁵¹ *Report 485, supra* note 85, at 11-12; *Report 1090, supra* note 102, at 13-14.

¹⁵² *Report 485, supra* note 85, at 11-12; *Report 1090, supra* note 102, at 13-14.

¹⁵³ Trade and Tariff Act of 1984, § 503(c)(3) (1984).

¹⁵⁴ *Report 1090, supra* note 102, at 14.

¹⁵⁵ Trade and Tariff Act of 1984, § 503(c)(2) (1984).

¹⁵⁶ See *supra* note 35 and accompanying text.

¹⁵⁷ *Report 485, supra* note 85, at 11-12; *Report 1090, supra* note 102, at 14.

¹⁵⁸ For an explanation of the original US-GSP section concerning ineligible articles, see

however, the Congress did pass a new provision which would require the Secretary of the Treasury to consult the USTR before mandating regulations governing the rules-of-origin requirements of the US-GSP.¹⁵⁹ This amendment is designed to give the USTR, which administers the GSP and the Caribbean Basin Initiative (CBI) program and had requested the change,¹⁶⁰ a chance to have input in the creation of regulations concerning rules-of-origin to ensure consistency between the GSP and the CBI.¹⁶¹ Granting opportunity for the USTR to provide feedback, however, is not designed to usurp the absolute authority of the Secretary of the Treasury or the United States Customs Service in determining the final substance of these rules-of-origin regulations.¹⁶²

The House and Senate also agreed to expand the listed exclusion for footwear to cover "footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel which were not eligible articles for purposes of this title on April 1, 1984."¹⁶³ Both houses recognized that such items were already prohibited administratively from receiving GSP treatment but wished to ensure their continued exclusion.¹⁶⁴ Although the House never formally requested it, the Ways and Means Committee urged the USTR to interpret the existing exclusion for "import-sensitive steel articles" to include specially fabricated steel products. By including these steel products in the existing exclusion, the committee sought to alleviate the adverse impact that the GSP treatment of foreign steel might have on West Coast steel industries of the United States.¹⁶⁵

supra notes 53-67 and accompanying text.

¹⁵⁹ Trade and Tariff Act of 1984, § 504(a) (1984).

¹⁶⁰ The CBI is a package of United States initiatives to help Central American and Caribbean island countries revitalize their economies. The big mainland countries in the region are not eligible to participate. One aspect of the CBI is similar to the US-GSP in that countries in the Caribbean Basin area are granted duty-free entry for their exports into the United States. The CBI was signed into law by President Reagan on August 5, 1984. Interest and Dividend Tax Compliance Act of 1983—Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, §§ 202-231, 97 Stat. 369, 384-98 (1983).

¹⁶¹ *Report 1090, supra* note 102, at 15.

¹⁶² *Id.*

¹⁶³ Trade and Tariff Act of 1984, § 504(b) (1984).

¹⁶⁴ *Report 485, supra* note 85, at 12; *Report 1090, supra* note 102, at 15. The Senate was unsuccessful in getting watches deleted from the list of ineligible articles. *Report 1156, supra* note 94, at 160. The deletion of watches was not originally in S. 1718 but was later approved as an amendment to the Senate's version of H.R. 3398. See *Print 219, supra* note 100, at 4.

¹⁶⁵ *Report 1090, supra* note 102, at 15.

4. Changes in Provisions for Withdrawing GSP Treatment

The initial adjustment to the President's authority to withdraw, suspend, or limit duty-free treatment calls for the President to conduct a general review of countries and articles eligible under the GSP. Following this review, the President must submit a report to Congress on the application of country/product criteria pursuant to any action limiting GSP treatment.¹⁶⁶ Although the House wanted earlier dates,¹⁶⁷ the new legislation requires that the general review be completed by January 4, 1987 and that the subsequent report to Congress be submitted on January 4, 1988.¹⁶⁸ Both houses strongly urged the President to apply these country/product limitations for GSP eligibility vigorously to noncomplying countries. Toward this end, the bill requires the USTR to seek advice constantly from any interested United States industry on the BDC's adherence to the requirements outlined in the GSP program.¹⁶⁹

The basic competitive-need limits of the existing program are retained in the renewed US-GSP,¹⁷⁰ but there was considerable conflict between the House and Senate concerning the President's graduation, cutback, and waiver authority. The House reacted very strongly to the ITC's finding that the top seven countries in the US-GSP receive seventy-five percent of the benefits.¹⁷¹ Accordingly, the House proposed a three-tiered system of mandatory and discretionary reductions in the competitive-need limits that take effect beginning on January 4, 1986.¹⁷²

The House, in the first tier of reductions, called for mandatory phasing out over a two-year period of all of a country's products should such country reach a level of \$9,000 per capita GNP in any calendar year.¹⁷³ Although the House noted that no BDC has ever attained this level, the committee believed any country that does so should be considered a developed country with respect to the

¹⁶⁶ Trade and Tariff Act of 1984, § 505(a)(2) (1984).

¹⁶⁷ The House wanted the review completed by January 4, 1986, and the report made to Congress on January 4, 1987. *Report 1156, supra* note 94, at 160-61.

¹⁶⁸ Trade and Tariff Act of 1984, § 505(a)(2) (1984).

¹⁶⁹ *Report 485, supra* note 85, at 18; *Report 1090, supra* note 102, at 12-13.

¹⁷⁰ For discussion of original competitive-need limits, see *supra* notes 71-79 and accompanying text.

¹⁷¹ *Report 1090, supra* note 102, at 3.

¹⁷² *Report 1156, supra* note 94, at 160.

¹⁷³ *Id.*

GSP.¹⁷⁴ Further, the House designated in the second tier that any BDC that either has a per capita GNP of \$5,000 or more or accounts for more than ten percent of the total GSP duty-free imports in the preceding calendar year have the competitive-need limits cut in half for all of its eligible articles. The President, however, may waive this cutback in competitive-need limits for any article from such country after receiving the ITC's advice, making a national interest determination based upon the new criteria, and publishing his determination in the Federal Register.¹⁷⁵ Those countries in the final tier which have per capita income of less than \$5,000 and account for less than ten percent of the total US-GSP imports in the previous calendar year are subject to having competitive-need limits cut in half for specific articles. Only those articles determined to have a sufficient degree of competitiveness are subject to the competitive-need cutback, however, and the President is permitted to waive such reductions.¹⁷⁶

Basing its position on the bill backed by the Administration, the Senate avoided mandatory graduation requirements and gave the President more discretion in reducing competitive-need limits. Beginning on January 4, 1987,¹⁷⁷ the President would have discretion to cut competitive-need limits in half on an article-by-article basis if a BDC has demonstrated a sufficient degree of competitiveness with regard to any article.¹⁷⁸ Following the product review report, the President may waive any competitive-need limits after performing the necessary steps.¹⁷⁹ The Senate noted that in making his national interest determination, the President should closely scrutinize the BDC's assurance of equitable and reasonable market access and effective intellectual property rights protection.¹⁸⁰

In passing the Renewal Act, the House and Senate reached a compromise solution for reforming the US-GSP by integrating as-

¹⁷⁴ Report 1090, *supra* note 102, at 20-21.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 19-20.

¹⁷⁷ The Senate set this date in order to be consistent with the first deadline for the President to conduct the new review. Consequently, the House provisions for waiver were set to begin with the requested review date of January 4, 1986.

¹⁷⁸ Report 1156, *supra* note 94, at 160.

¹⁷⁹ The steps required are the same as those proposed by the House. The President may waive the competitive need limits after (1) receiving ITC advice on whether any United States industry is likely to be adversely affected, (2) determining a waiver is in the national economic interest based upon designated criteria in sections 501 and 502(c) and, (3) publishing his determination in the Federal Register. *Id.*

¹⁸⁰ Report 485, *supra* note 85, at 14.

pects of both committees' proposals. Under the Renewal Act, the President may cut the competitive-need limits in half for any eligible article if, after conducting periodic reviews, he determines a BDC has demonstrated a sufficient degree of competitiveness, relative to other BDCs, regarding such article.¹⁸¹ After January 4, 1987,¹⁸² the President may waive all competitive-need limits for any article or BDC if before July 1 of that calendar year¹⁸³ he publishes his national interest determination based upon the ITC's advice in the Federal Register.¹⁸⁴ The President in making this determination is directed to give great weight to the BDC's market availability and to the protection of intellectual property rights as requested by the Senate. A very important aspect of the President's discretionary powers is that any waiver granted remains in effect until the President decides a waiver is no longer warranted by changed circumstances.¹⁸⁵ The President is not allowed to exercise his new waiver authority, however, if the quantity of eligible articles involved exceeds an aggregate value equal to thirty percent of the total value of all articles entering duty-free under the US-GSP in the previous calendar year. He also may not grant a waiver if the articles in question exceed fifteen percent of the prior year's total value when the BDC involved has a per capita GNP of \$5,000 or more or has imported under the US-GSP products having an appraised value of more than ten percent of all US-GSP articles for that preceding year.¹⁸⁶ Most importantly, the House succeeded in pushing through an amendment requiring mandatory graduation by a two year phase-out of countries with GNPs of \$8,500 per capita annually.¹⁸⁷

¹⁸¹ Trade and Tariff Act of 1984, § 505(b) (1984).

¹⁸² This date is consistent with the date established for conducting the general review. See *supra* notes 166-68 and accompanying text.

¹⁸³ The July 1 deadline is consistent with the new effective date for executive orders issued pursuant to application of the competitive-need criteria. See *infra* notes 197-98 and accompanying text.

¹⁸⁴ Trade and Tariff Act of 1984, § 505(b) (1984).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 505(c) (1984). This new subsection provides that the President is to determine the per capita GNP of the BDC for each calendar year after 1984 based upon "the best available information, including that of the World Bank . . ." The President then would check to see if the per capita GNP of the particular "determination year" exceeds an amount bearing the same ratio to \$8,500 as 50% of the increase of the United States' GNP for the preceding calendar year bears to the GNP of the United States in 1984. The Department of Commerce is designated to determine the United States GNP. The two year phase out process is designed to cut the competitive-need limit from 50% to 25% beginning July 1

Several other modifications to the limitations provisions of the US-GSP, each with varying degrees of importance, were brought about by the Renewal Act. The retention of the Philippine waiver¹⁸⁸ and the Senate's suggestion that this waiver remain subject to reductions in competitive-need limits on an article-by-article basis¹⁸⁹ have little real impact. Conversely, the Senate sponsored provision that refused application of competitive-need limits to the Least Developed Countries (LDCs)¹⁹⁰ as determined by the President¹⁹¹ sixty days after notification to Congress,¹⁹² has potentially far-reaching implications.¹⁹³ The original provision exempting those articles which do not have a like or directly competitive counterpart produced in the United States from the fifty percent of imports competitive-need limits was extended into 1985.¹⁹⁴ The final version of the bill also raised the *de minimis* waiver from one to five million dollars as had been suggested by the House.¹⁹⁵ The House was unsuccessful, however, in changing the redesignation provision from a one to two calendar-year waiting period.¹⁹⁶ One last, strategically significant change included in the Renewal Act was to require any modifications in article designation required by application of competitive-need limits to be made no later than July 1 of the next calendar year.¹⁹⁷ This change was designed to provide ample time for the United States Customs Service and the traders involved with the US-GSP to adjust to the new legislation and for the ITC to make tariff schedule publications.¹⁹⁸

of a determination year (a year when the per capita GNP was in excess as described). After the two years elapse, the developing country automatically loses BDC status. *Id.*

¹⁸⁸ See *supra* note 78.

¹⁸⁹ Trade and Tariff Act of 1984, § 505(b) (1984). Both houses wished to retain the waiver but only the Senate wanted it subject to a reduction in competitive-need limits on an article-by-article basis. *Report 1156, supra* note 94, at 162.

¹⁹⁰ Trade and Tariff Act of 1984, § 505(b) (1984).

¹⁹¹ The President's determination is to be based upon criteria for country eligibility with particular consideration given to a country's level of economic development. *Report 485, supra* note 85, at 15.

¹⁹² Trade and Tariff Act of 1984, § 505(b) (1984). The President is to notify Congress at least 60 days before any determination he makes becomes final. *Id.*

¹⁹³ See *infra* notes 271-85 and accompanying text.

¹⁹⁴ Trade and Tariff Act of 1984, § 505(b) (1984).

¹⁹⁵ *Id.* The Senate made no provision affecting the *de minimis* level. *Report 1156, supra* note 94, at 164.

¹⁹⁶ *Report 1156, supra* note 94, at 164.

¹⁹⁷ Trade and Tariff Act of 1984, § 505(b) (1984). See *infra* notes 236-53 and accompanying text.

¹⁹⁸ *Report 1090, supra* note 102, at 22.

5. New Section to the US-GSP

The House successfully added a novel section to the US-GSP. This new addition, entitled "Agricultural Exports of Beneficiary Developing Countries,"¹⁹⁹ directs appropriate United States agencies²⁰⁰ to assist BDCs "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."²⁰¹ Clearly this section addresses the protection of a BDC's citizens by attempting to prevent cash-cropping of cultivable land at the expense of feeding a developing country's people.²⁰² Though not much is known about how this new section will operate, it appears in reality to be a backdoor means of appeasing domestic farm interests in the United States which oppose GSP eligibility of agricultural goods.²⁰³

III. SURVEY OF CASE LAW INVOLVING US-GSP

There has been an increasing amount of judicial activity centered around the US-GSP. A critical survey is necessary, therefore, to examine the impact of these judicial decisions upon the US-GSP and the effect of the Renewal Act upon such decisions. Highlighted

¹⁹⁹ Trade and Tariff Act of 1984, § 507 (1984). The Senate made no similar provision with regard to agricultural exports. *Report 1156, supra* note 94, at 164-65.

²⁰⁰ Neither the statute nor the House Committee report gives a definition of "appropriate" United States agencies.

²⁰¹ Trade and Tariff Act of 1984, § 507 (1984).

²⁰² In the introduction of a similar provision in his bill, *see supra* note 103 and accompanying text, Representative Pease stated it was designed "to assure that agricultural exports are not promoted within those countries to the detriment of the production of food for local consumption within those countries." 130 CONG. REC. E979 (daily ed. March 14, 1984) (extended remarks of Rep. Pease).

²⁰³ Domestic farm interests in the United States opposed renewal of the GSP by arguing that all agricultural products should be exempted. *See U.S. Farm Interests Oppose Including Food in New GSP, Cite Modern Production Overseas*, 9 U.S. IMPORT WEEKLY 590-91 (1984); *February House Hearings, supra* note 103, at 10 (statement of Julian B. Heron, Jr., Counsel, on behalf of the California-Arizona Citrus League, Sun-Diamond Growers of California, California Almond Growers Exchange, California Raisin Advisory Board, California Prune Advisory Board, Tri-Valley Growers of California, and California Dried Fig Advisory Board); *January Senate Hearings, supra* note 98, at 64 (statement of W. Glenn Tussey, National Affairs Division, American Farm Bureau Federation, Washington, D.C.); *Id.* at 67 (statement of Randy M. Russell, Member Services and Farm Programs, National Council of Farmer Cooperatives, Washington, D.C.). *See also* H.R. 3581, 97th Cong., 1st Sess. (1983) (designed to exclude agricultural products from GSP treatment). It is possible United States agricultural interests could lobby the agencies which will regulate this new provision of the US-GSP and force creation of quotas and other trade barriers to BDC agriculture exports receiving duty-free treatment.

below for the practitioner are possible means of using the judicial system as well as some statutory modifications for improving the US-GSP regarding these judicial remedies.

A. *Challenging Presidential Authority*

An interested party is allowed to petition the USTR to have an eligible article placed on or removed from the GSP treatment list.²⁰⁴ According to the leading case of *Florsheim Shoe Co. v. United States*,²⁰⁵ however, the President has discretion to make the ultimate decision regarding an article's GSP status. In *Florsheim*, the Florsheim Shoe Company, an American shoe manufacturer, petitioned the USTR in 1979 and 1980 to have certain types of leather goods given GSP status.²⁰⁶ After denial of these petitions by the USTR, Florsheim brought suit in the United States Court of International Trade²⁰⁷ (formerly the United States Customs Court).²⁰⁸ The Federal Circuit Court of Appeals upheld the decision reached by the Court of International Trade.²⁰⁹

In its decision, the Court of International Trade focused primarily on the competitive-need limits under § 504(c)(1)(B) and (D) of the Trade Act of 1974.²¹⁰ Although finding that Florsheim had standing to bring the action as an importer within the "zone of interest,"²¹¹ the court ruled that the President has broad powers of

²⁰⁴ See *supra* notes 53-56 and accompanying text.

²⁰⁵ 570 F. Supp. 734 (Ct. Int'l Trade 1983), *aff'd*, No. 83-1371, slip op. (Fed. Cir. July 12, 1984). The case first appeared in the courts on a memorandum and order for discovery conference. 4 Ct. Int'l Trade 275 (1982).

²⁰⁶ Buffalo and goat and kid leather were placed on the list of eligible articles for GSP treatment, yet leather imports from India were denied duty-free treatment by executive order. Florsheim's 1979 petition sought to have created a separate category in the United States Tariff schedules for water-buffalo leather, arguing that no directly competitive article was produced in the United States on January 3, 1985. The USTR denied this petition, finding that water-buffalo leather was directly competitive with calf leather. The 1979 petition for GSP treatment of goat and kid leather, based on the same grounds, was also denied by the USTR which found that these types of leather were produced domestically. For a summary of the background of the *Florsheim* case and a general review of the decision, see *Scope of Review of Presidential Action Under GSP is Defined by Trade Court*, 8 U.S. IMPORT WEEKLY 583-85 (1983); *Court of Appeals for Federal Circuit Upholds President's GSP Authority*, 1 INT'L TRADE REP. 96 (1984).

²⁰⁷ *Florsheim*, 570 F. Supp. at 734.

²⁰⁸ Customs Courts Act of 1980, Pub. L. No. 96-417, § 501(2), 94 Stat. 1727, 1742-44.

²⁰⁹ *Florsheim*, No. 83-1371, slip op. (Fed. Cir. July 12, 1984).

²¹⁰ Trade Act of 1974, 19 U.S.C. § 2464(c)(1)(B) (1982) establishes the competitive-need limits, discussed *supra* notes 71-83 and accompanying text; § 2464(d) allows the 50 percent limit to be waived if a like or directly competitive article was not being produced on the date the US-GSP was implemented.

²¹¹ *Florsheim*, 570 F. Supp. at 737-38. The court allowed standing to challenge the Presi-

discretion in designating and removing eligible articles.²¹² According to the court this expansive grant of discretionary authority was not unconstitutional since Congress provided sufficient guidelines and standards for exercising such power.²¹³ Most importantly, the court ruled that neither the President's findings of fact nor his motivations are subject to judicial review.²¹⁴ In so holding, the Court of International Trade concluded that executive decisions in areas of international trade can only be reviewed to determine: (1) whether the President's action falls within his delegated authority; (2) whether the statutory language has been properly construed; and (3) whether the President's action conforms with the relevant procedural requirements.²¹⁵

The changes in the US-GSP made by the Renewal Act go beyond the *Florsheim* decision by granting the President even more discretionary power. The President can now factor into his competitive-need calculations nebulous criteria concerning a prospective BDC's efforts to provide market access and protect intellectual property rights. The President is also given discretion to waive competitive-need limits or to increase them in certain situations.

dent's decision based on 28 U.S.C. § 2631(a), which reads:

Persons entitled to commence a civil action. (a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

The court claimed *Florsheim*, as importer and ultimate consignee of the goods in question and whose protest had been denied, had standing to contest such denial. *Florsheim*, 570 F. Supp. at 737-38.

²¹² The court reasoned that the President's order denying the duty-free treatment was not based solely on Trade Act of 1974, 19 U.S.C. §§ 2464(1)(B) - (D) (1982), but also on *id.* § 2464(a). The court found § 2464(a) granted the President a broad range of authority to limit, withdraw, or suspend the application of duty-free treatment. *Florsheim*, 570 F. Supp. at 738-41.

²¹³ *Id.* at 741-42.

²¹⁴ *Id.* at 747.

²¹⁵ *Id.* at 743. The holding in *Florsheim* concerning judicial review of executive decisions is becoming the accepted standard test. See *Mast Indus., Inc. v. Regan*, No. 84-111, slip op. (Ct. Int'l Trade October 4, 1984). In *Mast*, Plaintiffs contended that congressional delegation of authority to the President by § 204 of the Agricultural Act of 1956 was an unconstitutional delegation of legislative power in violation of the separation of powers doctrine. *Mast Indus., Inc.* asserted that certain interim regulations promulgated pursuant to this delegated authority were arbitrary, capricious, and contrary to law. The court in *Mast* upheld the President's authority after applying the three-pronged test established by *Florsheim*. The *Mast* court further found that the *Florsheim* decision forbade it from even considering the factual basis of the President's decision to promulgate the regulations in question.

The Congress should therefore provide, as it does for ITC proceedings in antidumping and countervailing duty cases,²¹⁶ statutory authority for reviewing the evidence before the USTR or the ITC, and their factual findings which support the President's decisions regarding eligible articles.²¹⁷

Until Congress is persuaded to provide a statutory scope and standard of review in the US-GSP, practitioners are limited in basing a claim to the three permissive areas for challenging Executive decisions. There has already been some success, however, in challenging the discretionary decisions of the President in these areas. The Court of International Trade in *West Bend Co. v. United States*²¹⁸ stated that the term "article" means "individual product" rather than "tariff item" for purposes of the competitiveness test.²¹⁹ The court in *West Bend* ruled that the President violated the US-GSP, therefore, by failing to apply the test to individual

²¹⁶ The court in *Florsheim* stated that "[P]laintiff's reliance upon the scope and standard of review of commission proceedings in antidumping and countervailing duty cases, clearly, is misplaced since the scope and standard of review in such cases are specifically presented by statute." *Id.* at 746; see 19 U.S.C. § 1516(a), (b); 28 U.S.C. § 2640(b).

²¹⁷ In a report issued in 1980, the General Accounting Office (GAO) pointed out that the USTR did not fully explain to petitioners the basis of product eligibility decisions. The report stated: "The rationale for denying a petitioner's request are explained in brief general language unrelated to relevant parts of the preference program law, to the specific economic facts in a petition, or to the reason those facts failed to support the petitioner's argument." GENERAL ACCOUNTING OFFICE, TRADE PREFERENCE PROGRAM DECISIONS COULD BE MORE FULLY EXPLAINED: REPORT TO THE CONGRESS OF THE UNITED STATES BY THE COMPTROLLER GENERAL IV (1980) [hereinafter cited as GAO]. The GAO also noted that petition-related recordkeeping at the USTR was too informal. The report stated: "No minutes of inter-agency petitions are systematically collected or preserved, and complete documentary histories of each petition are not readily available." *Id.* Finally, the GAO suggested that the regulations do not clearly state the type of information petitioners (usually BDCs) need to provide in support of their petitions. *Id.* These problems must be corrected before any factual findings of the President are capable of review by the judiciary. *But cf.* the "Brock Thomas Agreement GSP Program Changes" designed to make the petition process more formal by requiring a standardized petition form, and at the same time more open by requiring the President to release a public report of the ITC's determinations. 130 CONG. REC. H10998 - 11000 (daily ed. October 3, 1984) (statement of Representative Thomas).

²¹⁸ No. 83-111, slip op. (Ct. Int'l Trade Nov. 3, 1983) *rev'd on other grounds*, No. 84-85, slip op. (Ct. Int'l Trade July 13, 1984).

²¹⁹ The dispute centered around the government's contention that "article" in the GSP always means tariff item. The court rejected this contention, reasoning that tariff item is a broad term which encompasses numerous separate products. The court said that when applying the 50 percent limit or when granting GSP treatment, "article" can be viewed as a tariff item number, but that it must mean "individual product" when applying the § 2464(D) waiver of the 50 percent limit if no competitive article was produced in the United States at the Trade Act's implementation. For discussion of the background and decision in *West Bend*, see *CIT Defines Terms in 'Competitiveness Test', Finds Legal Defect in Presidential Action*, 9 U.S. IMPORT WEEKLY 261-62 (1983).

products when he removed Hong Kong from the GSP for a particular eligible item.²²⁰

Similarly, the plaintiff in *Luggage and Leather Goods Manufacturers of America, Inc. v. United States*,²²¹ successfully brought a claim under the second *Florsheim* test concerning whether the statutory language had been properly construed. The plaintiffs in *Luggage and Leather Goods Manufacturers* were a nonprofit trade association and a domestic union acting on behalf of employees and manufacturers concerned with the production of luggage and personal leather goods. The plaintiffs filed suit after the USTR refused their petition for removal of certain man-made fiber flat goods following the President's designation of such goods' GSP eligibility in April, 1981.²²² The Court of International Trade found that such man-made fiber flat goods were included within the statutory language of "textile and apparel articles which are subject to textile arrangements" and thus were ineligible for GSP designation.²²³ Under the Renewal Act, the court's decision is supported by the specific exclusion for man-made fiber flat goods. Practitioners should be aware, however, of this type of judicial remedy for challenging the President's discretionary authority in deciding

²²⁰ The court ruled that the case should be remanded to allow the correct procedures to be followed concerning application of the 50 percent competitive-need limit to Plaintiff's corn poppers. Plaintiff, however, was asked to notify the court within 20 days as to whether it would make a claim of alternate classification of its goods. *Id.* at 262. On review, *West Bend*, No. 84-85, slip. op. (Ct. Int'l Trade July 13, 1984), the Court ruled that the government had waived a defense based on "failure to exhaust administrative remedies." The court noted, however, that this defense might have been decisive had it been raised in a timely manner by the government. The remedy that had been available was 15 C.F.R. § 2007.0(a)(3), which allows an interested party to petition for a factual determination under section 504(d) of the Trade Act of 1974 to get exemption for a product exceeding the competitive-need limits. If a determination is not made within the time an executive order is to be issued, Customs will be directed to withhold liquidation of entries of the involved product until such determination is made. Practitioners should be aware of this administrative remedy and resort to it when necessary to avoid, at a later trial, the government's defense of "failure to exhaust administrative remedies."

²²¹ No. 84-53, slip op. (Ct. Int'l Trade May 11, 1984), *partial stay of judgment granted*, No. 84-66, slip op. (Ct. Int'l Trade June 7, 1984). For an overview of the background and court's decision see *CIT Rules MFA is 'Textile Agreement', Bars Eligibility for Certain Flat Goods*, 9 U.S. IMPORT WEEKLY 998 (1984).

²²² The man-made fiber flat goods in question were "billfolds, key cases, coin purses, and similar articles of textile materials other than cotton (such as nylon, rayon, or polyester)." *Luggage and Leather Goods Manufacturers*, No. 84-53, slip. op. (Ct. Int'l Trade May 11, 1984).

²²³ *Id.* Man-made fiber flat goods are subject to the "Multifiber Arrangement" (MFA), according to the *Luggage and Leather Goods Manufacturers* court. The MFA is a "textile agreement" within the GSP exclusion discussed *supra* note 61 and accompanying text.

GSP status of eligible articles.

B. *Proper Jurisdiction of GSP Claims*

In seeking a judicial remedy the practitioner must be careful to choose the proper court since the Renewal Act fails to resolve jurisdictional issues raised in *Sybron Corp. v. Carter*²²⁴ and *Barclay Industries v. Carter*.²²⁵ In both cases the United States district court noted that the Trade Act of 1974 was silent as to jurisdiction for challenges to GSP determinations.²²⁶ Congress should statutorily remedy this problem by designating which courts have jurisdiction over different GSP issues, as it has done in the past for similar programs.²²⁷ The question in *Sybron* was whether the President was prohibited from designating microcover glasses and microscope slides eligible for GSP treatment due to the section excluding "import-sensitive semi-manufactured and manufactured glass products."²²⁸ The *Sybron* court ruled that it was proper for the Customs Court (now the United States Court of International Trade) to decide this complex issue since it related directly to national customs policy and concerned classification and rate of duty on the goods in question.²²⁹

The District Court in *Barclay*, making reference to the unresolved controversy in *Sybron*,²³⁰ held that the plaintiff's suit alleging the President improperly revoked GSP treatment previously accorded to imports from Brazil fell within the Customs Court's exclusive jurisdiction.²³¹ The court reached this conclusion despite plaintiff's contention that there was no adequate legal remedy in

²²⁴ 438 F.Supp. 863 (D.N.Y. 1977).

²²⁵ 494 F.Supp. 912 (D.D.C. 1980).

²²⁶ *Id.* at 913 n.2.

²²⁷ The court in *Sybron* noted that "section 331(b) of Public Law 93-618 amends 19 U.S.C. § 1516 to embrace protests on determinations on countervailing duties and anti-dumping duties. It is silent as to challenges on GSP determinations. (1974) U.S. Code Cong. & Admin. News 2290, 2377. See also Senate Report No. 93-1298 reprinted in (1974) U.S. Code Cong. & Admin. News 7186, 7320." *Sybron*, 438 F.Supp. 864 n.2.

²²⁸ *Id.* at 864. The exclusion of import sensitive glass products from GSP eligibility is discussed *supra* note 61 and accompanying text.

²²⁹ *Sybron*, 438 F.Supp. at 865. The court ultimately ruled that it would retain jurisdiction until plaintiffs were granted jurisdiction by the Customs Court. *Id.*

²³⁰ The *Barclay* court noted that, in the three years prior to the suit before it, the jurisdiction dispute in *Sybron* had remained unsettled. *Barclay*, 494 F.Supp. at 912-13 n.1.

²³¹ The court pointed out that the district court, pursuant to 28 U.S.C. § 1340 (1976), has original jurisdiction over civil actions arising under any Act of Congress providing import revenue except matters within the Customs Court's exclusive jurisdiction. *Id.* at 913.

the Customs Court.²³² Subsequently, until Congress makes statutory provisions for jurisdiction, most cases challenging GSP treatment should originate in the United States Court of International Trade.²³³

The decision on which court to choose can be very strategic with regard to the statute of limitations.²³⁴ Rejecting a claim of equitable estoppel, the court in *Wally Packaging, Inc. v. United States*²³⁵ held that the statute of limitations was not tolled while the plaintiff was being advised by a customs examiner to seek reliquidations. Practitioners should therefore bring their suits initially in the Court of International Trade to avoid losing valid causes of action because of the uncertainty of whether filing an action in the improper court will toll the statute of limitations.

C. *Timing and Classification Disputes Involving the US-GSP*

Timing is often a critical factor in judicial actions involving the US-GSP. The court in *Teters Floral Products Co. v. United States*²³⁶ ruled that an executive order removing certain merchandise from GSP eligibility did not retroactively deprive an importer of duty-free benefits. The plaintiff, therefore, was denied GSP treatment even though the goods had been released to the plaintiff before issuance of the order because the plaintiff had not yet received unconditional delivery of the merchandise.²³⁷ The Court

²³² The court ruled that the Customs Court has exclusive jurisdiction upon cases in which it is capable of granting an adequate remedy. In *Barclay*, the plaintiff could have obtained a Customs Court remedy, according to the court, by importing Brazilian hardboard, paying the duty, and filing a protest. If this protest was denied, the Customs Court would have accepted an action contesting that decision. *Id.* at 913.

²³³ The court suggested in *Barclay* that there are a few limited exceptions to the Customs Court's exclusive jurisdiction but failed to elaborate. It rejected Plaintiff's claims that it required a class action not available in the Customs Court and wished to challenge an invalid executive order not a Customs determination. *Id.* The jurisdictional changes wrought by §§ 1581-1582 of the Customs Courts Act of 1980 have not been fully interpreted regarding the various types of GSP claims. The United States Court of International Trade appears, however, to have a broader range of exclusive jurisdiction than its predecessor. It is still possible certain GSP claims might be brought in courts other than the Court of International Trade. Congress should specify, therefore, which court(s) will have original jurisdiction over all GSP matters.

²³⁴ A statute of limitations is a statute that declares no suit shall be maintained on certain described causes of action unless brought within a specified period after the right accrued. BLACK'S LAW DICTIONARY 1077 (4th ed. 1955).

²³⁵ 578 F. Supp. 1408 (Ct. Int'l Trade 1984).

²³⁶ 586 F. Supp. 960 (Ct. Int'l Trade 1984).

²³⁷ Plaintiff imported artificial flowers from Hong Kong on February 17, 1978, but these goods were not released to him until February 25, 1978. The goods were removed from GSP

specifically stressed that the importer-plaintiff had received adequate notice of the change in the GSP to take advantage of duty-free treatment before the order took effect.²³⁸

The plaintiff in *Teters* had a few days' opportunity to file its entries in order to guarantee duty-free treatment, but failed to do so due to "confusion."²³⁹ If courts continue to hold that a few days' warning is adequate, the Renewal Act probably will help in eliminating cases such as *Teters*. By changing the effective date of the President's eligibility decisions based on competitive-need limits to July 1 of the next year, traders under the US-GSP should always have sufficient notice.²⁴⁰

Traders must note, however, that statutorily the President is not bound to issue executive orders at any specific time before July 1. The custom has been to issue such orders around February when the information concerning the competitive need limits has been collected and analyzed.²⁴¹ In moving the effective date to July 1, the House Ways and Means Committee warned the President in its committee report to H.R. 6023 to try to issue all executive orders prior to April 1 to give traders time to adapt to any changes.²⁴² As the court in *Teters* noted, the government does not want to give too much notice of the GSP changes so that "importers might be able to thwart congressional intent by extraordinarily increasing affected imports during the notice period."²⁴³ Perhaps the optimal balance is for Congress to make it statutorily mandatory for the President to issue all executive orders designating or removing eligible articles and countries from the GSP no later than June 1— one month before they are to take effect.

Upon similar facts to *Teters*, the court in *Godchaux-Henderson Suger Co. v. United States*²⁴⁴ pointed out that an importer may be able to alleviate problems of untimely filing for liquidation if it can

status on March 1, 1978 pursuant to an executive order removing Hong Kong's GSP eligibility for such goods dated February 25, 1978 and released February 28, 1978. *Id.* at 961.

²³⁸ Plaintiff's customs house brokers were aware of the order on February 28, 1978 and, therefore, could have filed the necessary entries before March 1. *Id.*

²³⁹ The court never indicated what "confusion" prohibited plaintiff from filing the requisite papers. *Id.*

²⁴⁰ See *supra* notes 197-98 and accompanying text. This change should give the President ample time to collect and analyze information from the product reviews and make his competitive-need and graduation evaluations long before the July 1 effective date.

²⁴¹ *Id.*

²⁴² Report 1090, *supra* note 102, at 22.

²⁴³ *Teters*, 586 F.Supp. at 963.

²⁴⁴ 85 Cust. Ct. 68 (1980).

establish "a clerical error, mistake of fact, or other inadvertence . . . in an entry, liquidation, or other customs transaction . . ." ²⁴⁵ In *Godchaux*, the President terminated duty-free status to Nicaraguan sugar, but not before the plaintiff unloaded its goods without filing a consumption entry. After the effective date of the removal, the plaintiff first learned that when it unloaded the goods it could have received duty-free entry.²⁴⁶ The *Godchaux* court reasoned that the plaintiff's mistake or inadvertence was not in the entry, but in failing to file any entry before Nicaraguan sugar was effectively removed from GSP eligibility. The Court, in dicta, suggested that had the plaintiff mistakenly or inadvertently filed an improper dutiable entry before the effective date of the sugar removal it could have reliquidated the merchandise with duty-free status. Presumably the new July 1 effective date for Presidential decisions will make this mistake exception obsolete so long as the President heeds the House's request to issue all orders before April 1.

There are many cases in which traders have challenged Customs to get their merchandise reclassified to make such goods eligible for GSP treatment.²⁴⁷ Practitioners should be aware of this judicial option for gaining duty-free treatment, yet they must also be cognizant that the presumption in such cases is in favor of the correctness of the Customs classification.²⁴⁸ The burden is upon the importer to prove that the classification is incorrect. The old rule was a dual-burden of proof by which the importer had to show both that the government's classification was incorrect and that the importer's alternative classification was correct. According to the Court in *Harwood Manufacturing Co. v. United States*, however, an importer no longer has to prove the correctness of its alternative classification.²⁴⁹ The court, in its own discretion, may remand

²⁴⁵ *Id.* at 69.

²⁴⁶ Plaintiff learned it could have received duty-free treatment of the Nicaraguan sugar on March 3, 1976. He received shipment of the goods on February 24, 1976, and the order removing it from GSP treatment took effect on February 29, 1976. *Id.* at 68.

²⁴⁷ See, e.g., *Leather's Best, Inc. v. United States*, 555 F.Supp. 1064 (Ct. Int'l Trade 1982), *aff'd*, 708 F.2d 715 (Fed. Cir. 1983); *Rohm & Haas Co. v. United States*, 568 F.Supp. 751 (Ct. Int'l Trade 1983), *aff'd*, 727 F.2d 1095 (Fed. Cir. 1984); *Oak Laminates D/O Oak Materials Group v. United States*, No. 84-105, slip op. (Ct. Int'l Trade 1985). For a discussion of the Court of International Trade's decision in *Leathers*, 555 F.Supp. 1064, see *Importer Wins Duty-Free Treatment Under GSP for Embossed Leather*, 7 U.S. IMPORT WEEKLY 83-84 (1982).

²⁴⁸ See *Harwood Mfg. Co. v. United States*, No. 84-57, slip op. (Ct. Int'l Trade May 30, 1984), *reh'g and amendment of judg. granted*, No. 84-104, slip op. (Ct. Int'l Trade Sept. 19, 1984).

²⁴⁹ *Harwood*, No. 84-57, at 5.

the case for reclassification by the Customs Service, decide what is the proper classification itself, or schedule a retrial for the parties to introduce additional evidence.²⁵⁰

As the court in *Howard Rapaport v. United States*²⁵¹ points out, importers may seek reclassification only upon liquidation after timely filing of the proper protest.²⁵² The court noted that failing to file timely liquidation protests may be overcome if there is a clerical error, mistake of fact, or other inadvertence in the entry, liquidation, or other Customs transaction. The clerical error complained of by the plaintiff in *Howard* was found not to be sufficient to excuse late filing.²⁵³

D. *The Substantial Transformation Requirement*

A final area of the US-GSP which has generated much judicial and academic controversy is the rules of origin requirements.²⁵⁴ As previously detailed, the thirty-five percent requirement can be met by materials which are wholly grown, produced, or manufactured by the BDC, by imported materials substantially transformed in the BDC, or by a combination of the two.²⁵⁵ The court in *Torrington Co. v. United States*²⁵⁶ judicially acknowledged a Customs requirement that imported material go through a two-stage process of substantial transformation. Customs required that materials imported into the BDC for use in GSP articles be substantially transformed in the BDC prior to or during processing into "material produced in the BDC" and then that this "material produced in the BDC" be substantially transformed into the final article imported into the United States.²⁵⁷

The plaintiff in *Torrington*, a Portuguese manufacturer of indus-

²⁵⁰ *Id.* at 6.

²⁵¹ 4 Ct. Int'l Trade 215 (1982).

²⁵² The court in *Audiovox Corp. v. United States*, No. 84-112, slip op. (Ct. Int'l Trade Oct. 10, 1984) made some indications of what is not a "proper" protest. The court held that protests of liquidations calling for reliquidation of goods at 5.5% ad valorem or 6% ad valorem did not constitute intent to request GSP treatment.

²⁵³ *Howard*, 4 Ct. Int'l Trade at 216. The court refused to find the liquidation notice void even though the date of entry was indicated as "07-22-08" rather than "07-22-80" and the company of record was indicated as "In-Novo Co." rather than "In-Novo Engineering and Development Company." *Id.*

²⁵⁴ See generally Cutler, *The United States Generalized System of Preferences: The Problem of Substantial Transformation*, 5 N.C.J. INT'L & COM. REG. 394 (1980).

²⁵⁵ See *supra* notes 57-60 and accompanying text.

²⁵⁶ No. 84-101, slip op. (Ct. Int'l Trade Aug. 24, 1984).

²⁵⁷ *Id.* at 6-7.

trial sewing machine needles, sought to have included in the thirty-five percent evaluation made by Customs the cost of wire imported into Portugal from a non-BDC and used in the production of needles. The *Torrington* court reasoned that the administrative agencies have consistently supported and employed the two-process requirement and that such a restriction is not contrary to the GSP statute and its purposes.²⁵⁸ In ruling that there must be a dual substantial transformation of imported material, the court found that the wire in the *Torrington* case had been through the required two-stage process.

*Texas Instruments, Inc. v. United States*²⁵⁹ is the leading case concerning substantial transformation.²⁶⁰ In *Texas Instruments*, the Court of Customs and Patent Appeals overruled the decision of the Court of International Trade that mere assembly of fabricated components could not, within the meaning of GSP as a matter of law, create a material to be used in producing an article. The Court of Customs and Patent Appeals, in reversing the decision of the lower court, held that the "assembly of encapsulated integrated circuits in Taiwan from materials imported from the United States constituted a substantial transformation of such items into new and different articles of commerce such that the encapsulated integrated circuits could be considered materials produced in Taiwan for purposes of the 35% value-added requirement under generalized system of preferences."²⁶¹ In support of its position, the Court of Customs and Patent Appeals concluded that the purposes of the GSP were promoted in that training employees with the technical

²⁵⁸ *Id.* at 7. The court stated:

Furthermore, absent such a dual requirement, the GSP's goal of industrialization, diversification, and economic progression for underdeveloped nations could be frustrated. For example, a BDC could import eligible items, merely decorate or assemble these items and thereby satisfy the 35 percent value-added requirement since these direct costs of processing operations would be includable in the calculation. In this manner, BDC's could become mere conduits for the merchandise of developed countries. This is not the type of economic development envisioned by the GSP programs.

Id. at 7-8.

²⁵⁹ 520 F.Supp. 1216 (Ct. Int'l Trade 1981), *rev'd* 681 F.2d 778 (C.C.P.A. 1982). For a synopsis of the Court of Customs and Patent Appeals' decision see *Assembly of Fabricated Components is 'Substantial Transformation'*, *CCPA Rules*, 7 U.S. IMPORT WEEKLY 288-89 (1982).

²⁶⁰ Several cases involving substantial transformation issues have cited *Texas Instruments*. *E.g.*, *Belcrest Linens v. United States*, 573 F.Supp. 1149 (Ct. Int'l Trade 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984); *Data General Corp. v. United States*, 4 Ct. Int'l Trade 1982 (1982); *Sigma Instruments, Inc. v. United States*, 565 F.Supp. 1036 (Ct. Int'l Trade 1983).

²⁶¹ *Texas Instruments*, 681 F.2d at 778.

skills to convert materials into articles laid the foundation for the acquisition of even better skills and increased self-sufficiency.

Congress could have further promoted the purposes of the GSP and aided United States industries by adopting in the Renewal Act the American Association of Exporters and Importers' (AAEI's) proposed definition of the thirty-five percent local qualifier.²⁶² The main goal of the AAEI during the renewal process was to have all United States inputs counted in the thirty-five percent qualifier to promote voluntary use of United States materials and services by BDCs.²⁶³ Congress should adopt this new definition to reinforce the holding in *Texas Instruments*. Until Congress accepts this new definition, however, domestic interests in the United States should be aware of the dual substantial transformation requirement as judicially recognized in *Torrington*.

IV. IMPACT OF RENEWAL ACT UPON GATT

Providing preferential treatment to developing countries' imports into the markets of developed countries violates the first article of the GATT.²⁶⁴ Article I of the GATT contains the MFN provisions which require that trade policy measures be non-discriminatory for all contracting parties.²⁶⁵ The legal basis for allowing discriminatory treatment in favor of developing countries came about in June 1971 with the approval of a ten-year waiver by the contracting parties to the MFN provisions in Article I.²⁶⁶ By the terms of the waiver, developed countries were allowed to ac-

²⁶² See *February House Hearings*, *supra* note 103, at 26 (statement of W. Henry Parsons, Corporate Manager of Customs, General Electric Co., and Chairman, Generalized System of Preferences Committee, American Association of Exporters and Importers, accompanied by Steven Kessner, Counsel).

²⁶³ *Id.* at 32. The AAEI hoped to have United States inputs such as materials, fabricated parts, engineering, design, or research (regardless if sold or provided free to the BDC manufacturer) counted in the 35% qualifier to promote voluntary use of United States materials and services. *Id.*

²⁶⁴ See DeBouter, *Tariff Preferences Revisited*, 11 J. INT'L L. & ECON. 353 (1976), arguing that not only Article I but also Article XXVIII is violated. Article XXVIII is commonly known as the "reciprocity rule" and provides that negotiations on tariff reductions and other import/export charges are to be reciprocal. *Id.* at 358.

²⁶⁵ The MFN principle demands that "any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, Art. 1.

²⁶⁶ The text of the waiver is set forth in GATT Doc. L/3545 (1971), *reprinted in* GATT, 18th Supp. B.I.S.D. 24 (1972).

cord more favorable tariff treatment to products imported from developing countries than to similar articles imported from developed countries.²⁶⁷ The "Enabling Clause,"²⁶⁸ which was created by negotiations during the Tokyo Round to permit preferential treatment to developing countries, allows the extension of the GSP programs past 1981 without further GATT waiver.²⁶⁹

The preferential treatment being accorded developing countries was originally intended to be non-discriminatory and non-reciprocal.²⁷⁰ The United States accepted these conditions when embarking upon its own GSP program. New provisions in the Renewal Act will greatly affect the United States position with regard to both discrimination and reciprocity.

A. *Discrimination and the Least Developed Developing Countries (LDDCs)*

Critics contended that there was de facto discrimination against LDDCs under the previous US-GSP although the discrimination was not evident on the face of the statute.²⁷¹ They primarily pointed to an unequal distribution of benefits in that seven major developing countries received over two-thirds of the GSP advantages.²⁷² They also criticized the exclusion of certain types of articles from GSP treatment of particular importance to LDDCs.²⁷³

²⁶⁷ *Id.* For a discussion of the negotiations surrounding the development of the waiver see generally Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341 (1974).

²⁶⁸ The full text of the Enabling Clause (known properly as "Differential and more Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries") is in GATT Doc. MTN/FR/W/20/Rev. 2 (1979). For a detailed discussion of the GSP and Enabling Clause as developed during the Tokyo Round negotiations, see Graham, *supra* note 19, at 170-71; Comment, *Preferential Trade Treatment for Less Developed Countries: Implications of the Tokyo Round*, 20 HARV. INT'L L.J. 540 (1979).

²⁶⁹ The Enabling Clause permits developed countries to "accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." This provision specifically applies to the GSP as noted in paragraph 2(a). OECD, *supra* note 1, at 15.

²⁷⁰ See *supra* notes 5-6 and accompanying text.

²⁷¹ A summation of the structural bias in the US-GSP can be found in 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) (concluding that a super GSP is required which favors the LDDCs). *But see* T. MURRAY, *supra* note 27, at 51-52 suggesting that discrimination in favor of the poorer developing countries would violate the non-discriminatory principle of the GSP but acknowledging that LDDCs must be further aided.

²⁷² See *supra* note 85.

²⁷³ See Lahoud, *supra* note 271, at 7.

Even though the GSP was originally conceived to cover manufactured and semi-manufactured products,²⁷⁴ the poorer developing countries often cannot garner any GSP benefit due to dependence on less sophisticated, labor-intensive products.²⁷⁵ A final area of discrimination against LDDCs was the application of competitive-need limits in that often specialized products excluded for exceeding these limits constituted the LDDCs' only benefit from GSP participation.²⁷⁶

The Renewal Act attempts to alleviate some of this de facto discrimination. The provisions for increasing the trend toward graduating countries and products²⁷⁷ are designed to equalize distribution of GSP benefits among all participating countries. Statutorily providing for increased discretionary graduation, however, merely shifts the burden to the President to ensure that such graduation takes place. The House measures for levels of mandatory graduation should have been adopted.²⁷⁸ Although not politically popular,²⁷⁹ these proposed provisions would have guaranteed across-the-board graduations. As the Renewal Act is now, countries which should be graduated from the program can put political pressure on the President not to exercise his discretionary authority. The \$8,500 mandatory cut-off for graduation is a significant step forward, but falls short of having any immediate impact.²⁸⁰

Graduation as an overall means of creating even distribution of GSP benefits is hampered by the ITC's finding that developed and advanced developing countries benefit most from product exclusions.²⁸¹ The ITC found that excluded products tend to be sophis-

²⁷⁴ See *supra* note 4.

²⁷⁵ The labor intensive products being excluded were primarily textile and apparel articles, leather goods, and footwear. Lahoud, *supra* note 271, at 7 n.33. Also of importance to LDDCs, however, are agricultural items. Agricultural products, unfortunately, received limited GSP coverage. *Id.* at 9 n.50; see also *supra* note 203 and accompanying text.

²⁷⁶ Lahoud, *supra* note 271, at 17-18.

²⁷⁷ See *supra* notes 171-87 and accompanying text.

²⁷⁸ See *supra* notes 171-76 and accompanying text.

²⁷⁹ The rationale expressed by President Carter in his Five Year Report is still applicable. See *supra* notes 86-88 and accompanying text. Supporters of the Senate bill offered by the Reagan administration feared compulsory graduation would alienate those successful developing countries forced from the program. The Reagan administration also wanted discretionary authority for graduations as an additional bargaining chip for enforcing the new reciprocity provisions explained *supra* notes 150-57 and accompanying text.

²⁸⁰ See *supra* notes 173-87 and accompanying text. The House noted that to date no BDC has currently attained a level of \$9,000 per capita GNP. Few BDCs, if any, will be affected by the new \$8,500 mandatory phase-out provision.

²⁸¹ ITC Report 1535, *supra* note 84, at iii.

ticated manufactured products, and that the more developed countries are better able to fill the market void thus created.²⁸² Consequently, it is necessary to re-evaluate the types of products being automatically excluded from GSP eligibility.

The Renewal Act further increases the list of automatic exclusions²⁸³ and thereby increases the discrimination against LDDCs. United States domestic producers of leather products, for example, argued during the congressional hearings of the renewed US-GSP that leather goods should be excluded due to the effect on American employment through the high level of labor required.²⁸⁴ Yet labor-intensive products such as these have the greatest potential for allowing LDDCs to create the necessary infrastructure in order to progress into more sophisticated manufacturing. LDDCs should have GSP treatment extended, therefore, to include textiles, footwear, handicrafts (including leather goods), and more agricultural products.

The Renewal Act greatly reduces the discrimination toward LDDCs by automatically waiving application of competitive-need limits.²⁸⁵ This waiver will allow some of the poorer developing countries to focus their industrial efforts on producing a specialized product eligible for GSP treatment without fear that success in its production will result in loss of GSP status. There is, nevertheless, potential harm in becoming too dependent upon a particular commodity that may lose its marketability. The United States should provide advisors to the LDDCs, therefore, to instruct them on proper ways of reinvesting capital gained from specialized GSP articles into more diversified product sectors.

B. *Reciprocity and Market Access*

The new provisions in the Renewal Act which link the Presi-

²⁸² *Id.*

²⁸³ See *supra* notes 163-65 and accompanying text. Since these articles were already being excluded administratively, providing for their statutory exclusion does not add to the LDDC's problems. Yet it must be realized that administrative exclusions are much easier to overcome than statutory prohibitions. This is why, of course, some members of Congress were pressured by domestic United States interests to provide for statutory exclusion. See also *supra* notes 221-23 and accompanying text discussing this precise controversy created in *Luggage and Leather Goods Manufacturers*.

²⁸⁴ See, e.g., *January Senate Hearings*, *supra* note 98, at 102 (statement on behalf of the Leather Products Coalition). The Leather Products Coalition calls for statutory exclusion because its products are highly labor intensive and thus very vulnerable to import competition from low-wage developing countries. *Id.*

²⁸⁵ See *supra* notes 190-92, and accompanying text.

dent's discretionary authority in applying competitive-need limits and making BDC designations to a developing country's degree of market access²⁸⁶ provide great potential for violating the legal requirement of non-reciprocity. Although legitimate support for renewing the program is based on the benefit to the United States,²⁸⁷ the GSP should not be used as a weapon for forcing developing countries to make trade concessions to the United States.

The executive branch, unfortunately, has made it quite clear that it plans to manipulate BDCs by conditioning GSP eligibility upon broader access to such countries' markets for United States interests.²⁸⁸ Using the GSP benefits to force trade concessions from developing countries is precisely the type of political behavior forbidden by the GATT because it hampers the free-flow of international trade. Speculation as to how much the President might rely upon this provision in regulating the US-GSP is difficult.

If the United States should begin to place too much pressure upon developing countries by exercising this illegal tactic, BDCs should seriously consider collectively withdrawing from the program and demanding even more MFN tariff liberalization.²⁸⁹ Presently, developing countries often view general MFN tariff reductions as not in their best interests. They see such cuts as eroding the existing preference margin which makes their exports competitive on the world market.²⁹⁰ As renewed, however, the US-GSP is limited in duration which causes instability in future projection,

²⁸⁶ See *supra* notes 150-57 and accompanying text.

²⁸⁷ The Finance Committee noted that there are many benefits to the United States from operation of the GSP program. It found that "[a]pproximately 40 percent of U.S. exports go to the 140 developing countries that are GSP beneficiaries. U.S. exports to these countries increased at an average annual rate of 12.5% since 1976, compared to 9.6 percent growth in exports to developed countries." *Report 485, supra* note 85, at 9.

²⁸⁸ *August Senate Hearings, supra* note 98, at 8 (statement of Ambassador William E. Brock, United States Trade Representative). Ambassador Brock specifically stated that "[t]he Administration proposes that the statute allow for the liberalization of competitive need limits on various products as a means of further inducing beneficiaries to provide significant access to their markets It is clear the United States has much to gain from a GSP program restructured to help induce beneficiaries to liberalize their markets in a manner commensurate with their level of development." *Id.*

²⁸⁹ The ITC estimated in 1980 that the average tariff level on items receiving preferential treatment was approximately 9%. The ITC further stressed, however, that the recently concluded multilateral trade negotiations would reduce the average tariff to 4.5% from 1980 to 1987. *GAO, supra* note 217, at 65. With the margin of preference slowly eroding anyway, BDCs might push hard for their elimination entirely and seek other non-tariff means of giving their products preferential treatment in the markets of the developed countries.

²⁹⁰ See W. CLINE, N. KAWANABE, T. KRONSSJO, AND T. WILLIAMS, *TRADE NEGOTIATIONS IN THE TOKYO ROUND: A QUANTITATIVE ASSESSMENT* 220-24 (1978).

has a decreased product scope, and still penalizes eligible articles, which successfully penetrate the United States market, through competitive-need limits. Conversely, overall MFN tariff cuts are advantageous because they are perpetual and cover all products.²⁹¹ Should the United States abuse the new provision calling for BDCs to open their markets before GSP status is extended, the BDCs might discover that withdrawal from the program is the optimal solution. To compensate for withdrawal, the developing countries could demand reductions in non-tariff barriers which hamper import of their products into the developed countries' markets.

V. CONCLUSION

The US-GSP may not have broad economic consequence, but it plays a symbolically strategic role. Renewing the program until January 4, 1993 signifies the United States' desire to continue bridging the broad economic gap between the developed and developing countries by using trade rather than aid. Most of the revisions and additions to the US-GSP during this renewal process reflect a concentrated effort to enhance the equitable and efficient distribution of the benefits derived from granting duty-free treatment to developing countries' imports into the United States.

Traders utilizing the US-GSP, however, must recognize that the program is based on a dynamic process. Renewal of the program, even with revisions, does not guarantee that it will function smoothly and fairly in the future. Practitioners should be aware, therefore, of the judicial system as a means of effectively challenging shortcomings in the US-GSP's operation. The shortcomings which might be questioned range from improper presidential decisions involving GSP treatment to incorrect classifications of an importer's goods by Customs. Although the judicial option should not be abused, the judiciary as originally designed by the drafters of the constitution was intended to provide a check and balance to the Executive.

Congress should also be constantly aware of the evolving nature of the US-GSP and should strive to modify the system's design in order to promote effective use of the judicial option by practitioners. For example, Congress should provide a statutory standard and scope of review, for the courts, of the President's factual determi-

²⁹¹ For a detailed statistical analysis advocating MFN tariff cuts over existing GSP schemes see Baldwin and Murray, *MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP*, 87 *ECON. J.* 30-46 (March 1977).

nations regarding designation and removal of eligible articles for GSP treatment.

The US-GSP as renewed and revised can remain consistent with the GATT principles of non-discrimination and non-reciprocity. Though the renewed US-GSP allows discrimination among countries by waiving the competitive-need limits for LDDCs, such discrimination is necessary and commendable. Congress should even make further concessions in favor of the poorer developing countries by removing statutory exclusions of articles which potentially can benefit the LDDCs most. The President, furthermore, should graduate more products and countries which do not need GSP treatment, and actively apply the competitive-need limitations.

In applying the competitive-need limits and in designating countries, however, the President should refrain from emphasizing the requirement that developing countries provide greater access to their markets. This demand for reciprocal trade concessions clearly violates the GATT ideal of non-reciprocity. If the US-GSP is used as a weapon to force trade concessions, the developing countries should consider collectively withdrawing from the program. Perpetual, across-the-board tariff reductions and greater relaxation of non-tariff barriers may be the optimal alternative to an uncertain, restrictive US-GSP.

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