STUDENT NOTE

GSP AND DEVELOPMENT: INCREASING THE EFFECTIVENESS OF NONRECIPROCAL PREFERENCES

Matthew G. Snyder*

INTRODUCTION........................................................................................................821
I. NONRECIPROCAL PREFERENCES AND THE WTO FRAMEWORK......824
II. U.S. NONRECIPROCAL PREFERENCE SCHEME.........................827
III. EU NONRECIPROCAL PREFERENCE SCHEME ..............................830
IV. COMPARISON OF EU AND U.S. NONRECIPROCAL
   PREFERENCE SCHEMES .................................................................835
   A. Stability of Preference Schemes...............................................836
   B. Conditions on Country Eligibility .........................................840
   C. Product Coverage.................................................................843
   D. Rules of Origin....................................................................849
CONCLUSION .......................................................................................................859

INTRODUCTION

The intellectual foundations of nonreciprocal preferences were first laid out in the 1960s, as several scholars noted developing countries’ increasing reliance on highly volatile, low-value-added exports like agricultural and mineral commodities.1 The Generalized System of Preferences (GSP), which became the mechanism for implementing nonreciprocal preferential market access, was developed in this context.2 GSP was envisioned as part of a larger development strategy that included import-substitution policies, infant industry protection, and preferential access to developed countries’ markets.3 As GSP granted preferential access over World Trade Organization (WTO) most favored nation (MFN) rates, development economists anticipated that it would provide developing countries’ economies with the

---

* J.D., University of Michigan Law School; B.A. Biology, Greenville College. I would like to thank the editors and staff of the Michigan Journal of International Law for their hard work and editorial contributions. In particular, I would like to thank my Note Editor, Sarah Baumgartner, for her patience and feedback throughout the writing of this Note. Thanks as well to Professor Simon Lester and Ms. Michiko Hayashi for their insightful comments on previous drafts.

2. Id. at 192.
3. Id.
competitive edge they needed to diversify and grow. Dr. Supachai Panitchpakdi, current Secretary-General of the U.N. Conference on Trade and Development and former Director-General of the WTO, summarized the purpose behind GSP as follows:

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

At present, thirteen countries or groups of countries have established GSP schemes and, despite criticism over the discretionary and conditional nature of some of these countries’ schemes, commentators acknowledge that nonreciprocal preferences have had a positive effect on development and economic growth in beneficiary countries. Despite their positive impact, however, nonreciprocal preference programs have met resistance in some countries. In the United States, for instance, continuation of U.S. GSP was

---

5. Id.
6. According to the U.N. Conference on Trade and Development (UNCTAD), a U.N. body tasked with monitoring trade and development issues, the following countries have implemented GSP schemes: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union (EU), Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, and the United States. About GSP, UNCTAD.org, http://wwwunctadorg/Templates/Pageasp?infItemID=2309&lang=1 (last visited June 7, 2012).
7. See Özden & Reinhardt, supra note 1, at 192–93.
recently the subject of a prolonged and contentious Congressional debate. Moreover, given the widespread effects of the global economic recession, policy makers may face increasing pressure to evaluate whether the potential benefits of nonreciprocal preference programs justify their costs.

Such an evaluation is advisable. Its findings could streamline nonreciprocal preference programs and improve how they function. Removing eligibility for imports with few realized benefits would increase tariff revenue and free up economic resources that could be used to improve market access for other, more important imports. Oil products, for example, result in relatively few developmental benefits, but they consistently account for a significant percentage of imports under some countries’ nonreciprocal preference programs.9


11. As a result of lost tariff revenue, U.S. GSP was estimated to cost U.S. taxpayers around $992 million between 2007 and 2009. Lost tariff revenue from AGOA is estimated to total around $180 million from 2007 to 2016. U.S. Gov’t Accountability Office [GAO], GAO-08-443, U.S. Trade Benefits Provide Important Benefits, But a More Integrated Approach Would Better Ensure Programs Meet Shared Goals 13–14 (2008). Some members of the U.S. Congress have also expressed legitimate concerns that continued nonreciprocal preferential market access may create a disincentive for beneficiary countries to negotiate reciprocal free trade agreements with the United States. Id. at 44. Other concerns regarding the negative effects of nonreciprocal preference programs, however, may be exaggerated. Further liberalization of nonreciprocal preferences, for instance, will not necessarily result in a significant reduction in domestic employment. In fact, both national and local leaders in the United States have argued that U.S. nonreciprocal preference programs can benefit U.S. businesses and consumers. See, e.g., id. at 9–12 (listing consumer savings from duty-free market access); Alex Penelas, Trade with Africa: A Great Opportunity for Miami-Dade County, 10 U. Miami Int’l & Comp. L. Rev. (Special Issue) 1, 2 (2001–2002) (stating, as mayor, that Florida’s Miami-Dade County stands to benefit from AGOA). AGOA, in particular, is estimated to have created around three hundred thousand jobs since its inception. Whitaker, supra note 8. Moreover, nonreciprocal preference programs often have a relatively minor effect on a preference-granting country’s economy, as they generally represent only a small percentage of the country’s total trade. In 2010, for instance, only 4% of U.S. imports entered under nonreciprocal preference programs. Vivian C. Jones et al., Cong. Research Serv., R41429, Trade Preferences: Economic Issues and Policy Options 10 (2011).

12. It should be noted, however, that beneficiary countries’ national policies, infrastructure, and capacity might also impede utilization of preferences. Although this Note does not address the extent to which these concerns may play a role, for more information see Sub-Saharan Africa: Effects of Infrastructure Conditions on Export Competitiveness, Third Annual Report, USITC Pub. 4071, Inv. No. 332–477 (Apr. 2009), available at http://www.usitc.gov/publications/332/pub4071.pdf; Collier & Venables, supra note 8, at 1329.

programs. On the other hand, expanding market access for agricultural products and processed foods could result in significant benefits for beneficiary countries. While domestic political resistance may prevent implementation of all potential reforms, at least some reforms will likely be feasible.

In light of these issues, this Note will analyze how nonreciprocal preference schemes can be implemented more effectively. When applicable, it will also evaluate the feasibility of potential reforms. Part I will provide background on how nonreciprocal preferences became incorporated into the WTO framework and will outline the requirements that a country must meet when offering nonreciprocal preferences. Part II will then provide a brief history and examples of how one country—the United States—has chosen to implement its nonreciprocal preference scheme. Next, Part III will engage in a similar analysis regarding the nonreciprocal preference scheme of another group of countries—the European Union (EU). Using Parts II and III as case studies, Part IV will then propose recommendations regarding the design of a more effective nonreciprocal preference scheme. Part IV will also evaluate the feasibility of such reforms in light of certain political and economic realities and, where necessary, suggest workable compromises. Lastly, this Note will conclude by summarizing feasible modifications that would significantly improve the functionality of nonreciprocal preference schemes.

I. NONRECIPROCAL PREFERENCES AND THE WTO FRAMEWORK

After decades of debate and negotiation, the WTO rules governing nonreciprocal preferences have evolved into a permissible framework that allows a great deal of variation. The modern international trade system is

---


16. While this Note limits its recommendations to market access reforms, other types of assistance, such as capacity-building support, technical assistance, and exchange of information, should not be ignored. Many preference-granting countries, for instance, supplement preferential market access with other assistance, including debt relief, technical assistance, and capacity-building support. See Dries Lesage & Bart Kerremans, The Political Dynamics of U.S. and EU Trade Initiatives Towards Least Developed Countries, in EUROP息 TRADE POLICIES AND DEVELOPMENT: ‘EVERYTHING BUT ARMS’ UNRavelled 74, 75–76 (Gerrit Faber & Jan Orbie eds., 2007); see also Danielle Langton, Cong. Research Serv., RL31772, U.S. TRADE AND INVESTMENT RELATIONSHIP WITH SUB-SAHARAN AFRICA: THE AFRICAN GROWTH AND OPPORTUNITY ACT AND BEYOND 13–14, 17–21 (2008); GAO, supra note 11, at 55. For information on how certain other types of assistance have been implemented, see Langton, supra, at 13–14, 17–21; GAO, supra note 11, at 55.
based on reciprocity, and the General Agreement on Tariffs and Trade (GATT), the multilateral international trade agreement that preceded the WTO, initially contained no provision authorizing special and differential treatment.17 However, increasing interest in development economics and the emergence of a number of new, vulnerable states following decolonialism led GATT contracting parties to soften some strict provisions of the GATT, at least in the context of developing countries.18 GATT Article XVIII, which outlines permitted government assistance to nascent industries, was rewritten in 1955 to allow developing countries to enact measures to protect their infant industries.19 In addition, revisions to GATT Article XVIII allowed developing countries to more easily impose trade restrictions to remedy balance-of-payments issues.20 GATT contracting parties also incorporated certain nonbinding provisions into the GATT for the benefit of developing countries.21 For example, Article XXIIIbis, which sets out the framework for future GATT negotiations, states that negotiations should take into account “the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development.”22

In 1971, GATT contracting parties moved a step further when they waived obligations resulting from the GATT Article I(1) MFN provision “for a period of [ten] years.”23 In effect, this created a small exception in the traditional reciprocal framework of the GATT: developed GATT contracting parties could single out developing GATT contracting parties’ products for nonreciprocal preferential tariff treatment above and beyond that which was granted to MFN trading partners.24 Contracting parties to the GATT more clearly defined the framework for this exception during the Tokyo Round negotiations in 1979.25 The resulting agreement, the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the Enabling Clause),26 solidified nonreciprocal

21. Id. (discussing the addition of Part IV of the GATT).
22. Id. (citing GATT art. XXVIIIbis(3)(b)).
23. Lenaghan, supra note 17, at 118.
25. Lenaghan, supra note 17, at 118.
preferential treatment within the GATT and provided a permanent legal basis for nonreciprocal preferences.\textsuperscript{27} The Enabling Clause also expanded the scope of the 1971 waiver by permitting preferential treatment for nontariff measures.\textsuperscript{28} Lastly, by permitting selective treatment based on a beneficiary’s level of economic development, the Enabling Clause made it possible for preference-granting countries to grant different levels of preference to developing countries with different levels of economic development.\textsuperscript{29} Thus, GATT contracting parties could now phase out nonreciprocal preferences as beneficiary countries reached a preset economic-development threshold.\textsuperscript{30} Despite the 1994 Uruguay Round’s shift back toward reciprocity with the establishment of the WTO,\textsuperscript{31} nonreciprocal preferences remain entrenched in the current international trade system.\textsuperscript{32}

\textsuperscript{27} Lenaghan, \textit{supra} note 17, at 118.
\textsuperscript{28} Moss, \textit{supra} note 24, at 670.
\textsuperscript{29} Id.
\textsuperscript{30} Most nonreciprocal preference programs base eligibility on World Bank high-income economy designations or U.N. least developed country (LDC) designations. See Lars Nilsson, \textit{Comparative Effects of EU and US Trade Policies on Developing Country Exports} 5–8 (2005), available at http://trade.ec.europa.eu/doclib/html/129998.htm. In most preference-granting countries’ schemes, countries that the World Bank designates as high-income economies are generally ineligible to receive nonreciprocal preferences. The high-income economy threshold, which is determined through gross national income per capita, is currently set at $12,476. \textit{How We Classify Countries}, \textit{World Bank}, http://data.worldbank.org/about/country-classifications (last visited June 7, 2012). Unlike the World Bank high-income economy designations, U.N. LDC designations are based on a combination of economic and noneconomic factors. In addition to having a gross national income of nine hundred dollars or less, a country must also meet economic vulnerability and human resource weakness criteria. U.N. Office of the High Representative for Least Developed Countries, Landlocked Developing Countries & Small Island Developing States, \textit{The Criteria for the Designation of the LDCs}, \textit{United Nations}, http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm (last visited June 7, 2012). External benchmarks are necessary because the Enabling Clause, as well as the World Trade Organization (WTO) framework in general, provides no objective criteria for determining whether a country is developed, and thus ineligible for special treatment, or developing, and thus eligible for special treatment. Instead, WTO members may self-designate, though other WTO members may challenge a self-designated “developing” country’s use of provisions available only to developing countries. Panitchpakdi, \textit{supra} note 4, at 774. In practice, however, WTO members may be reluctant to challenge other members’ self-designations. See Alexander Keck & Patrick Low, \textit{Special and Differential Treatment in the WTO: Why, When, and How?}, in \textit{Economic Development and Multilateral Trade Cooperation}, \textit{supra} note 1, at 147, 159 (mentioning that Mexico and South Korea continue to self-designate as developing countries despite becoming members of the OECD).

\textsuperscript{31} The 1994 Uruguay Round agreements focused on integrating developing countries into the international trade system rather than maintaining static differentiation between developed and developing countries as had been done under the GATT. Thus, developing countries’ indefinite exemptions from certain obligations shifted for the most part to definite exemptions that allowed for gradual rather than immediate implementation. Garcia, \textit{supra} note 18, at 296–97; Moïsé, \textit{supra} note 18, at 3–4. LDCs, however, remain exempt from implementation time frames. Panitchpakdi, \textit{supra} note 4, at 774.

\textsuperscript{32} The Enabling Clause was subsequently incorporated into the WTO agreements under paragraph 1(b)(iv) of the GATT 1994. Moss, \textit{supra} note 24, at 670 n.19.
Preference-granting countries, however, still enjoy significant discretion over their nonreciprocal preferential schemes. Although WTO members are allowed to grant nonreciprocal preferences, they are by no means obligated to do so.\textsuperscript{33} In addition, while the Enabling Clause provides a legal basis for non-reciprocal preferences, it also gives preference-granting countries significant policy space in which to implement their own programs.\textsuperscript{34} Certain limitations on eligibility are prohibited,\textsuperscript{35} but preference-granting countries are otherwise given significant discretion regarding a program’s conditionality, the scope of its product coverage, and its rules for determining what goods qualify as “originating” from the beneficiary country.\textsuperscript{36} Thus, as will be seen in this Note, the nature and effectiveness of nonreciprocal preferences can differ greatly from one preference-granting country to another.

II. U.S. Nonreciprocal Preference Scheme

Many aspects of the U.S. nonreciprocal preference scheme\textsuperscript{37} reflect the discretionary nature of nonreciprocal preferences. While eligibility for U.S. GSP is based on economic criteria, which are measured by World Bank high-income economy designations,\textsuperscript{38} the United States also uses additional

\begin{itemize}
\item \textsuperscript{33} Garcia, supra note 18, at 311.
\item \textsuperscript{35} For instance, discriminatory treatment between similarly placed beneficiaries and creation of a closed list of beneficiaries is not permitted. Moss, supra note 24, at 691–93. As will be discussed in note 125, WTO members’ ability to selectively target nonreciprocal preference program beneficiaries has become subject to increased challenge in recent years. While WTO members have agreed to a specific special and differential treatment exception for WTO members who are LDCs, some have questioned the legality of other targeted preference programs in light of a recent WTO panel decision, \textit{EC—Tariff Preferences}. See WTO General Council, \textit{Preferential Tariff Treatment for Least-Developed Countries: Decision on Waiver}, WT/L/304 (June 17, 1999), available at http://www.wto.org/english/docs_e/legal_e/waiver1999_e.pdf (outlining the LDC special and differential treatment exception); Panitchpakdi, supra note 4, at 774; Lorand Bartels, \textit{The WTO Legality of the EU’s GSP+ Arrangement}, 10 \textit{J. Int’l Econ. L.} 869, 869–70 (2007).
\item \textsuperscript{36} Özden & Reinhardt, supra note 1, at 190–91.
\item \textsuperscript{37} The United States first established its scheme in 1974, when it authorized the president to “provide duty-free treatment for any eligible article from any beneficiary developing country . . . .” 19 U.S.C. § 2461 (1974); Jones, supra note 9, at 7–8.
\item \textsuperscript{38} Countries that are determined to be high-income economies according to World Bank statistics are not eligible for U.S. GSP. Jones \textit{et al.}, supra note 11, at 20; Office of the U.S. Trade Rep. [USTR], U.S. \textit{Generalized System of Preferences (GSP) Guidebook} 13 (2011).
\end{itemize}
eligibility requirements as a tool to promote U.S. foreign policy. In addition to economic criteria, eligibility for U.S. GSP rests on a variety of mandatory criteria, including the potential beneficiary’s enforcement of U.S. arbitral awards and its efforts to protect and develop workers’ rights and eliminate child labor. In addition, U.S. officials may also consider certain enumerated discretionary criteria, such as the extent that other preference-granting countries have extended similar preferences, whether the potential beneficiary has opened its own markets to U.S. goods and services, and the extent to which the beneficiary has enforced U.S. intellectual property rights.

At present, 128 beneficiary countries and territories are eligible for preferential treatment under U.S. GSP. Unlike other schemes, such as EU GSP, U.S. GSP grants duty-free treatment to all GSP-eligible products originating from these beneficiaries. U.S. GSP, however, does impose several limitations on market access. For instance, products designated as import-sensitive, such as certain textiles, electronic goods, steel, and glass, are not eligible for GSP. In addition, U.S. GSP imposes competitive need limitations (CNLs) on eligible products. CNLs prevent an otherwise eligible product that originates from a beneficiary country from receiving preferential treatment if product import values from that country exceed either $135 million or fifty percent of total U.S. imports for that product.

Like other countries, the United States also grants special nonreciprocal preferences to select subgroups of countries. Beneficiaries recognized by the United States as least developed countries (LDCs), for instance,
receive more favorable market access through U.S. GSP-LDC. Under U.S. GSP-LDC, LDC beneficiaries receive preferential market access on many additional tariff lines not available to non-LDC GSP beneficiaries. Moreover, LDC beneficiaries are not subject to certain restrictions imposed on non-LDC beneficiaries, such as CNLs.

The United States also grants special nonreciprocal preferences based on a country’s geographical location. The African Growth and Opportunity Act (AGOA), for example, grants nonreciprocal preferences specifically to sub-Saharan African countries. Initial legislation made AGOA beneficiaries eligible for U.S. GSP preferences as well as preferences on additional tariff lines not available to U.S. GSP beneficiaries. Subsequent AGOA amendments also expanded coverage for textile and apparel products. The AGOA legislation does impose restrictions on market access and eligibility, but relative to other preference programs AGOA is quite

48. See Jones, supra note 9, at 11; UNCTAD, supra note 13, at 11.


50. Jones, supra note 9, at 11; UNCTAD, supra note 13, at 8.


52. Moss, supra note 24, at 677.


54. For instance, while AGOA gives the U.S. president discretion to expand product coverage, his decision is subject to a prior determination of the product’s import-sensitivity. UNCTAD, supra note 13, at 37. In addition, like U.S. GSP, AGOA also imposes conditions on eligibility. To be AGOA eligible, a sub-Saharan African country must have begun or have already implemented certain institutional reforms, such as a market-based economy with minimal government interference, economic policies to reduce poverty and improve health care and education, rule of law, and a system to prevent corruption and bribery. Id. at 36.
generous. AGOA beneficiaries enjoy preferential access for over 1,800 additional tariff lines—including watches, electronic articles, steel articles, footwear, handbags, luggage, flat goods, work gloves, leather wearing apparel, and semimanufactured and manufactured glass products—not available to non-AGOA GSP beneficiaries. Moreover, AGOA beneficiaries can qualify for preferential access for textile and apparel products that are excluded from the U.S. GSP and U.S. GSP-LDC programs. Product coverage under AGOA, in fact, exceeds product coverage under U.S. GSP and U.S. GSP-LDC. In addition, unlike U.S. GSP, both LDC and non-LDC AGOA beneficiaries are exempt from CNLs.

III. EU Nonreciprocal Preference Scheme

The EU scheme was originally created in 1971. Its current iteration grants nonreciprocal preferences through three programs—general GSP, GSP-plus, and the Everything but Arms (EBA) Initiative. General EU GSP, the most widely used program, currently grants preferences to 176 beneficiary countries and territories. General EU GSP preferential tariff rates, in recognition of their limited capacity, however, lesser-developed AGOA beneficiaries are subject to less stringent sourcing restrictions. Under the Special Rule for Apparel Applying to Lesser Developed AGOA Countries, until September 30, 2012, exports from lesser-developed AGOA beneficiaries made from fabric of any origin can still qualify for duty-free and quota-free treatment, provided the product is wholly assembled in the lesser-developed beneficiary country. However, these exports are still subject to a cap.

Moreover, AGOA eligibility designations are not static—failure to make continued progress on eligibility criteria can result in termination of eligibility. Id. To be eligible for AGOA textile and apparel preferences, beneficiaries must first meet certain requirements. For instance, before an AGOA beneficiary can qualify for textile and apparel preferences, it must develop an effective visa system, as well as enforcement and verification procedures, to prevent illegal trans-shipment and counterfeit documentation. AGOA Apparel Eligibility, supra note 53. Products must also comply with sourcing restrictions—such as requirements that products be made from U.S., regionally-assembled, or LDC materials—and caps are placed on products not wholly assembled from U.S. fabric or yarn. Id. In recognition of their limited capacity, however, lesser-developed AGOA beneficiaries are subject to less stringent sourcing restrictions. Id. The EU program, in contrast, grants all LDCs the same level of preferences. See Ctr. for Global Dev., Working Grp. on Global Trade Preference Reform, Open Markets for the Poorest Countries: Trade Preferences That Work 7 (2010). While the U.S. Congress recently considered extending AGOA preferences to all LDCs, it eventually decided to leave the current AGOA framework unchanged. See infra note 176.

56. Id. at 10–11.
57. Id. To be eligible for AGOA textile and apparel preferences, beneficiaries must first meet certain requirements. See Ctr. for Global Dev., Working Grp. on Global Trade Preference Reform, Open Markets for the Poorest Countries: Trade Preferences That Work 7 (2010). While the U.S. Congress recently considered extending AGOA preferences to all LDCs, it eventually decided to leave the current AGOA framework unchanged. See infra note 176.
58. UNCTAD, supra note 55, at 9. The EU program, in contrast, grants all LDCs the same level of preferences. See Ctr. for Global Dev., Working Grp. on Global Trade Preference Reform, Open Markets for the Poorest Countries: Trade Preferences That Work 7 (2010). While the U.S. Congress recently considered extending AGOA preferences to all LDCs, it eventually decided to leave the current AGOA framework unchanged. See infra note 176.
59. GAO, supra note 11, at 18.
61. Id. at vii–viii.
however, differ depending on whether a product is classified as sensitive or nonsensitive. While nonsensitive products enter the EU duty-free, tariff reductions on sensitive products vary depending on the product and the type of duties normally applied. Like U.S. GSP, general EU GSP imposes certain graduation mechanisms that limit the volume of exports originating from any one beneficiary country. For instance, utilization of general EU GSP preferences may be reduced because of country-section graduation. When a certain product section from a beneficiary country accounts for more than fifteen percent—or twelve-and-a-half percent in the case of textile products—of total EU imports for that product section over three consecutive years, then the EU will suspend the beneficiary country’s GSP preferences for that product section.

While differences in the number of countries eligible for general EU GSP vis-à-vis the number of countries eligible for U.S. GSP may seem dramatic, two differences between U.S. GSP and general EU GSP help explain this disparity. First, the general EU GSP program inclusively grants eligibility while placing restrictions on utilization. All developing countries are initially considered eligible for general EU GSP unless and until they fail to satisfy certain conditions specified by the program. However, should an eligible

63. Özden & Reinhardt, supra note 1, at 195. Sensitive products face two types of tariffs: ad valorem duties and specific duties. Most favored nation (MFN) ad valorem duties, which are a set percentage of the value of the product being imported, are reduced by 3.5 percentage points, while MFN-specific duties, a sum assessed without reference to a product’s market value, are reduced by 30%. See UNCTAD, supra note 60, at 3. Textile products are treated differently than other sensitive products under general EU GSP: MFN-specific duties are only reduced by 20%. Id. at 3.

64. UNCTAD, supra note 60, at 6.

65. Examples of product sections include Live Animals and Animal Products (Section I), covering Harmonized System (HS) Chapters 1 through 5; Vegetable Products (Section II), covering HS Chapters 6 through 14; and Textiles and Textile Articles (Section XI), which cover HS Chapters 50 through 63. For a complete list of all twenty-one sections, see Commission Regulation 861/2010, 2010 O.J. (L 284) 1, 5–7 (EU).


67. UNCTAD, supra note 60, at 6. Preferences, however, can be reintroduced if imports subsequently fall below threshold limits. Id. at 7. In addition, if the imports in the section account for more than 50% of the value of the beneficiary’s total GSP imports to the EU, graduation rules do not apply. Id. For more information, see Council Regulation 732/2008, supra note 62, art. 13.

68. See ANTHONY, supra note 51, at 11.

country fail to satisfy any of these conditions, its benefits under the program, but not its eligibility for the program, are temporarily suspended. 70 Second, unlike the EU scheme, the U.S. scheme excludes certain Communist countries and conditions eligibility on a country’s adoption of certain political and macroeconomic policies. 71 Thus, general EU GSP extends preferences to certain countries—China, Vietnam, and Cuba—that are excluded from U.S. GSP. 72

Despite the permissive nature of general EU GSP eligibility, beneficiary status can be completely revoked in certain circumstances. If a beneficiary is classified as a high-income country, as determined by the World Bank, 73 and imports from its five largest sectors account for less than seventy-five percent of the value of its total GSP-eligible imports, the beneficiary will become ineligible for general GSP preferences. 74 Beneficiaries that have signed a free trade agreement with the EU are also ineligible to receive general EU GSP preferences, provided the free trade agreement offers at least the same level of preference as general EU GSP. 75

In 2006, the EU established its GSP-plus program, which grants enhanced nonreciprocal preferences for certain countries. 76 Eligibility for the program is based on a combination of economic and noneconomic factors. First, a country must be considered economically “vulnerable” in terms of the size or limited diversification of its exports. 77 Like general EU GSP, cli-

Web_ECDPM/Web/Content/Download.nsf/0/09398052BE300D50C12578640059F6FC/$FILE/Bilal-Ramdoo-Roquefeuil%20BN24%20April%202011%20GSP%20reform_final.pdf. In contrast, countries must satisfy certain conditions before they are considered eligible for U.S. GSP. ANTHONY, supra note 51, at 12. However, the EU has recently proposed removing upper-middle-income countries from general GSP eligibility, which would significantly reduce the number of countries eligible for general GSP preferences. See Commission Proposal, supra note 66, at 9, 11; Nilsson, supra note 66, at 5–7; Ramdoo, supra note 66.

70. See ANTHONY, supra note 51, at 12–13.
71. JONES, supra note 9, at 8–9; ANTHONY, supra note 51, at 12–13.
72. ANTHONY, supra note 51, at 5–6; see JONES, supra note 9, at 8.
73. ANTHONY, supra note 51, at 13. See also supra note 30 (describing World Bank classification of countries).
74. Council Regulation 732/2008, supra note 62, art. 3(1). Preferences, however, can be reintroduced if a country does not meet the above two criteria for three consecutive years. UNCTAD, supra note 60, at 7.
75. Council Regulation 732/2008, supra note 62, art. 3(2). A new EU-proposed GSP reform would enlarge the scope of this provision by prohibiting general GSP preferences for any country that has signed a preferential market arrangement with the EU, including an interim economic partnership agreement (EPA), that provides at least the same level of preference as general EU GSP. However, preferences would be phased out over a two-year period after the preferential market arrangement enters into force. See Nilsson, supra note 66, at 6; Ramdoo, supra note 66.
76. ANTHONY, supra note 51, at 4–5.
77. The Commission Proposal has left this program in place, though it does modify it slightly. Commission Proposal, supra note 66, at 6, 13. For a country to meet diversification requirements, the Proposal states that the seven largest sections of its GSP-covered imports into the EU must represent more than 75% of its total GSP-covered imports. GSP-covered im-
gibility is determined by the country’s performance in the EU market during a three-year period.\textsuperscript{78} Second, eligibility for GSP-plus is conditioned on ratification and effective implementation of twenty-seven specified international conventions on human rights, labor standards, sustainable development, and good governance.\textsuperscript{79}

Although the vast majority of nonreciprocal preferential imports continue to enter the EU market under general EU GSP, the GSP-plus program provides its beneficiaries with more extensive market access.\textsuperscript{80} While the EU GSP-plus program provides preferential market access for roughly the same number of tariff lines as general EU GSP, it grants duty-free treatment to almost all sensitive and nonsensitive products.\textsuperscript{81} General EU GSP, in contrast, does not.\textsuperscript{82}

EU GSP-plus eligibility must be requested and reapplied for each time the GSP-plus enabling regulation is renewed.\textsuperscript{83} Unfortunately, the application process is not flexible; applications for EU GSP-plus eligibility may only be filed during a relatively small window of time.\textsuperscript{84} EU GSP-plus eligibility may also be revoked if a beneficiary fails to implement the specified conventions.
or continues to engage in certain unfair trade practices. In such cases, the enabling regulation outlines a systemic procedure for revoking benefits.

The EU also offers a special nonreciprocal preference program—the EBA Initiative—for LDCs. Eligibility for the EBA Initiative is linked only to a country’s designation by the United Nations as an LDC. Under the EBA Initiative, all LDC-originating products except for arms and ammunition are given duty-free and quota-free access to EU markets. The EBA Initiative covers approximately 7,200 tariff lines, including important products like “beef and other meat; dairy products; fruit and vegetables; processed fruit and vegetables; maize and other cereals; starch; oils; processed sugar products; cocoa products; pasta; and alcoholic beverages.” Moreover, unlike general EU GSP and GSP-plus, authority for the EBA Initiative is not limited to a certain time period, as no end date is specified in the enabling regulation.

Lastly, the EU has also pursued economic partnership agreements (EPAs) with many of its former nonreciprocal preference program beneficiaries. Beginning in 1963, EU countries provided nonreciprocal preferences for their former colonies, known collectively as the African Caribbean and Pacific (ACP) group. However, EU countries began to pursue more reciprocal arrangements through negotiation of the Cotonou Agreement in 2000. Nonreciprocal ACP-group preferences under the Cotonou Agreement were finally liberalized through progressive reductions in tariff rates, and rice and sugar were fully liberalized by 2009 through progressive elimination of duty-free tariff quotas. See UNCTAD, Handbook on Duty-Free Quota-Free and Rules of Origin, Part I: Quad Countries, 20–21, U.N. Doc. UNCTAD/ALDC/2008/4 (2008).

85. UNCTAD, supra note 60, at 16.
86. For a comprehensive explanation of the procedure, see id. at 17–18.
87. Id. at 12. However, the EU has retained flexibility over eligibility decisions and has the authority to establish at least a three-year transitional period to phase out benefits for beneficiaries that have graduated from LDC status. Id.
92. Shaffer & Apea, supra note 34, at 982–83.
Agreement were offered pursuant to a temporary WTO waiver.\textsuperscript{94} However, owing to opposition from non-ACP developing countries, the EU allowed the waiver to lapse in 2007.\textsuperscript{95} Following the EU’s decision, many non-LDC ACP countries signed interim EPAs with the EU.\textsuperscript{96} While non-LDC ACP countries were not required to enter into EPAs, many chose to do so as other arrangements available to them, such as general EU GSP, would have significantly reduced their preferential access to EU markets.\textsuperscript{97}

EPAs are distinct from nonreciprocal preference programs, but they do resemble nonreciprocal programs in some ways. Like nonreciprocal preference programs, EPA signatories receive immediate, unilateral access to EU markets.\textsuperscript{98} However, in contrast to nonreciprocal preference programs, an EPA signatory is required to gradually reduce tariffs on EU goods as well as eliminate other barriers to trade.\textsuperscript{99} In addition, unlike nonreciprocal preferences, which are unbound grants that can be withdrawn, preferential access under EPAs is part of a broader, legally binding international treaty by which the EU has committed itself to providing preferential market access for signatory country products.\textsuperscript{100}

\section*{IV. Comparison of EU and U.S. Nonreciprocal Preference Schemes}

Overall, juxtaposing different schemes can be difficult, as the extent to which each scheme promotes or inhibits development and economic growth in beneficiary countries can be case-specific.\textsuperscript{101} Nonetheless, an analysis of the U.S. and EU schemes provides several recommendations regarding the creation of a more effective nonreciprocal preference scheme, particularly with respect to stability of preferences, conditions on country eligibility, product coverage, and rules of origin.

\textsuperscript{94} In this case, a WTO waiver was necessary, as Cotonou Agreement preferences violated the EU’s WTO commitments. See UNCTAD, supra note 91, at 5.
\textsuperscript{95} Kimberly Anne Elliot, \textit{Opening Markets for Poor Countries: Are We There Yet?} 14 (Ctr. for Global Dev., Working Paper No. 184, 2009), available at http://www.cgdev.org/content/publications/detail/1422923.
\textsuperscript{96} Id.
\textsuperscript{97} See Kelly, supra note 46, at 5; Lippoldt & Kowalski, supra note 8, at 12.
\textsuperscript{98} UNCTAD, supra note 91, at 1.
\textsuperscript{99} See id. at 1, 59, 62 (mentioning limitations on use of export duties and nontariff barriers). In exchange for immediate duty-free and quota-free access to EU markets, developing-country parties must commit to liberalize “substantially all trade” within an established time frame. Id. at 1. Current EPAs require signatories to liberalize between 75% and 97.5% of tariff lines over periods of one to twenty-five years. Id.
\textsuperscript{100} UNCTAD, supra note 55, at 33.
\textsuperscript{101} See Lesage & Kerremans, supra note 16, at 74.
A. Stability of Preference Schemes

To effectively promote long-term development and economic growth, preferential access through a nonreciprocal preference scheme needs to be stable and predictable. In this regard, short-term renewal of a nonreciprocal preference program can create uncertainty, as its continuity may become contingent on domestic political consensus. In countries where political consensus over trade policy is difficult to build, such as in the United States, this can be problematic. Since 2008, the U.S. Congress has consistently chosen to renew U.S. GSP for relatively short periods of time. Moreover, lapses in U.S. GSP are common. Since 1993, U.S. GSP has lapsed on multiple occasions, creating gaps in the program that have lasted from one to fifteen months. Such inconsistency can create uncertainty, impose obstacles to long-range capacity-building strategies, and inhibit export-focused investment in beneficiary countries.

Several reforms could make nonreciprocal preference programs like U.S. GSP more stable and predictable. First, one of the most effective ways to ensure the stability of nonreciprocal preferences is to remove temporal limits in their authorizing legislation, thereby disassociating them from uncertain outcomes during renewal debates. For example, authorization for regional nonreciprocal preferences under the U.S. Caribbean Basin Economic Recovery Act is not time limited. In the EU, authorization for the EBA Initiative is also open ended, and the EU has discussed removing temporal limitations on its other nonreciprocal preference programs by 2014.

102. See Jones et al., supra note 11, at 18; Ctr. for Global Dev., supra note 58, at 12.
104. See Jones, supra note 9, at 14 (“Since its renewal in December 2006, however, the extension of the GSP program and other trade preferences continues to be a matter of some debate.”); Garcia, supra note 18, at 302–04 (mentioning how political difficulties affect the U.S. nonreciprocal preference scheme).
106. See GAO, supra note 11, at 42. Subsequent renewal, however, has generally been made retroactive to the date the program lapsed. Generalized System of Preference (GSP), supra note 42.
107. See GAO, supra note 11, at 42.
108. Id.; see also Jones et al., supra note 11, at 19.
109. Jones et al., supra note 11, at 19; Anthony, supra note 51, at 5.
110. Commission Proposal, supra note 66, at 3 (“The [proposed] Regulation will no longer be limited in duration, thus promoting a stable framework both for economic operators and beneficiary countries.”); see also Nilsson, supra note 66, at 8, 14; Everything
As a result, nonreciprocal preferences would not be constrained to a specific time frame, and the continued existence of each program would not depend on subsequent enabling legislation. However, completely separating all nonreciprocal programs from temporal limits may not be feasible, as such an endeavor would be difficult to accomplish politically. Moreover, nonreciprocal preferences were, from their inception, considered to be a temporary answer to developmental disparities. Arguably, this perspective has influenced how most preference-granting countries have implemented their programs.

Second, as an alternative, preference-granting countries could renew programs for longer time periods. In the EU, for instance, general EU GSP and GSP-plus are generally implemented in ten-year cycles, and the enabling legislation for such programs is regularly renewed. Some U.S. regional nonreciprocal preference programs have also enjoyed more predictable mandates and longer renewal periods than U.S. GSP. AGOA, for


111. See JONES ET AL., supra note 11, at 18 (mentioning that authorization for the U.S. Caribbean Basin Economic Recovery Act program does not depend on subsequent renewal legislation); Everything but Arms, supra note 110.

112. See MICHAEL J. HISCOX, INTERNATIONAL TRADE AND POLITICAL CONFLICT: COM- MERCe, COALITIONS, AND MOBILITY 10 (2002) (describing how politics and industry-based special interest groups create cleavages in industrial countries’ trade policy). In the United States, for instance, recent disagreement in the U.S. Congress over important trade issues, such as free trade agreements with South Korea and Colombia and the recently expired Trade Adjustment Assistance (TAA) program, have influenced U.S. GSP renewal discussions. See, e.g., TAA, ATPDEA Renewal Remains Mired in Controversy in House, Senate, supra note 9. Unfortunately, U.S. nonreciprocal preference programs are likely to continue to be used as a bargaining chip for other trade policy measures. See Korea FTA Passage Further Complicated by Republican Link to TAA, FTAs, INSIDE U.S. TRADE, Feb. 18, 2011, at 1, 16–17.

113. See JONES, supra note 9, at 2.

114. Notably, no major preference-granting country appears to have extended all of its nonreciprocal preference programs indefinitely. See JULIA V. SEKKEL, CTR. FOR GLOBAL DEV., SUMMARY OF MAJOR TRADE PREFERENCE PROGRAMS 2, 5–6, 7, 9–11 (Apr. 2009), available at http://www.cgdev.org/doc/Trade/Summary_of_Major_Trade_Preference_Programs_Final_12_09.pdf (describing authorizing legislation for nonreciprocal preferences in the United States, the EU, Japan, Canada, Australia, and Norway). Although initial nonreciprocal benefits under the U.S. Caribbean Basin Economic Recovery Act are not time limited, subsequent expansion of the program through the U.S.-Caribbean Basin Trade Partnership Act has only been authorized through 2020. See JONES ET AL., supra note 11, at 18; Caribbean Basin Initiative (CBI), USTR, http://www.ustr.gov/trade-topics/trade-development/preference-programs/caribbean-basin-initiative-cbi (last visited June 7, 2012). Moreover, nonreciprocal programs are often envisioned as a precursor to binding reciprocal trade relations. The initial AGOA legislation, for instance, identified negotiation of free trade agreements as the next logical step in trade relations between the United States and sub-Saharan Africa. Lesage & Kerremans, supra note 16, at 80, 91.

115. See Everything but Arms, supra note 110.

116. See JONES ET AL., supra note 11, at 3, 5 (mentioning regional nonreciprocal programs for the Caribbean and sub-Saharan Africa); UNCTAD, supra note 55, at 8. AGOA, in
instance, was first authorized for an initial period of eight years and was
subsequently renewed for an additional seven years by the 2004 AGOA
amendments. However, longer-term renewal alone will not completely
isolate nonreciprocal programs from the uncertainty that has plagued U.S.
GSP. EU and U.S. nonreciprocal programs are still renewed on an ad hoc
basis, and therefore, they remain dependent on continued political consen-
sus. It could be argued that the risk of future instability is minimal, as
most programs generally enjoy broad support and are not viewed as contro-
versial. However, prior to 2006, U.S. GSP also enjoyed similar support.

Moreover, practical constraints in some countries may make long-term
renewal difficult. For instance, in 1990, the United States adopted new
budget rules that instituted a “pay-as-you-go” approach. Any bill that
requires an increase in expenditures or, in the case of tariff reductions, a
decrease in U.S. government revenue must include equivalent offsetting
measures. Thus, for every year that a U.S. nonreciprocal preference program
is renewed, legislators must also approve spending cuts or tax increases to
offset losses. Reauthorization of GSP alone can require hundreds of millions
of dollars a year in cuts or tax increases. Legislators are, justifiably, not
eager to be associated with large tax increases or budget reductions, and as a
result they may favor short-term reauthorization rather than long-term
reauthorization, which would require larger tax increases or budget cuts.

Further, even if a preference-granting country’s domestic framework
does not require offsetting measures, it may still need to make costly con-
cessions in order to maintain some of its programs because of the WTO
waiver process. While U.S. GSP, EU GSP, U.S. GSP-LDC, and the EBA
Initiative are permitted under WTO exceptions for special and differential
treatment for developing countries, the WTO panel decision in EC—Tariff

particular, has enjoyed relatively strong support in the U.S. Congress. See Lesage & Ker-
remans, supra note 16, at 77 (discussing AGOA’s history).

117. UNCTAD, supra note 13, at 35. In addition, AGOA’s third-country fabric provision,
which grants preferences for textile and fabric products, was renewed for three years and five

118. See Int’l Ctr. for Trade and Sustainable Dev. [ICTSD], US, Africa Push for AGOA
Extension at Tenth Annual Forum, BRIDGES WKLY. TRADE NEWS DIG., June 15, 2011, at 3–4,
available at http://ictsd.org/i/news/bridgesweekly/108713/ (citing anticipated difficulties dur-
ing the AGOA renewal process in the U.S. Congress).

119. See JONES ET AL., supra note 11, at 18; Everything but Arms, supra note 110.

120. See, e.g., JONES ET AL., supra note 11, at 19 (finding that most U.S. nonreciprocal
preference programs have enjoyed broad approval in the U.S. Congress and have been con-
sistently renewed).

121. JONES, supra note 9, at 14.

122. UNCTAD, supra note 13, at 29.

123. Id.

124. See Kelly, supra note 46, at 1–2.
Preferences indicated that some targeted or regional nonreciprocal preference programs were not covered under special and differential treatment and therefore were not consistent with WTO members’ obligations. As a result, preference-granting countries that wish to offer certain targeted or regional nonreciprocal programs must seek a waiver of their WTO obligations. Waivers, however, are temporary, and WTO consensus is required if a waiver is to be renewed. WTO members often use their ability to block waivers as a tool to gain favorable trade concessions. Thus, as WTO members are not permitted to offer certain nonreciprocal preference programs without a waiver, officials may rightfully question whether the benefits of

125. In 2002, India, itself a general EU GSP beneficiary, requested consultations with the European Community regarding the legality of one of the EU’s special GSP programs. India claimed that special incentives that were given to help combat drug production and trafficking were not in compliance with the EU’s WTO commitments; the only countries that were eligible for these incentives were twelve countries recognized by the European Community to be experiencing significant drug problems. The dispute progressed to the Panel stage, where it was found that the European Community’s special drug program violated GATT Article I(1), since it did not grant identical treatment for all WTO members, and was not justified under the Enabling Clause, which requires “non-discriminatory” treatment. Appellate Body Report, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, ¶¶ 134–141, WT/DS246/AB/R (Apr. 7, 2004). The WTO Appellate Body, while upholding the Panel’s conclusion, clarified that granting different levels of tariff preference within a GSP scheme does not necessarily constitute discriminatory treatment. Id. ¶ 157. Instead, differential tariff treatment among GSP beneficiaries is permitted if the preferences correspond to a particular “development, financial or trade need” and are offered on the basis of an objective standard to “all beneficiaries that share that need.” Id. ¶¶ 160–165. Thus, the EU’s special arrangements were not justified because they set out a closed list of beneficiaries rather than objective criteria that, if met, would allow “similarly affected” developing countries to be included in the special arrangement. Id. ¶¶ 187–188. See also WTO, WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES 1995—SEPTEMBER 2006 91 (2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/dispu_e/cases_e/ds246_e.htm (last visited June 7, 2012).

126. See, e.g., Bartels, supra note 35, at 869.

127. Waivers are required whenever a country, absent an exception, violates its GATT Article I obligations. See ACHILLE BASSILEKIN, POSSIBILITY OF OBTAINING A NEW ACP-EC WAIVER AT THE WTO I (Eur. Ctr. for Dev. Policy Mgmt., Discussion Paper No. 71, 2007), available at www.ecdpm.org/dp71. Thus, in 2010, when the EU wished to grant Pakistan short-term special nonreciprocal tariff preferences to help the country recover from devastating floods, it had to request a WTO waiver to provide such preferences. See Council for Trade in Goods, EU Requests Waiver on Trade Preferences to Pakistan, WTO.Org (Nov. 30, 2010), http://www.wto.org/english/news_e/news10_e/good_30nov10_e.htm.

128. See BASSILEKIN, supra note 127, at 1–2, 7.

129. Several GSP beneficiaries, led by Thailand, Indonesia, and the Philippines, threatened to block the EU’s waiver request for its Cotonou Agreement with ACP countries unless they also received tariff concessions on canned tuna products. Id. at 2; ICTSD, EC-ACP Cotonou Waiver Finally Granted, BRIDGES WKLY. TRADE NEWS DIG., Nov. 15, 2001, at 6, available at http://ictsd.org/i/news/bridgesweekly/6664/. In addition, U.S. waivers for the Caribbean Basin Economic Recovery Act and Title Two, Article IV of the U.S. Compact of Free Associated States programs faced stiff resistance from Paraguay. See Kelly, supra note 46, at 1.
such a program merit the trade concessions that must be given in order to obtain a waiver.130 The EU, for example, decided not to seek an extension of its Cotonou Agreement waiver, which permitted it to extend nonreciprocal preferences to ACP countries, as other WTO members who were excluded from the program requested further concessions in exchange for their support.131

Even if perpetual preferences or binding long-term renewal are not feasible options, preference-granting countries could, at a minimum, issue nonbinding guidance concerning the duration and direction of their nonreciprocal preference programs. The European Commission, for instance, has traditionally laid out the guidelines for its general EU GSP and GSP-plus programs for ten-year cycles.132 Granted, such guidelines are nonbinding, and most preference programs would revert to MFN tariff rates in the absence of subsequent legislation.133 However, the guidelines do provide a clear roadmap regarding the anticipated direction of the programs, which could help create a more predictable environment that promotes further investment and capacity building in beneficiary countries.134

B. Conditions on Country Eligibility

Many preference-granting countries also place conditions on beneficiaries’ eligibility for and continued use of nonreciprocal preferences.135 Eligibility conditions are often used as a tool to promote foreign policy goals,136 and although some have criticized their use as such,137 it would be

130. Cf. Bassilekin, supra note 127, at 6 (mentioning difficulties securing the initial AGOA waiver because of resistance from developing-country parties); Kelly, supra note 46, at 3 (“Waivers are becoming more and more difficult to obtain and it is increasingly unlikely that new waivers will be granted for special preferences.”). While an assessment of the relative merits of EU EPAs versus U.S. regional nonreciprocal preference programs is outside the scope of this Note, it should be noted that some have advocated for converting nonreciprocal programs to binding reciprocal preferences. E.g., Keck & Low, supra note 30, at 159.

131. Elliot, supra note 95, at 14; see also Bassilekin, supra note 127, at 5–6.

132. See Everything but Arms, supra note 110.

133. See Sekkel, supra note 114, at 1.

134. See Jones et al., supra note 11, at 18 (discussing the importance of a predictable trade environment for long-term investment, stability, and economic development in beneficiary countries).


136. GAO, supra note 11, at 2–3, 14–15. Many of the U.S. GSP and AGOA eligibility criteria demonstrate an underlying desire to influence beneficiary countries’ domestic policy both for idealistic and practical reasons. U.S. investors, who possess significant political influence, strongly desire political stability and a secure investment climate in the beneficiary country in which they invest. In addition, many in the United States retain a strong belief that “good governance, a market-based economy and democracy” will in turn lead to more peaceful and prosperous states. Lesage & Kerremans, supra note 16, at 87.

137. See Jones et al., supra note 11, at 17–18 (mentioning criticisms that eligibility conditions “politicize” trade).
difficult to completely sever underlying policy concerns from eligibility requirements. While many countries condition eligibility for nonreciprocal preferences on governance and human rights concerns, the way in which they apply these criteria to eligibility determinations may affect the extent to which beneficiaries utilize preferences. First, some countries define their policy objectives ambiguously, while others do so by referencing defined standards such as international treaties. Certain ambiguous eligibility criteria in U.S. GSP and AGOA provide an example of the first group. Beneficiaries that “engage in activities that undermine United States national security or foreign policy interests” or do not provide “adequate and effective protection of intellectual property rights” risk having their benefits suspended. Moreover, U.S. nonreciprocal preference programs often lack a discrete mechanism for determining whether eligibility requirements have been met. As a result, administration of eligibility provisions may sometimes seem unpredictable and inconsistent. Cameroon and Chad, for instance, continue to be AGOA-eligible despite reports of stifled democratic processes and systematic human rights abuses by their governments. Rwanda, Nigeria, and Uganda also remain eligible for AGOA despite frequent “minor” political infringements. On the other hand, U.S. officials decided not to grant AGOA beneficiary

138. See Monica Patel, Note, Expanding the Role of Trade Preference Programs, 95 MINN. L. REV. 1490, 1498 (2011) (“All countries model their trade preference programs on either positive or negative conditionality . . . . ”). Moreover, elimination of some eligibility criteria could undermine attempts to promote international human rights. See, e.g., Lucy Heenan Ewins, Note, “Gross Violation”: Why Uganda’s Anti-Homosexuality Act Threatens Its Trade Benefits with the United States, 34 B.C. INT’L & COMP. L. REV. 147, 147 (2011) (arguing that AGOA eligibility criteria could be used to help protect human rights in Uganda). However, as an alternative, some have suggested that eligibility criteria should be based on positive conditionality rather than negative conditionality. See Jones et al., supra note 11, at 21. Most U.S. programs are based on negative conditionality, in which countries that do not meet criteria are ineligible for benefits. Lorand Bartels, The Appellate Body Report in European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R and Its Implications for Conditionality in GSP Programmes, in Human Rights and International Trade 463, 466–67 (Thomas Cottier et al. eds., 2006). In contrast, EU GSP-plus is based on positive conditionality, which gives beneficiaries that meet eligibility criteria enhanced benefits and market access. Id. at 465–66.

139. See supra note 138.


141. Id. § 2462(c)(5).

142. E.g., id. § 2462(d)(1) (permitting benefits to be suspended, withdrawn, or limited if a country fails to abide by eligibility criteria).

143. See Jones et al., supra note 11, at 21 (mentioning complaints that application of some eligibility criteria is “arbitrary and unpredictable”); Jones, supra note 9, at 22 (mentioning inconsistent application of intellectual property eligibility criteria).


145. Lesage & Kerremans, supra note 16, at 86.
status to Burkina Faso in 2003 despite widespread acknowledgment by nongovernmental organizations, international institutions, and even the U.S. government of Burkina Faso’s good governance, democratic and market reforms, and assistance in fighting terrorism. More recently, Congolese officials claimed that one-sided information from Western nongovernmental organizations regarding the human rights environment in the Democratic Republic of the Congo resulted in the country’s suspension from AGOA.

While the EU also incorporates good governance and human rights concerns into most of its nonreciprocal preference program eligibility criteria, it generally bases eligibility for its programs on more defined standards than those used in the U.S. programs. Activities that lead to temporary withdrawal of eligibility under the EU scheme include:

- the serious and systematic violation of principles laid down in the [listed] conventions [on human and labor rights], on the basis of the conclusions of the relevant monitoring bodies;
- the export of goods made by prison labour; and
- serious shortcomings in customs controls on the export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money-laundering.

Second, some countries provide cooperative mechanisms for discussing and correcting deficiencies before benefits are suspended. EU programs, for instance, often provide for a defined procedure, which includes consultation and other collaborative measures, before preferences under the program are suspended. Sri Lanka, for example, recently had its GSP-plus eligibility suspended only after it declined to engage with the EU or respond to the EU’s findings by the deadline set. In contrast, U.S. programs do not provide for a formal cooperative process for resolving concerns or a gradual procedure for withdrawing eligibility. Instead, continued eligibility for AGOA and U.S. GSP is determined by an annual review and is at the discretion of U.S. officials. Moreover, beneficiaries

---

146. Fuhr & Klugman, supra note 144, at 142.
149. See UNCTAD, supra note 60, at 22–24 (describing use of a multistep consultation process prior to suspension of preferences).
151. See GAO, supra note 11, at 53–54.
152. See id. at 53. Some observers continue to support the annual review process, having found that it has led to improved compliance with eligibility criteria. Id.; JONES, supra note 9,
who fail to meet eligibility requirements can be removed from the program shortly after notification of the decision.\textsuperscript{153}

It may be difficult to excise preference-granting countries’ foreign policy interests from nonreciprocal preference program eligibility provisions. However, use of eligibility provisions that are based on objective standards, cooperative mechanisms for resolving eligibility issues, and a defined consultation period prior to suspension\textsuperscript{154} could provide a feasible compromise. Such provisions could improve the effectiveness of nonreciprocal preference programs while providing a useful opportunity for officials from the preference-granting country and beneficiary country to discuss policy reforms.\textsuperscript{155}

C. Product Coverage

Limitations on product coverage and caps on preferential treatment can also constrain a beneficiary’s ability to utilize nonreciprocal preferences. Most nonreciprocal preference-granting countries completely exclude or provide only limited preferences for sensitive imports like agricultural products, textiles, and certain manufactured goods.\textsuperscript{156} While regional and special incentive programs often offer more extensive product coverage or better preferential margins than general GSP programs,\textsuperscript{157} at

\textsuperscript{153}See 19 U.S.C. § 2462(f)(2) (2006) (stating that GSP administrators must notify Congress and the beneficiary country only 60 days before the decision to rescind benefits is enforced).

\textsuperscript{154}As an example, some have proposed that beneficiaries be guaranteed preferences for a defined period, during which time benefits may only be revoked in “extreme circumstances.” Lorand Bartels & Christian Hieberl, \textit{Binding Tariff Preferences for Developing Countries Under Article II GATT}, 13 \textit{J. Int’l Econ. L.} 969, 987–90 (2010); William R. Cline, \textit{Trading Up: Strengthening AGOA’s Development Potential}, Ctr. for Global Dev. Brief, June 2003, at 3.

\textsuperscript{155}See supra note 152 (discussing how consultations with beneficiary country officials can improve beneficiary countries’ compliance with eligibility criteria).

\textsuperscript{156}See Anthony, supra note 51, at 6–7. For example, although most manufactured and semimanufactured products and some agricultural, fishery, and primary industrial products are eligible for duty-free treatment under U.S. GSP, “import-sensitive” products like leather goods and footwear do not receive preferential treatment. UNCTAD, supra note 13, at 12. General EU GSP also designates many products as sensitive. Sensitive products still receive preferential treatment under general EU GSP but to a lesser degree than nonsensitive products. Laura Páez et al., \textit{African Trade Policy Ctr., A Decade (2000–2010) of African-U.S. Trade Under the African Growth and Opportunities Act (AGOA): Challenges, Opportunities and a Framework for Post AGOA Engagement} 11 (2010).

\textsuperscript{157}AGOA, for instance, grants preferential treatment on certain products that are not eligible for preferences under U.S. GSP. Raj Bhala, \textit{Generosity and America’s Trade Relations with Sub-Saharan Africa}, 18 \textit{Pace Int’l L. Rev.} 133, 176 (2006). Unlike general EU GSP, the EU GSP-plus program provides duty-free treatment for most sensitive and nonsensitive products. Anthony, supra note 51, at 8.
least some still exclude certain products that are produced in beneficiary countries.  

In addition, some nonreciprocal preference programs place limits on covered agricultural imports through restrictions on the volume of imports that can receive preferences. The United States, for instance, applies a two-tier tariff system called a tariff-rate quota (TRQ) to certain AGOA agricultural imports. TRQs apply a lower tariff to a certain in-quota quantity of exports and a higher tariff to additional imports over this quantity. AGOA offers duty-free access only for in-quota quantities of certain agricultural products like peanuts, beef, dairy, and tobacco. U.S. TRQs are generally allocated according to historic market-share data for a given product, with any remaining amount allocated on a “first-come/first-served” basis. As many TRQs are calculated based on relatively old data, they can pose a major impediment to beneficiary countries’ utilization of preferences. Moreover, making nonreciprocal preference programs subject to restrictions like TRQs can constrain rather than promote many developing countries’ efforts to diversify their economies through value-added processing.

158. Lippoldt & Kowalski, supra note 8, at 11. For instance, over two hundred tariff lines, roughly 17% of dutiable agricultural lines, are ineligible for preferential treatment under AGOA. GAO, supra note 11, at 37–38; PÁEZ ET AL., supra note 156, at 13. Most sugar and cotton imports, two important exports for many beneficiary countries, are among those products excluded. See DAVID SKULLY, INT’L FOOD & AGRIC. TRADE POLICY COUNCIL, IPC POLICY FOCUS: U.S. TARIFF RATE QUOTAS AND AGOA MARKET ACCESS 2 (July 2010), available at http://www.agritrade.org/Publications/AGOA_TRQs.html.

159. See, e.g., JONES ET AL., supra note 11, at 3.

160. See SEKEL, supra note 114, at 4.

161. WTO members have committed to provide in-quota access for WTO-member-country products. For each product, WTO members must provide in-quota allocations equivalent to at least 5% of domestic consumption. See SKULLY, supra note 158, at 2.

162. Id. at 2–3. Over-quota tariff rates can be very high. Peanuts face a 164% over-quota rate while tobacco faces a 350% over-quota rate. Id. at 3–4.

163. Id. at 3–7.


165. See SKULLY, supra note 158, at 2. Some in-quota fill rate allocations—including cotton and beef—are not generally filled and thus do not appear to pose a significant problem for AGOA beneficiaries, provided global production remains static. Id. at 5–6. However, other in-quota allocations, such as that for peanuts, can significantly constrain beneficiaries’ ability to utilize preferences. See id. at 3. Argentina is currently allocated over 80% of the in-quota allocation for peanuts; since 2003, it has filled below 40% of its allocation. Id. AGOA peanut imports fall into the remaining in-quota allocation, which is granted on a “first-come, first served” basis and is generally quickly filled. See id. Thus, despite the fact that peanuts are a major agricultural product for many AGOA beneficiaries and receive duty-free access under AGOA, as of 2010 the United States had not imported peanuts or peanut products from any AGOA beneficiary since 2002. Id. at 3–4.

166. U.S. escalating tariffs on cocoa products help illustrate this problem. Cocoa beans, paste, and cocoa powder are granted duty-free access under U.S. GSP and AGOA. Id. at 7.
In response to the above concerns, preference-granting countries could increase the effectiveness of their preference programs by removing caps on preferential treatment and reducing or eliminating tariffs on agricultural products.\textsuperscript{167} While liberalization of certain agricultural products could negatively affect some domestic producers,\textsuperscript{168} studies have shown that reducing or completely eliminating tariffs and caps on many agricultural products may not significantly affect domestic production.\textsuperscript{169} In fact, the EU has already removed quantitative limitations and tariff protections on agricultural and processed-food imports from LDCs and does not appear to have experienced negative repercussions as a result.\textsuperscript{170} Moreover, further liberalization could generate significant savings for industries and consumers in preference-granting countries.\textsuperscript{171}

However, eliminating tariffs and caps on agricultural products in all nonreciprocal preference programs may be a difficult goal to achieve. Protectionist agricultural trade policies are often supported by powerful political lobbies and any potential reform can be difficult to implement.\textsuperscript{172}

However, products that contain butter fat or products that are composed of 10% or more of sugar, characteristics common to most processed cocoa products, are subject to tariff-rate quotas. Id. These products do have a theoretical in-quota tariff rate, but beneficiaries are usually allocated a very small or nonexistent in-quota allocation. See id. at 8. For instance, although AGOA grants in-quota duty-free access for the tariff lines comprising low-fat chocolate crumb, no AGOA-eligible country has been assigned an in-quota allocation. Id. Thus, in reality most processed cocoa products from AGOA beneficiaries face over-quota tariff rates. As a result, exports of raw cocoa and cocoa by-products under AGOA accounted for an average of ninety-one million dollars during recent years, but the total value of AGOA imports for chocolate and other processed products averaged only seventeen thousand dollars during the same time period. Id. at 7.

\begin{thebibliography}{99}
  \bibitem{167} See \textit{supra} note 158 (describing how restrictions on preferential access for agricultural products can limit beneficiary-country exports).
  \bibitem{168} See \textit{Jones et al., supra} note 11, at 17 (describing how preferential access for asparagus and certain cut flowers has negatively affected U.S. producers of such products).
  \bibitem{169} \textit{GAO, supra} note 11, at 1, 10.
  \bibitem{171} See \textit{Jones et al., supra} note 11, at 18 (noting that trade liberalization generally results in cheaper imported products).
Therefore, as a second option, preference-granting countries could focus on eliminating caps and tariffs on agricultural products imported from certain subgroups of countries, such as LDCs. The EU has already enacted such a program through its EBA Initiative, and other countries have expressed a commitment to provide LDCs with similar access. Some in the United States have considered enacting similar reforms, but the structure of the U.S. political system could make such reforms difficult to implement. The institutional framework of the EU ratification process allows politicians to somewhat transcend local interests; final ratification of EU agreements in national parliaments appears, at least at times, to be more of a formality. Members of the U.S. Congress, on the other hand, must answer to smaller, more active constituencies and are thus more likely to be sensitive to constituents’ specialized interests.

Pub. Pol’y 883, 891 (2006). Some have argued that protective tariffs and caps are contrary to domestic interests and international development efforts as they artificially increase sugar prices in the United States and undermine global prices. Maki, supra, at 891; Letter from Women’s Edge Coal. et al. to the Office of the U.S. Trade Rep., Duty-Free Quota-Free Access for Least Developed Countries 8 (Mar. 15, 2007), available at http://www.cgdev.org/doc/commentary/Market_Access.pdf. One study commissioned by the Sweetener Users Association found that 7,500 to 10,000 jobs in sugar-using industries have been lost since 1997 as a result of artificially high sugar prices. Others have estimated that U.S. consumers would save about $1.6 billion per year if trade barriers on sugar products were unilaterally removed. Maki, supra, at 892–93.

173. See Jones et al., supra note 11, at 20–22 (describing various ways to accommodate LDCs). As LDCs may be specifically targeted for special and differential treatment, such programs would be consistent with WTO members’ commitments. See supra note 35.

174. See discussion supra Part III.

175. See Jones et al., supra note 11, at 22 (discussing commitments by developed-country WTO members to extend duty-free and quota-free treatment to all LDC imports). WTO members initially made commitments to provide duty-free and quota-free access for LDCs during the 2005 Hong Kong Ministerial Conference. However, while WTO members discussed the possibility of turning their commitments into binding preferences during the Doha Round in 2011, they were unable to reach a consensus regarding the final “LDC-plus” proposal at that time. ICTSD, “Doha Light” Takes Shape as WTO Members Lower Ambitions, BRIDGES WKLY. TRADE NEWS DIG., June 1, 2011, at 1–2, available at http://ictsd.org/i/trade-and-sustainable-development-agenda/107871/; Trade Negotiations Comm., Members to Think About ‘What Next for Doha, WTO’ for December Meeting, WTO.org (July 26, 2011), http://www.wto.org/english/news_e/news11_e/tnc_stat_26jul11_e.htm.

176. See New Partnership for Trade Development Act of 2009, H.R. 4101, 111th Cong. (2009). This bill, introduced in 2009 by one of the architects of AGOA, would have created immediate duty-free and quota-free access for all nonapparel products from LDC countries and immediate duty-free and quota-free access for certain apparel products, subject to a 50% cap for competitive Asian LDCs like Bangladesh and Cambodia. Jones et al., supra note 11, at 21; AGOA V? H.R. 4101, AGOA.INFO, http://www.agoa.info/index.php?view=about&story=agoaV (last visited June 7, 2012).

177. Lesage & Kerremans, supra note 16, at 92.

178. Id. During the Doha Round negotiations in 2011, domestic specialized interests arguably influenced the U.S. delegation’s decision to resist cotton liberalization provisions in the LDC-plus proposal. See ICTSD, supra note 175, at 2; Vlad Spanu, Liberalization of the International Trade and Economic Growth: Implications for Both Developed and Developing
Summer 2012] GSP and Development 847

Therefore, as an alternative, preference-granting countries could provide tariff reductions (rather than duty-free access) to beneficiary countries.¹⁷⁹ Unlike caps, which can deter long-range investment by making it difficult for individual exporters and investors to determine applicable preferential margins in advance,¹⁸⁰ tariff reductions create a more predictable environment for investment while also providing a way to shield competing producers in the preference-granting country.¹⁸¹

While tariff reductions would be preferable, TRQ reforms could also increase utilization of preferences. TRQs could be increased for beneficiary countries or reallocated to their benefit.¹⁸² U.S. in-quota allocations for sugar imports, for instance, are already regularly redistributed on a temporary basis when fill rates remain low.¹⁸³ But such reforms may have a limited effect, as permanent reallocation of TRQs would require the consent and appropriate compensation of current allocation holders, which could be difficult to obtain.¹⁸⁴ On the other hand, creation of additional in-quota allocations for beneficiary countries would be relatively simple and would not be contingent on the consent of other countries.¹⁸⁵ Alternatively, preference-granting countries could provide beneficiaries with increased margins of preference on in-quota and over-quota imports.¹⁸⁶

TRQs and tariff reductions, however, possess a significant potential weakness: they may be more susceptible to preference erosion. Preference erosion, which refers to the diminishing preference margins that result when tariff levels are reduced in multilateral or bilateral trade agreements with third-party countries, can eliminate the competitive advantage that beneficiary countries of nonreciprocal preference programs would otherwise enjoy.¹⁸⁷ Regardless, if it is possible to create tariff reductions or modified


¹⁷⁹. See JONES ET AL., supra note 11, at 20.

¹⁸⁰. See supra notes 165–166 (discussing difficulties that result from volume-based restrictions).

¹⁸¹. See JONES ET AL., supra note 11, at 20 (mentioning limited tariff reductions as a way to protect import-sensitive products).


¹⁸³. Skully, supra note 158, at 10.

¹⁸⁴. See id. at 9.

¹⁸⁵. In fact, additional in-quota allocations are regularly created through free trade agreements and are consistent with countries’ WTO commitments. See id. at 9–10. Some have questioned, however, whether permanent allocations of increased quotas or in-quota tariffs would necessarily be covered under the Enabling Clause if they were offered outside of a non-reciprocal preference program. E.g., MATTHEWS & LAROCHE-DUPRAZ, supra note 182, at 20.

¹⁸⁶. See Skully, supra note 158, at 9. Such arrangements are also used in free trade agreements. Id.

TRQs that provide a competitive advantage over nonbeneficiary-country products, both still represent a feasible reform strategy. Lastly, as a compromise, it may be possible to create a program that incorporates sourcing requirements for processed agricultural products that are similar to those currently used for AGOA apparel and textile products. In other words, the nonreciprocal preference program would provide duty-free treatment for both in-quota and over-quota processed agricultural imports, provided they incorporate a certain minimum percentage of primary agricultural products from the preference-granting country. Such an arrangement would, of course, decrease the value of preferential market access, as production costs for the products would significantly increase. However, given that tariff rates on certain processed agricultural products can be very high, it may be possible to prevent increased production costs from erasing the competitive advantage that duty-free access would provide.

As the above reforms would likely result in lost tariff revenue, they could be offset by reducing preferential access for certain imports that provide little value for the preference-granting country or beneficiaries. Both the EU and United States allow certain oil products to enter duty-free under nonreciprocal preference programs. Commentators and U.S. officials, in fact, have criticized the extent to which oil imports can dominate nonreciprocal preference programs.

It is unlikely that eliminating preferential treatment for oil products would have a significant impact on the economies of oil-producing beneficiary countries. Moreover, it would probably not significantly affect

188. As previously mentioned, apparel and textile imports must generally incorporate U.S.-manufactured materials in order to be eligible for AGOA preferences. See supra note 57.
189. See Gumisai Mutume, Mounting Opposition to Northern Farm Subsidies: African Cotton Farmers Battling to Survive, AFRICA RECOVERY, May 2003, at 18, available at http://www.un.org/ecosocdev/geninfo/afrec/vol17no1/171agri4.htm (implying that developed countries have significantly higher agricultural-product production costs than developing countries).
193. As oil-production industries in beneficiary countries are already heavily capitalized and able to compete with their counterparts in high-income countries, they are unlikely to need preferential assistance. Moreover, relatively few nonreciprocal-program beneficiaries ex-
domestic consumers in preference-granting countries or producers in beneficiary countries. In industrialized countries like the United States, for example, MFN tariff rates on most oil products are relatively low.\textsuperscript{194} Thus, oil imports from beneficiary countries could still be competitive absent preferential treatment under nonreciprocal preference programs.\textsuperscript{195}

D. Rules of Origin

Rules of origin, which define the conditions a product must satisfy to be considered as originating in a beneficiary country,\textsuperscript{196} can also impact market access.\textsuperscript{197} Rules of origin are, at their root, an attempt to balance between promoting integrated production, preventing dilution of preferences, and providing sufficient flexibility for countries with limited capacity to utilize preferences.\textsuperscript{198} Generally, as rules of origin become less flexible or impose stricter requirements, exporters lose the ability to choose the most cost-effective materials and processing facilities.\textsuperscript{199} This, in turn, results in higher production costs, which lower the competitiveness of the product in its intended market.\textsuperscript{200} In fact, when the costs of complying with rules of origin are greater than the preferential margins granted under the program, preferential access will be of no practical value.\textsuperscript{201} Thus, overly rigid rules of origin can often result in low utilization rates.\textsuperscript{202}
Although a variety of methods for determining rules of origin exist, nonreciprocal preference programs often specify a limited number of methods that beneficiaries may use to satisfy origin determinations. Rules of origin for U.S. nonreciprocal preference programs, for instance, require that imports meet a thirty-five percent value-added threshold. Under the EU nonreciprocal preference programs, rules of origin are generally calculated based on local-content thresholds. For most products, local-content thresholds are set at thirty percent, though some industrial products are subject to a fifty percent threshold. Most industrial products from LDCs, however, need only meet a thirty percent threshold instead of the heightened fifty percent threshold. In addition, for both LDCs and non-LDCs, the EU scheme allows rules of origin for many industrial products to be met in one


203. Most programs use one or several of four criteria: (1) domestic-content requirements, which are generally measured according to a minimum value added or local content percentage; (2) change in tariff heading requirements; (3) requirements that a specific process must be performed, such as U.S. triple-transformation requirements for AGOA textiles; and (4) substantial-transformation requirements, which at least some countries determine on a case-by-case basis. Krishna, supra note 197, at 8–9.

204. See Anthony, supra note 51, at 10 (listing the United States, the EU, and Canada’s nonreciprocal rules of origin); Sekkel, supra note 114, at 4–14 (describing the United States, the EU, Canada, Japan, Australia, Norway, New Zealand, and Switzerland’s nonreciprocal rules of origin).

205. A 35% value-added threshold means that the total cost or value of locally produced materials and local processing must equal at least 35% of the value of the finished product. UNCTAD, supra note 13, at 14. Nonlocal materials can be counted toward the aforementioned value-added requirement only if they are “substantially transformed.” Id. The 35% value-added threshold appears to be preferred by the United States, as witnessed by its inclusion in reciprocal and nonreciprocal trade arrangements to which the United States is a party. See Antoni Estevadeordal & Kati Suominen, Rules of Origin: A World Map and Trade Effects 14 (May 2004) (paper presented at the Seventh Annual Conference on Global Economic Analysis (June 17–19, 2004)), available at http://www.gtap.agecon.purdue.edu/resources/download/1866.pdf (listing 35% thresholds for several U.S. free trade agreements).

206. Local-content thresholds, like other value-added thresholds, require that a certain minimum percentage of originating materials be used in the working or processing of final products. See Commission Regulation 1063/2010, supra note 170, Annex I, n.1.2(a), 2010 O.J. (L 307) at 29.

207. See id. Annex I, pt. II, 2010 O.J. (L 307) at 34–70. The EU appears to favor the 30–50% percent local-content requirement, as witnessed by its inclusion in other trade arrangements to which the EU is a party. See Estevadeordal & Suominen, supra note 205, at 14 (listing 30–50% local-content requirements for EU free trade agreements with South Africa, Mexico, and Chile).

Summer 2012]

_**GSP and Development**_ 851

of two ways—through a local-content threshold as described above209 or through a change in tariff classification.210

To maintain flexibility and reduce compliance costs, many preference programs also permit cumulation, which allows exporters to include in local-content or value-added calculations components or materials sourced from certain countries or regional trade associations.211 U.S. GSP, for example, allows beneficiaries that belong to a common regional trade association recognized by U.S. GSP to regionally cumulate components.212 AGOA cumulation is even more flexible and allows for both bilateral cumulation213 and extended cumulation among AGOA beneficiaries.214 EU rules of origin also permit bilateral215 and regional cumulation among recognized trade associations.216 However, the EU rules do carve out some exceptions.

210. To meet the EU change in tariff classification requirement, a final product and its original components must be classified in a different four-digit Harmonized System heading or six-digit Harmonized System subheading. Id. Annex I, n.1.2(b), 2010 O.J. (L 307) at 29. Thus, using woven cotton fabric (HS 5208) to produce cotton shirts (HS 6105) would result in a change in tariff classification on the four-digit level. Brenton & Manchin, _supra_ note 196, at 12. As six-digit tariff groups represent subcategories within the four-digit headings, a change on the 6-digit level would require a similar, though less extensive, transformation. See Frequently Asked Questions—Tariff Affairs, USITC, http://www.usitc.gov/faqs/tariff_affairs_faqs.htm (last visited June 7, 2012).
211. Cumulation is based on the assumption that regional materials are inexpensive and relatively available. But if this assumption is not correct, products may require significant preferential margins to be competitive in the preference-granting market, and producers will need to develop separate supply chains to be competitive in other markets. In fact, the EU’s decision to expand cumulation provisions while only slightly relaxing local-content thresholds and tolerance levels was criticized in this regard. Gibbon, _supra_ note 202, at 20.
212. U.S. GSP currently recognizes five regional cumulation groups: the Andean Group, the Association of South-east Asian Nations (ASEAN) excluding Singapore and Brunei Darussalam, the Caribbean Common Market, the Southern Africa Development Community, and the West African Economic and Monetary Union. UNCTAD, _supra_ note 13, at 14–15.
213. Components produced in the United States can count for up to 15% of the 35% value-added threshold. Bhala, _supra_ note 157, at 178.
214. The cost or value of materials produced in any current AGOA beneficiary or any former AGOA beneficiary that has signed a free trade agreement with the United States may count toward value-added thresholds. Id. at 178–82. However, AGOA does not allow beneficiary countries to count processing completed in other beneficiaries toward this threshold. Raj Bhala, in particular, has argued that permitting cumulation of processing costs could increase utilization of preferences and lead to further regional integration. See id. at 179.
216. Four regional cumulation groups are recognized by the EU: Group I (ASEAN member countries), Group II (Andean Community and Central American Common market countries and Panama), Group III (South Asian Association for Regional Cooperation member states), and Group IV (Argentina, Brazil, Paraguay, and Uruguay). Id. pmbl. (11), art. 86(1), 2010 O.J. (L 307) at 2, 11. The EU regional cumulation provisions also allow Group I.
Agricultural products processed in certain ways are not eligible for bilateral cumulation and “certain sensitive products” are excluded from regional cumulation. In addition, a beneficiary country may not cumulate components when the components would face a higher tariff if shipped directly from the originating country.

While the divergent structure of preference-granting countries’ regimes makes it difficult to make sweeping recommendations, a survey of the EU and U.S. rules of origin demonstrates at least six ways in which preference-granting countries could make their rules of origin more user friendly and development oriented. First, rules of origin should allow origin determinations to be satisfied through more than one method. Second, rules of origin should permit cumulation with free trade agreement signatories. Third, rules of origin should encourage the use of simplified origin determinations. Fourth, rules of origin should permit extended cumulation among all beneficiaries. Fifth, rules of origin should permit cumulation with nonbeneficiary countries from the same regional trade group. Lastly, stringent transformation requirements for apparel and textile products should be relaxed. As will be discussed, some of the first five recommendations may face resistance, but the resulting benefits of such reforms may be sufficient to overcome any resistance. However, the last recommendation may be difficult to implement, at least in some countries.

First, allowing rules of origin to be satisfied through one of several methods, as permitted in the EU scheme, could increase the flexibility of preferential rules of origin and potentially lower the costs of complying with the rules. In contrast, permitting origin determinations to be satisfied only through value-added or local-content thresholds could increase compliance costs. While the costs of complying with rules of origin depend on the type of product and the production capacity of a beneficiary, value-added and local-content thresholds tend to have higher compliance costs than other methods for origin determination such as change in tariff calculations.

countries and Group III countries to request permission to cumulate. Id. pmbl. (15), art. 86(5), 2010 O.J. (L 307) at 3, 12.
217. Id. pmbl. (13), art. 78(1)(f)–(h), 85(1), 2010 O.J. (L 307) at 3, 10, 11.
218. Id. pmbl. (10), 2010 O.J. (L 307) at 2. For a full list of excluded products for each region see id. Annex II, 2010 O.J. (L 307) at 34–70.
219. Id. art. 86(3), 2010 O.J. (L 307) at 12.
220. See Brenton & Hoppe, supra note 15, at 13 (advocating for allowing exporters to choose between value-added and change in tariff requirements); Brenton & Manchin, supra note 196, at 15. U.S. GSP and AGOA, in contrast, require nontextile rules of origin to be satisfied only through a combined value-added and substantial-transformation requirement. See Anthony, supra note 51, at 10.
222. See id. at 27–28 (noting that compliance costs for change in tariff classifications are generally lower than those for value-added thresholds). Moreover, a change in tariff classification can result in lower administrative costs, as it does not require the importer to prove the
Moreover, U.S. and EU value-added or local-content thresholds for some products may be difficult to meet through processing in that beneficiary alone. Thus, even if regional sourcing is not economical or practical, manufacturers in beneficiary countries may need to incorporate components or materials from other beneficiaries or from recognized cumulation groups to satisfy value-added or local-content thresholds. If other methods for satisfying origin requirements were available, however, manufacturers would have the ability to meet origin requirements through the most practical or economical method.

Second, rules of origin should permit cumulation between nonreciprocal-preference beneficiaries and the preference-granting country’s preferential trading partners, as this arrangement could increase integration and economical sourcing of components. EU rules of origin, for instance, allow GSP and EBA beneficiaries to cumulate components originating in countries with which the EU has a free trade agreement. This in effect allows the beneficiary country to treat components originating in the free trade agreement signatory as if they originated in the beneficiary country, provided that the rules of origin in the free trade agreement would otherwise have been met. This arrangement benefits both the preference-granting country and the beneficiary country, as consumers in preference-granting countries would

origin of materials incorporated into the finished product. See Brenton & Manchin, supra note 196, at 15 (“The costs of proving origin involve satisfying a number of administrative procedures so as to provide the documentation that is required and the costs of maintaining systems that accurately account for imported inputs from different sources to prove consistency with the technical rules.”). Commentators have noted, however, that manufacturers of final goods may benefit more from change in tariff requirements than manufacturers of intermediate goods. See, e.g., Carrère & de Melo, supra note 221, at 27.

223. Typical value-added levels for the manufacture or processing of many products of interest to developing countries such as chocolate, processed food and vegetables, and certain manufactured products, for instance, do not reach the EU or U.S. threshold. See Overseas Dev. Inst., Creating Development Friendly Rules of Origin in the EU 3 (Briefing Paper 12, 2006) (demonstrating the severity of the current regime). However, decreasing value-added thresholds in nonreciprocal preference programs below 30 or 35% percent may not be feasible in all developed countries, particularly as such requirements appear to represent the status quo for those countries’ trade arrangements. See supra note 205 (explaining U.S. threshold minimums); supra note 207 (explaining EU threshold minimums).

224. See Brenton & Hoppe, supra note 15, at 11.

225. AGOA also permits free trade agreement cumulation between AGOA beneficiaries and sub-Saharan African countries that have signed a free trade agreement with the United States. See 19 U.S.C. § 3721(b)(7) (2004); see also AGOA III, AGOA.Info, http://agoa.info/index.php?view=about&story=agoa_three (last visited June 7, 2012) (“Where beneficiary countries migrate to a FTA with the US, other beneficiary countries will not be disadvantaged as such countries will still be regarded as AGOA beneficiaries for cumulation purposes . . .”). For a list of such countries, see Free Trade Agreements, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited June 7, 2012).

have access to higher-quality, lower-cost products and beneficiary-country producers would be able to source components more economically.\textsuperscript{227}

Third, preference-granting countries should implement simpler and more importer-friendly origin determinations. Given global supply chains and fragmented production processes, determining the origin of goods can be a burdensome, costly process.\textsuperscript{228} Moreover, rules of origin for some nonreciprocal preference programs do not provide readily measurable criteria for determining whether origin requirements have been met.\textsuperscript{229} Decisions regarding whether origin requirements have been satisfied are thus often made on a case-by-case basis at the time the product is imported, meaning that it may not be possible to accurately predict whether products will qualify for preferential treatment or whether they will not qualify and thus be subject to elevated tariffs.\textsuperscript{230} The EU rules of origin, however, provide a template for a simpler system that can make product origin determinations more predictable and less costly. For regional-cumulation purposes, products imported to the EU are deemed to originate in the last country in which the finished product was processed, provided the processing was more than a minimal operation.\textsuperscript{231} If the processing was minimal, the finished product is deemed to originate in the country of the applicable regional group that has provided the highest value of materials used to manufacture the finished product.\textsuperscript{232} In addition, the EU now uses a relaxed “non-manipulation” requirement\textsuperscript{233} to verify direct shipment\textsuperscript{234} to the EU.\textsuperscript{235} Unless customs authorities have reasonable doubts, goods imported under EU nonreciprocal preference programs will be assumed to

\textsuperscript{227.} See Harris, supra note 197, at 19.

\textsuperscript{228.} Peter Lloyd & Donald MacLaren, Rules of Origin, in Negotiating a Preferential Trading Agreement: Issues, Constraints, and Practical Options 170, 171 (Sisira Jayasuriya et al. eds., 2009); Krishna, supra note 197, at 6.

\textsuperscript{229.} See, e.g., Jones, supra note 9, at 26 (noting that U.S. GSP rules of origin do not provide a measurable definition for the term “substantial transformation”).

\textsuperscript{230.} See id.


\textsuperscript{232.} Id.

\textsuperscript{233.} “Non-manipulation” requirements prohibit products from being “altered, transformed in any way or subjected to operations other than operations to preserve them in good condition” during transit from the country of origin to the importing country. Generalised System of Preferences, European Commission Taxation and Customs Union, http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_781_en.htm (last visited June 7, 2012).

\textsuperscript{234.} Direct-shipment requirements are commonly found in nonreciprocal and reciprocal trade arrangements. They require that products be transported directly from the beneficiary country to the preference-granting country without entering into the commerce of another country while en route. UNCTAD, supra note 13, at 14.

have met requirements, and systematic evidence of direct transport is no longer required.236

Fourth, preference-granting countries should permit extended cumulation among all beneficiary countries. Like regional cumulation, extended cumulation provides low-income countries with greater “flexibility in sourcing inputs.”237 In addition, some have argued that extended cumulation can promote multilateral trade liberalization and freer trade between developed and developing countries.238 However, it may be difficult to expand extended cumulation to all nonreciprocal-preference beneficiaries, at least in some countries.239 Several preference-granting countries, even those that have reformed other aspects of their nonreciprocal preference programs, have continued to resist extending cumulation to include a wider group of beneficiaries.240 However, such resistance may not be insurmountable. Some preference-granting countries already permit extended cumulation241 and other preference-granting countries permit extended cumulation among beneficiaries of regional preference programs.242 Some scholars have argued that extended cumulation could at times present an attractive political

236. In case of doubt, however, customs authorities may still request evidence of compliance, such as bills of lading. Id. art. 74(1)–(2), 2010 O.J. (L 307) at 8. Other recent improvements to the EU scheme include the ability to split consignments en route to the EU, provided such consignments remain under customs supervision in the transit country, and replacement of certification paperwork with statements of origin that can be transmitted electronically. Id. pmbl. (18), (23), art. 94(1), 2010 O.J. (L 307) at 3, 4, 15.


238. **See Harris, supra note 197, at 3–4 (arguing that extended cumulation creates an incentive for beneficiary countries to lower their current high tariffs on nonagricultural products).**

239. **See Hatem Mabrouk, Rules of Origin as International Trade Hindrances, 5 Entrepreneurial L.J. 97, 174 (2010) (noting that less competitive intermediate-goods producers have an incentive to lobby for maintaining current cumulation rules, as extended cumulation rules would result in loss of market share for producers currently outside the cumulation group).**

240. **See Eckart Naumann, The Revised Rules of Origins for the GSP: What Has Changed?, TRADE NEGOT. INSIGHTS, July–Aug. 2011, at 17, 18, available at [http://ictsd.org/inews/trn/1110513/](http://ictsd.org/inews/trn/1110513/) (mentioning that new general EU GSP rules of origin do not permit extended cumulation); Harris, supra note 197, at 11 (mentioning that the GSP schemes of the EU, the United States, and Japan do not permit extended cumulation).**

241. **See Harris, supra note 197, at 11 (mentioning that Australia and Canada permit all beneficiaries of nonreciprocal preferences to cumulate components).**

compromise between those who want stricter rules of origin and those who favor increased market access. Moreover, extended cumulation could promote lower tariff rates in beneficiary countries, which would benefit intermediate component producers in preference-granting countries.

Fifth, rules of origin should promote cumulation between beneficiary countries and nonbeneficiary countries that belong to the same regional trade group. Regional cumulation can facilitate economic development, as it allows LDCs with limited production capacity to source materials from regional non-LDCs more effectively. In addition, greater regional integration can promote fragmentation, which allows a country to exploit comparative advantages for certain sets of tasks. In contrast, prohibiting regional cumulation between beneficiaries and nonbeneficiary countries in a common regional trade group could undermine regional integration and development. For example, while the Republic of Guinea and Côte d’Ivoire are both members of the Economic Community of West African States, both are ineligible for AGOA. As a result, AGOA creates a disincentive for beneficiary countries to source from either of these countries, as their components or materials cannot be counted toward required value-added thresholds.

However, as nonreciprocal preference programs are often designed as a tool to promote foreign policy, it may seem counterproductive to provide benefits for noneligible countries without requiring policy reforms in exchange. As a compromise, rules of origin could permit regional cumulation between beneficiary countries and current beneficiaries, former beneficiaries that have signed a free trade agreement with the preference-granting country, and, for a limited period of time, beneficiaries that have recently had their benefits suspended or revoked. Such an arrangement would promote development of more stable and predictable regional supply chains between beneficiaries. Moreover, in the event that a country that

243. E.g., Harris, supra note 197, at 3–4.
244. See id. at 35 (arguing that extended cumulation would cause firms in a beneficiary country that use intermediate goods in their production processes to pressure the beneficiary country to make MFN tariff reductions on those goods).
245. General EU GSP and the EBA Initiative contain regional cumulation provisions that permit cumulation between program beneficiaries and nonbeneficiaries who are members of a recognized regional trade group. UNCTAD, supra note 89, at 31. U.S. GSP contains similar provisions. Id. at 55–56.
246. See id. at 35–36.
247. Collier & Venable, supra note 8, at 1329.
249. In other words, cumulation with nonbeneficiary countries would promote production in these countries since beneficiaries could source components from nonbeneficiaries and count them toward value-added or local-content thresholds. However, nonbeneficiary countries would receive these benefits regardless of whether they implemented the policy reforms required by the preference-granting country.
250. See Brenton, supra note 237, at 4–5.
supplied intermediate components lost its benefits, temporary extension of benefits would give producers in other beneficiary countries additional time to find alternative suppliers. Encouraging continued interactions between final producers in beneficiary countries and intermediate suppliers in countries that have had their benefits suspended or revoked could actually help promote preference-granting countries’ policy interests. Countries that have lost their benefits would likely come under increased pressure from domestic suppliers to requalify for the nonreciprocal preferences as the limited eligibility period neared expiration.\(^\text{251}\)

Lastly, relaxing stringent transformation requirements for apparel and textile products could increase utilization of preferences and make nonreciprocal programs more development friendly.\(^\text{252}\) Some nonreciprocal preference programs apply stringent requirements regarding the origin of materials used to make eligible products in non-LDC beneficiary countries. For example, to meet origin requirements under AGOA, many non-LDC apparel and textile products must undergo triple transformation.\(^\text{253}\) Triple transformation can greatly reduce the competitiveness of beneficiaries’ imports in the U.S. market.\(^\text{254}\) In 2002, for example, approximately fifty percent of South African fabric exports to the United States did not qualify for AGOA preferences.\(^\text{255}\) Manufacturers instead found it was more economical to source fabric from third countries and export finished products under MFN rates than comply with AGOA origin requirements.\(^\text{256}\)

\(^{251}\) See Harris, supra note 197, at 33 (noting that intermediate manufacturers and final producers would exert political influence to maintain profitable trade relationships).


\(^{253}\) See Langton, supra note 16, at 11–12. Apparel transformation requirements can generally be divided into three groups: single transformation, double transformation, and triple transformation. Single transformation, which is the least restrictive method, allows a finished product to be assembled from fabric originating in any country. UNCTAD, supra note 252, at 1. In contrast, double transformation permits use of yarn of any origin. Id. Thus, fabric used to assemble the final product must be woven in the preference-granting country, the beneficiary country, or a country with which cumulation is permitted. Id. Triple transformation, which is the most restrictive method, requires that both yarn and fabric used in the finished product originate in the preference-granting country, the beneficiary country, or a country with which cumulation is permitted. See id. at 1, 3.


\(^{255}\) Lippoldt & Kowalski, supra note 8, at 15–16 (citing C. Stevens & J. Kennan, The Utilisation of EU Preferences to the ACP (paper presented at the WTO Technical Seminar on Tariff Preferences and Their Utilisation (Mar. 31, 2004))).

\(^{256}\) Id.
Some preference-granting countries already allow non-LDC textile and apparel products to qualify for preferences under double-transformation requirements.\textsuperscript{257} However, across-the-board liberalization of non-LDC triple-transformation requirements may face political resistance, at least in the United States.\textsuperscript{258} Although single-transformation requirements were considered during the formation of AGOA, elements of the U.S. clothing industry successfully lobbied for the current triple-transformation requirement.\textsuperscript{259} AGOA’s triple-transformation requirement benefits U.S. businesses and industry by allowing utilization of outward-processing arrangements, in which U.S. manufacturers focus on capital-intensive activities like fabric production and then ship components overseas for assembly, a relatively labor-intensive process.\textsuperscript{260} Thus, AGOA non-LDC textile and apparel transformation requirements, while stringent and complicated, are already the result of a compromise between proponents of increased market access and influential domestic clothing and textile industry groups.\textsuperscript{261} Unless the political influence of the clothing and textile industry groups significantly weakens, further reforms may be difficult to implement.\textsuperscript{262}

While it may be difficult to implement a sweeping liberalization of transformation requirements, more focused reforms may be easier to achieve. For instance, many countries have successfully incorporated single-transformation requirements for LDC apparel products.\textsuperscript{263} Given the limited

\textsuperscript{257} See, e.g., Commission Regulation 1063/2010, supra note 170, pt. II, 2010 O.J. (L 307) at 49–59 (describing EU GSP textile and apparel rules for non-LDCs); Naumann, supra note 240, at 18 (noting that non-LDCs generally remain subject to double-transformation requirements).

\textsuperscript{258} See Mabrouk, supra note 239, at 118–19 (describing resistance by the U.S. clothing lobby).

\textsuperscript{259} Id.

\textsuperscript{260} GAO, supra note 11, at 11.

\textsuperscript{261} Lesage & Kerremans, supra note 16, at 77; Mabrouk, supra note 239, at 118–19 (arguing that current triple-transformation rules reflect concerns about U.S. textile and fabric products’ lack of competitiveness compared to their Asian counterparts). Moreover, AGOA textile and apparel provisions already retain some flexibility as a result of political compromises. For instance, U.S. officials may grant duty-free and quota-free access to apparel made from third-country fabric provided two conditions have been met: the product is both cut and assembled in the beneficiary country, and commercial quantities of component materials cannot be supplied by U.S. industry in a timely manner. UNCTAD, supra note 13, at 46. In addition, AGOA includes a de minimis exception for fibers and yarns not wholly formed in the United States or another AGOA beneficiary country, provided their weight does not exceed 10% of the total weight of the assembled product. Langton, supra note 16, at 13.

\textsuperscript{262} See Mabrouk, supra note 239, at 118–19. See also supra note 172 and accompanying text (describing how the structure of the political system in the United States makes it susceptible to specialized interests).

capacity of many LDCs, apparel products and their components can be difficult and expensive to produce domestically. As a result, absent special treatment, apparel products from LDCs with limited capacity are likely to be less competitive than those from more developed beneficiaries. Relaxed transformation requirements, however, can help compensate for competitiveness problems that such countries face vis-à-vis more developed beneficiaries.

**CONCLUSION**

Drawing upon the examples of the EU and U.S. nonreciprocal preference programs, preference-granting countries could improve the effectiveness of their programs through implementing the following four reforms: increasing the stability of preference programs, developing more defined eligibility provisions, expanding product coverage, and making rules of origin simpler and more flexible.

First, as demonstrated by the recent GSP renewal debates in the United States, instability and unpredictability in a nonreciprocal preference program can decrease its effectiveness and hurt manufacturers in the...
beneficiary country and businesses and consumers in the preference- 
granting country. Internal factors, such as partisan disagreements and budget 
constraints, and external factors, such as the political nature of the WTO 
process, may contribute to this instability. But while external factors can be 
mitigated, internal factors may be difficult to overcome. Regardless, prefer-
ence-granting countries should still consider issuing nonbinding guidance 
regarding the anticipated scope and duration of their programs.

Second, intrusive, ambiguous, and unpredictable conditions on eligibil-
ity can constrain utilization of some preferences. While it may not be 
feasible to completely eliminate or dramatically modify eligibility require-
ments, it may be possible to incorporate more defined eligibility provisions. 
This would improve administration of the preference program while main-
taining its effectiveness as a foreign policy tool. Eligibility for general EU 
GSP and GSP-plus, for instance, is based on similar objectives as the U.S. 
scheme but uses more defined standards, such as international conventions, 
as a reference point. Adding a preset period of time during which benefits 
are phased out for noncompliant beneficiaries would also help improve the 
functionality of nonreciprocal programs.

Third, product coverage in nonreciprocal preference programs should 
be expanded to cover a greater number of agricultural and processed 
agricultural products from beneficiary countries. While strong political 
resistance would make full liberalization difficult, other reforms are 
possible. For instance, in-quota allocations could be reassigned or created 
or an increased margin of preference could be granted to in-quota and 
over-quota agricultural products imported under nonreciprocal preference 
programs. Tariff reductions on sensitive products, rather than duty-free 
treatment, may also provide a workable compromise. In addition, it may 
be possible to design a special arrangement for processed agricultural 
products that grants duty-free treatment provided a certain percentage of 
primary agricultural inputs from the preference-granting country are 
incorporated. A similar arrangement is already used for AGOA textile and 
apparel products. Given significant over-quota tariff margins on processed 
agricultural products in some countries, this arrangement may be able to 
overcome competitiveness problems that have hampered textile and 
apparel imports. In addition, any resulting loss of tariff revenue from the 
above reforms could be compensated through eliminating preferential 
market access for oil products, which would be unlikely to harm either the 
preference-granting country’s domestic consumers or producers in 
beneficiary countries.

Lastly, preference-granting countries could further simplify and 
 improve rules of origin for their preference programs. For instance, additional 
methods for satisfying origin requirements—such as a change in tariff 
heading—could supplement the single, value-added requirement currently 
used by some countries. In addition, preference-granting countries should 
strive to simplify origin determinations. Nonreciprocal preference programs 
should also permit cumulation with free trade agreement signatories and
nonreciprocal-program beneficiaries. While proposals to allow beneficiary countries to cumulate materials from a nonbeneficiary country in the same regional trade group may face initial resistance, permitting such an arrangement for a limited period of time could actually further preference-granting countries’ policy goals. However, certain other modifications, such as relaxing special apparel and textile rules of origin, may not be feasible in all preference-granting countries.

Nonreciprocal preference programs have the potential to benefit both preference-granting countries and beneficiaries. To take full advantage of these programs, preference-granting countries should consider implementing the reforms discussed above, which would improve the functionality and coverage of their programs.