St. Mary's Law Journal

Volume 26 | Number 2 Article 5

1-1-1995

International Law of Trade Preferences: Emanations from the European Union and the United States.

Kele Onyejekwe

INTERNATIONAL LAW OF TRADE PREFERENCES: EMANATIONS FROM THE EUROPEAN UNION AND THE UNITED STATES

KELÉ ONYEJEKWE*

* Attorney in Washington, D.C.; B.A., University of Nigeria; M.S., University of Wisconsin; J.D., Howard University. The views reflected in this Article are exclusively those of the author. Although he is solely responsible for any errors appearing herein, the author thanks R. Badrinath, Mahmoud Hamza, John Harbison, Gerd Langer, Jake Looney, Chidi Ogolo, Don Pedersen, Vinod Rege, Teruo Ujiie, and Gwen Utitz for their comments or assistance regarding earlier drafts.

I. INTRODUCTION

Preferential tariff arrangements have proliferated. Trade preferences are granted when an importing nation eliminates or significantly reduces tariffs[1] placed on goods shipped from particular countries. The most widespread example of trade preferences is the Generalized System of Preferences (GSP). This system, monitored by the United Nations Conference on Trade and Development (UNCTAD), requires developed countries to grant trade preferences to developing countries. The European Union (EU)[2]

1. A tariff is a tax imposed on imports by the importing country, which could be a fixed charge per unit of product imported or a fixed percentage of the value of imports. KATHRYN L. LIPTON, AGRICULTURE, TRADE, AND THE GATT: A GLOSSARY OF TERMS 40 (USDA, ERS & Agric. Info. Bull. No. 625, 1991).

2. As much as possible in this Article, the countries of Europe that are members of this customs union will be called the European Union (EU). Such references will occur at points when the EU did not technically exist, a posture taken by other commentators. *See* INT'L AGRIC. TRADE RESEARCH CONSORTIUM, THE URUGUAY ROUND AGREEMENT ON AGRICULTURE: AN EVALUATION (1994) (recognizing universal acceptance of phrase "European Union" in instances in which "European Community" may technically apply).

and the United States have gone beyond the requirements of the GSP to grant special preferences to qualifying countries.[3]

This Article posits that the proliferation of preferences is evidence of the "hardening" of a body of international trade-preference law. Although this would have been a bold assertion years ago, it is not so any longer. To understand the transformation of the law of trade preferences and development, a brief historical review is necessary. This review begins with the earliest formulation of international law—the classical doctrine.

Classical international law consisted simply of the law between nations. It did not recognize human beings as its subjects,[4] nor did it envision a world in which two-thirds of all states would constitute developing countries. Not surprisingly, an international law of trade preferences in any form was unthinkable.

Neither international cooperation nor a duty for developed countries to assist developing countries is recognized under classical international law doctrine.[5] The doctrine of equality—which supposed that all states are equal, no matter what their economic consequentialities—precluded such assistance.[6] A companion doctrine—that of sovereignty—declared each state sacred and its territories inviolable. The concepts of reciprocity and commercial freedom further contributed to an environment that made development assistance or a law of development unthinkable under the classical approach.[7]

Developments following the two World Wars posed insurmountable challenges to the survival of classical international law. The carnage of World War II gave impetus to a new international think-

---

3. A European special-preference system is contained in the Lomé IV Convention. *See* discussion *infra* Part VI (B). A United States special-preference system is called the Caribbean Basin Initiative. *See* discussion *infra* Part V (B).

4. *See* Goler T. Butcher, *Forword* to *World Food Day—Food and Law Conference: The Legal Faces of the Hunger Problem*, 30 How. L.J. 193, 196 (1987) (referring to development of individual human rights at international level after World War II).

5. F.V. Garcia-Amador, The Emerging International Law of Development: A New Dimension of International Economic Law 1 (1990).

6. *See* Georges Abi-Saab, *Foreword* to Abdulqawi Yusuf, Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law at ix (1982) (stating that classical international law doctrine confined itself to limiting state imperium and power).

7. *See id.* (noting that states essentially abstained from transgressing limits of other states' sovereignty).

ing frequently referred to as "the sovereignty of humankind"[8] or "humanitarian universalism."[9] These terms are used to capture a new environment of cooperation among nations in the interest of humankind.

As developing countries emerged from colonialism, they called for a new world economic order, complaining that the international economic order had effectively undermined their development efforts. Thus, the seeds of the emerging law of international development were sown. Today, a concrete aspect of this emerging law is the law of trade preferences.[10]

When the General Agreement on Tariffs and Trade (GATT)[11] was signed in 1947, it was largely controlled by the dominant paradigm of international law—the classical doctrine.[12] Hence, Article I[13] and the Preamble[14] of the GATT contained the famous Most-

---

8. HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 3 (Richard P. Claude & Burns H. Weston eds., 1989) (citing HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 47 (1973)).

9. Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*, 26 WILLAMETTE L. REV. 113, 113 (1989).

10. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 95 (1990).

11. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, art. I, para. 1, 61 Stat. A5, 55 U.N.T.S. 187 [hereinafter GATT].

12. *Towards a New Trade Policy for Development: Report By the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Econ., U.N. Doc. E/CONF.46/3 at 28 (1964).

13. Article I of the GATT provides:

GENERAL MOST-FAVOURED-NATION TREATMENT

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III [prohibiting discrimination against imports], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 11, art. I, para. 1, 61 Stat. at A12, 55 U.N.T.S. at 196-98.

14. The GATT Preamble states in relevant part that the contracting parties were "desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra* note 11, pmbl., 61 Stat. at A11, 55 U.N.T.S. at 196.

Favoured-Nation (MFN) Clause and the concept of reciprocity, respectively.

Developing countries called for an amendment to GATT's Article I that excluded trade with them, or among them, from its mandate.[15] They wanted the reciprocity doctrine eliminated.[16] Part IV of the GATT[17] attempted to satisfy the developing countries by eliminating the reciprocity doctrine.[18]

Although special preferences are at least as old as colonialism, one of the developments in the call for a new international economic order is the GSP.[19] The GSP's overall goal is to open developed-country doors to developing-country exports of semi-manufactured and manufactured goods. All of the systems, like those of United States and the EU, accommodate developing countries' agricultural exports.

This Article contends that the law of trade preferences is now widely practiced in international affairs; as such, developed nations that terminate all trade preferences for developing countries probably engage in illegal conduct under international law. The Article

---

15. *See* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 11 (1987) (writing that developing countries tabled many proposals asking for positive transfer of resources); *see also* Abdulqawi A. Yusuf, *"Differential and More Favourable Treatment": The GATT Enabling Clause*, 14 J. WORLD TRADE L. 488, 490 (1980) (showing why amendment procedure was never used).

16. *Compare* DIANA TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT 27 (1987) (indicating that "[developing countries] proposed that the developed members should make unilateral concessions with a view to contributing to the rise in export earnings of [less developed countries]") *with Towards a New Trade Policy for Development: Report By the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Econ., U.N. Doc. E/CONF.46/3 at 28, 31 (1964) (noting that "[t]here is a real or implicit reciprocity, independent of the play of conventional concessions" and that "this is what must be recognized in international trade policy").

17. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, *opened for signature*, Feb. 8, 1965, arts. 36–38, 17 U.S.T. 1977, 1978–87, 572 U.N.T.S. 320, 322-36 [hereinafter GATT Part IV].

18. *But see* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 237–38, 239–46 (1970) (acknowledging that review of provisions indicate little involvement of concrete commitments and qualifications of other General Agreement provisions).

19. ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 11 (1987) (stressing that "[t]he only major element of the . . . New International Economic Order that did not appear during the GATT-ITO negotiations was the call for systematic tariff preferences by the developed countries—the idea now embodied in the Generalized System of Preferences").

is structured as follows: Part II traces the evolution of international legal standards for development and trade preferences. Part III outlines the history, development, and structure of the GSP, and Part IV reviews the history of special preferences. Parts V and VI examine the GSP and special preference systems of the United States and the EU, respectively. Part VII assesses the value of the U.S. and EU schemes to developing countries, and finally, Part VIII evaluates the schemes' compliance with the international law of development.

II. EMERGENCE OF INTERNATIONAL LAW OF DEVELOPMENT AND TRADE PREFERENCES

A. *The Passing of the Classical Doctrine of Noncooperation*

The modern doctrine of international law formally emerged in 1648 following the Treaty of Westphalia.[20] Symbolizing the beginning of the modern state system, the Treaty's most important features were equality of nations and respect for national sovereignty.[21] These doctrines did not prevent that states could not cooperate. Rather, they symbolized the notion that states were under no legal duty to cooperate, especially in the common interest of nations. By the end of the nineteenth century, however, it became clear that nations must cooperate to achieve a better standard of living for their citizens.[22]

A new norm gradually crept into international law that

> impose[d] upon the States obligations of a new and different type, namely, those generated by international cooperation. Such obligations consist of mandates, that is to say, duties to do something with a view to protecting, by means of positive actions, the common interests of the States and of the international community as a whole.[23]

---

20. For a general disquisition on the influence of the Treaty on the development of international law, see Leo Gross, *The Peace of Westphalia*, 1648–1948, *in* INTERNATIONAL LAW IN THE TWENTIETH CENTURY 25–46 (Leo Gross ed., 1969).

21. GEORGES ABI-SAAB, *Foreword* to ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW at ix (1982).

22. The Hague Peace Conferences of 1889 and 1907, and the creation of the International Telegraph Union of 1865, are examples of this type of international cooperation. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 2 (1990).

23. *Id.* at 3.

Although the earliest forms of international cooperation were bilateral, the world increasingly relied upon multilateral treaties to preserve the law of cooperation. Following the first World War, however, reliance upon multilateral treaties dissipated. Economic depression caused a wave of nationalism, and protectionist economic policies informed widespread recourse to bilateralism. The competitive devaluation of currencies led to beggar-thy-neighbor policies. A regression in the development of world trade law and practice occurred.

After the second World War, the international order changed. Following the atrocities of World War II, nations were ready to cooperate in the interest of humanity. It became plausible that humankind could extinguish itself. This realization brought about a watershed in human rights law, converting the world from a sovereignty of nations to one in which a sovereignty of humankind was imaginable. The United Nations now expresses a post-World War II mentality and remains the dominant norm-creating body in contemporary international law.[24] Because economic and social deprivation encourage international wars and international human rights violations, the United Nations, like the League of Nations before it, has attempted to ensure international economic and social progress.

The *Universal Declaration of Human Rights*[25] assigns economic and social rights.[26] Under the Preamble to the Charter of the United Nations (the Charter), the peoples of the United Nations are "determined . . . to promote social progress and better standards of life in larger freedom . . . [and for these ends] . . . to employ international machinery for the promotion of the economic and social advancement of all peoples."[27]

Chapter Nine[28] of the Charter is devoted to international economic and social cooperation. Article 55 states:

> With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among na-

---

24. *See* Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 17 (1994) (discussing evolution of United Nations' human rights lawmaking activities).

25. U.N. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. at 71, U.N. Doc. A/810 (1948).

26. *Id.* at 75–76.

27. U.N. CHARTER pmbl.

28. U.N. CHARTER arts. 55–60.

tions based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation . . . .[29]

Article 56 requires that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[30]

The Charter also created the Economic and Social Council.[31] The Charter's ratification by the 51 original[32] and 185 present[33] member nations evidences widespread acceptance of a duty to cooperate in the international community. Trade preferences, as a subset of the law of development, are one aspect of cooperation. The U.N. General Assembly has issued declarations, such as the *Declaration on the Establishment of a New International Economic Order*[34] and the *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States*,[35] to elaborate the law of trade preferences.[36] These resolutions flow from the Charter, the *Universal Declaration of Human Rights*, and the principles they espouse. The new era of cooperation includes the emerging law of development. The law of development encompasses the legal efforts of the international community to address the need for more uniform economic and social progress around the world through the provision of nonreciprocal trade preferences.

---

29. *Id.* at art. 55.

30. *Id.* at art. 56.

31. *See id.* at arts. 61–72 (providing for composition, functions, powers, voting rights, and procedures of Economic and Social Council).

32. *See* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 894 (Burns H. Weston et al. eds., 1990) (listing 51 original members).

33. *See United Nations Press Release, United Nations Member States*, ORG/1190 (Dec. 15, 1994) (listing 185 present member states).

34. U.N. GAOR Ad Hoc Comm., 6th Sess., Agenda Item 7, U.N. Doc. A/Res/3201 (S-VI), *reprinted in* 13 I.L.M. 715 (1974).

35. U.N. GAOR, 25th Sess., 1883d plen. mtg., *reprinted in* 9 I.L.M. 1292 (1970).

36. *See* discussion *infra* Part VIII.

B. *Legal Nature of a Right to Preferences as a Part of the Right to Development*

Many of the emerging laws of development, including the law of trade preferences, emanate from the Charter and are amplified by numerous resolutions of the U.N. General Assembly. However, the practices of individual states and the activities of other international organizations are relevant for accessing the emergence of trade-preference norms.

The declarations of the General Assembly have an ambiguous legal effect[37] and are not always considered sources of "hard" international law.[38] Many of these instruments reside in the area of "soft" international law,[39] and some simply declare existing customary law. Notwithstanding hesitations concerning their legal effect, the international community has accepted these resolutions as a basis for international law.[40]

The primary juridical problem is that Article 38 of the Statute of the International Court of Justice,[41] the authoritative statement of international law sources, does not incorporate the declarations of

---

37. Costa R. Mahalu, *Human Rights and Development: An African Perspective,* 1 LEIDEN J. INT'L L. 15, 19 (1988).

38. *Id.*

39. *See* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment,* 12 MICH. J. INT'L L. 420, 420 (1991) (noting that soft law "constitutes part of the contemporary law-making process but, as social phenomenon, it evidently overflows the classical and familiar legal categories").

40. *See* Oscar Schachter, *United Nations Law,* 88 AM. J. INT'L L. 1, 17 (1994) (noting metamorphosis of *Universal Declaration of Human Rights* from aspirational in nature to accepted, binding law).

41. Article 38 states:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38, *reprinted in* CURRENT INTERNATIONAL TREATIES 137 (Thomas B. Millan ed. 1984). Article 59 states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, art. 39, *reprinted in* CURRENT INTERNATIONAL TREATIES 141 (Thomas E. Millan ed., 1984).

the General Assembly. Nevertheless, these declarations emerge as law when they are accepted as law by custom and general principles—sources of international law sanctioned by the Statute. According to Ian Brownlie:

> In general these resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.[42]

Clearly, the right to development is an emerging general norm of international law.[43] The law of development calls upon developed countries to assist the efforts of developing countries to improve their standards of living through trade and other forms of cooperation. A central part of the law of development is the norm of preferential (nonreciprocal) trade favoring developing countries.[44] This concept is now permanently and widely accepted as a norm of behavior in international trade.[45] Any effective rule of law, however, yields a high level of voluntary compliance. The international

---

42. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14 (1990).

43. *See* KAREL DE VEY MESTDAGH, *The Right to Development: From Evolving Principle to "Legal" Right: In Search of Its Substance* (tracing emergence of right to development), *in* DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 143, 145–49 (1981); *see also* Clarence J. Dias, *Realizing the Right to Development: The Importance of Legal Resources*, (reviewing evolution and scope of right to development) *in* DEVELOPMENT, HUMAN RIGHTS, AND THE RULE OF LAW 187–88 (1981); Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 1–16 (1976) (predicting continuing contradictory and ambivalent trends in transforming international law of development).

44. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 95 (1990) (explaining that claim of preferential treatment favoring developing countries is referred to as *par excellence* of "duality of norms" and is most distinctive feature of normative system of international law of development). *See generally* ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 167–68 (1982) (stating that "[a]s one of the most important elements of the ideology of development and of the struggle for a New International Economic Order, differential treatment in favour of developing States is an instrument of compensatory equality aimed at the modification of the respective rights and duties of States according to their level of development").

45. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 167 (1982).

law of trade preferences was indeed part of international soft law in the 1960s, 1970s, and perhaps the early 1980s. In the late 1980s and beyond, despite neoclassical hesitations,[46] the norm of the law of trade preferences metamorphosed into binding international customary law—into hard law.

Hard law is the stage at which soft law has progressively consolidated into customary rules of international law. At this point, the law is precise and specifies the exact rights and obligations it imposes.[47] To understand this transformation, an analysis of the nature of soft law is necessary.

1. Soft Law

Soft law, distinguished by a certain "vagueness of the obligation that it imposes,"[48] may be contained in treaties, declarations, or other instruments. Softness of content is demonstrated by such titles as "guidelines" and "declaration of principles."[49] Soft law is often signalled by such phrases as "seek to," "make efforts to," "examine with understanding," "act as swiftly as possible," "take all due steps with a view to,"[50] "wherever feasible," and "whenever possible." These phrases and titles signify soft law because they have no specific content. However, the use of these terms does not always mean that a soft-law provision is apparent.

As soft law moves toward hard law, the language of its texts appears more precise. For example, the *Declaration on the Establishment of a New International Economic Order* calls for preferential treatment "wherever feasible . . . whenever possible."[51] A subsequent instrument, the *Charter of Economic Rights and Duties of*

---

46. *See* Kelé Onyejekwe, *GATT, Agriculture and Developing Countries*, 17 HAMLINE L. REV. 77, 125–28 (1993) (noting atmosphere of pressures for liberalization of trade); *see also Analytical Report by the UNCTAD Secretariat to the Conference*, U.N. Doc. TD/358 at 75 (1992) (recognizing often-minimized fact that "a programme which relies solely on market forces to bring about structural adjustment can be costly and slow, and can meet with substantial political resistance").

47. C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989).

48. Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443, 443 (1983).

49. *Id.*

50. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414 (1983).

51. U.N. GAOR Ad Hoc Comm., 6th Sess., Agenda Item 7, U.N. Doc. A/RES/3201 (S-VI), *reprinted in* 13 I.L.M. 715, 718 (1974).

States, imposes on states the "responsibility to cooperate."[52] Finally, the *Declaration on the Right to Development* not only declares a "right" but also assigns a duty "to cooperate."[53]

Soft law exists in international law because it is often necessary to prepare the populace for more positive legal norms. In essence, it panders to world public opinion. Soft law agreements are often reached to give the impression that governments, especially the United Nations,[54] are "doing something." This "something" is often couched in aspirational statements. "[O]ne should never underestimate the focalizing and authorizing effect of the use of legal symbols in these communications."[55]

Soft law evidences progress in world cooperation. First, soft law allows agreement in areas that insistence on hard law would not. Second, the norms of soft law eventually progress into hard law, giving people the opportunity to examine the law and elaborate on its contents. Soft laws, even after ratification by national assemblies, have little political or social cost. However, soft law promotes the idea that is the subject of the agreement in the various nations and subsequently hardens the idea into concrete domestic law.[56] The GSP represents this sort of evolution.

The emergence of many developing countries in the 1960s has served as the primary reason for the rise of soft laws of international economic cooperation. These countries have called for drastic changes to "a great number of international customary norms which had been elaborated at a time when [the countries] were not in existence as sovereign States."[57] Furthermore, developments in

---

52. U.N. GAOR 2d Comm., 29th Sess., Agenda Item 48, U.N. Doc. A/RES/3281 (XXIX), *reprinted in* 14 I.L.M. 251, 256 (1975).

53. G.A. Res. 41/128, U.N. GAOR, Supp. No. 53, U.N. Doc. A/41/925 (1986).

54. *See* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 421 (1991) (showing how United Nations has assisted emergence of soft law).

55. Michael Reisman, *The Concept and Functions of Soft Law in International Politics, in* 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS: CONTEMPORARY INTERNATIONAL LAW AND HUMAN RIGHTS 135, 140 (Emmanuel G. Bello & Bola Ajibola eds., 1992).

56. *Id.* at 139–40.

57. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 421 (1991).

economics, science, and technology have contributed to the ubiquity of soft international law.[58]

2. How Does Soft Law Become Hard Law?

Whether declarations of the U.N. General Assembly become hard law usually rests on three principles.[59] The first principle involves the condition of adoption and recognizes that the greater the number of countries calling for the declaration, the nearer it is to hard law.[60] The second principle addresses the style and content of the declarations.[61] The more precise the declaration, the greater its tendency to form hard law. The third principle concerns how states have practiced the principles of the declaration.[62] International law generally possesses weak means of enforcement. Therefore, whether states are effectuating the principles of the declaration is important. If states already regard and practice a particular principle as law, the principle forms hard law independent of any General Assembly declaration. The greater the number of countries practicing the principle, the more likely that a norm of hard international law has emerged. All countries do not have to accept the norm to be bound by it.[63]

3. Why Do These Instruments Declare Hard Law?

For several reasons, the resolutions discussed in this Article now form hard law. For example, 122 countries voted for the *Charter of Economic Rights and Duties of States*, 9 countries abstained, and 6 voted against the measure.[64] Additionally, 146 countries voted for the *Declaration on the Right to Development*, 8 countries abstained, and only the United States voted against the proposal.[65] Hence, these declarations, particularly the articles enunciating the norm of

58. *Id.*

59. *See* Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291, 327 (1987–88) (exploring three-pronged test developed by French legal scholar, Professor Bollecker-Stern).

60. *Id.*

61. *Id.* at 330.

62. *Id.* at 331.

63. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (1990).

64. *See* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 935 (Burns H. Weston et al. eds., 1990) (listing approving, abstaining, and disapproving countries).

65. *Id.* at 931.

preferential trade treatment, are widely accepted.[66] Furthermore, the International Court of Justice has held that "[t]he effect of consent to the text of such resolutions . . . may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[67] Because these declarations each command the votes of more than two-thirds of the states of the United Nations, the intention of governments is clearly evidenced.

Second, these instruments have become increasingly (and are now sufficiently) clear. For example, the *Program of Action on the Establishment of a New International Economic Order*[68] clarified the ambiguities found in the *Declaration on the Establishment of a New International Economic Order.*[69] Article 3(a)(x) of the former instrument states:

> All efforts should be made:
> (a) To take the following measures for the amelioration of terms of trade of developing countries and concrete steps to eliminate chronic trade deficits of developing countries:
>
> . . . .
>
> (x) Implementation, improvement and enlargement of the generalized system of preferences for export of agricultural primary commodities, manufactures and semimanufactures from developing to developed countries.[70]

Furthermore, Article 3(b) states:

> All efforts should be made:
>
> . . . .
>
> (b) To be guided by the principles of non-reciprocity and preferential treatment of developing countries in multilateral trade negotiations between developed and developing countries, and to seek sustained and additional benefits for the international trade of developing

---

66. The GATT and the UNCTAD predated these declarations in formulating the norms of international trade preferences. The agreements among nations contained in the Special Committee on Preferences' Agreed Conclusions and in Part IV of the GATT served to consolidate international trade-preference norms. *See* discussion *infra* Part III(A).

67. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100 (June 27), *reprinted in* 25 I.L.M. 1023, 1066 (1986).

68. G.A. Res. 3202, U.N. GAOR, 6th Sess., Supp. No. 1, at 5, U.N. Doc. A/9556 (1974), *reprinted* in 13 I.L.M. 720 (1974).

69. U.N. GAOR Ad Hoc Comm., 6th Sess., Agenda Item 7, U.N. Doc. A/RES/3201 (S-VI), *reprinted in* 13 I.L.M. 715 (1974).

70. *Id.* at 723–24.

> countries, so as to achieve a substantial increase in their foreign exchange earnings, diversification of their exports and acceleration of the rate of their economic growth.[71]

Precision and definiteness, however, are not essential requirements of the law. A legal order may be effective though imprecise. Although the Agreed Conclusions of the UNCTAD Special Committee on Preferences do not explicitly address agricultural primary products, state practices and declarations have enlarged GSPs to include such products.

Third, the states are utilizing differential treatment in practice. During the GATT Uruguay Round, the developed countries affirmed that they "do not expect reciprocity for commitments."[72] They also agreed with the decision that expands the use of special preferences such as the Caribbean Basin Economic Recovery Act.[73] Furthermore, GSPs are actually expanding. In the United States, for example, the Support for East European Democracy (SEED) Act of 1989 made Poland a GSP-eligible country,[74] and the Customs and Trade Act of 1990 added Czechoslovakia and East Germany as GSP-eligible countries.[75] Additionally, the scope of products covered is widening.[76] An analytical report by the UNCTAD Secretariat concluded that

> [p]referential imports by . . . preference-giving countries in 1988 amounted to about US$60 billion—a fivefold increase from the US$12 billion recorded in 1976, the first year that all schemes were in operation. These imports have on average increased almost twice as fast as imports from all sources. This serves as a demonstration of the increased products coverage of the schemes, the enhancement of

---

71. *Id.*

72. *Ministerial Declaration on the Uruguay Round* (Declaration of Sept. 20, 1986), *reprinted in* 33 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19, 21 (1987).

73. *Id.*; *see Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Decision of Nov. 28, 1979), *reprinted in* 26 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 203 (1980).

74. 22 U.S.C. §§ 5401(c)(10), 5411–5412 (Supp. V 1993).

75. 19 U.S.C. § 2462 (Supp. V 1993).

76. *See USTR Adds 83 East European Products to GSP List Resulting from Special Review*, 9 Int'l Trade Rep. (BNA) 1053 (June 17, 1992) (reporting that new products were added to GSP list to stimulate economic growth and promote democracy in countries emerging from communism).

beneficiary export-supply capabilities and efforts to diversify exports towards non-traditional products.[77]

Fourth, the use of special preferences has increased. Although the United States historically shunned preferential trade practices,[78] it is now a major player in this enterprise. The North American Free Trade Agreement,[79] the Andean Trade Preference Act,[80] the Trade Enhancement Initiative,[81] and the U.S.-Israeli Free Trade Agreement,[82] all bear testimony to the United States's inclination toward special preferences. Moreover, the absolute number of developing countries covered under these programs has increased over the years.[83] This expansion of trade preferences is consistent with the duty to assist developing countries, and it provides further evidence of the growing norm of special preferences. Furthermore, the uses for which preferences are employed have

---

77. *Analytical Report by the UNCTAD Secretariat to the Conference*, U.N. Doc. TD/358 at 75 (1992). The report described the limitations of the GSPs:

> However, while the GSP has brought considerable trade benefits to developing countries during the decade of the 1980s, the evolution of the system has not been favourable in all respects, there have been tendencies in some major preference-giving countries from benefits on a unilateral basis. Limits to preferential treatment through various mechanisms have proliferated. Non-tariff measures outside the GSP have also limited effective access to preferential treatment. The rules of origin continue to be complex and different from scheme to scheme, discouraging the utilization of the system, particularly by least developed and other low-income countries. As a result, the proportion of dutiable imports which actually received preferential treatment has varied slightly during the years but has remained around 20 percent.

Id. Although these hesitations have some force, the direction of developing-developed country trade appears to be toward expansion of trade preferences. The Special Committee on Preferences has noted the need for continuing preferential systems and for correcting some of the practices that limit the benefits of the system. *Id.*

78. *See* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 9 (1987) (reviewing United States's reluctance to include special provisions for developing countries in first draft of International Trade Organization (ITO) Charters in 1945).

79. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., ch. 22, art. 2203, 32 I.L.M. 605 (entered into force Jan. 1, 1994). *See generally* Canada, United Mexican States, & United States of America, *Description of the Proposed North American Free Trade Agreement*, 9 Int'l Trade Rep. (BNA) 1454, 1454–74 (Aug. 19, 1992).

80. 19 U.S.C. §§ 3201-3206 (Supp. IV 1992).

81. *Trade Policy Review: United States*, vol. 2, GATT, 39 (1992).

82. Agreement on the Establishment of a Free Trade Area, Apr. 22, 1985, U.S.-Israel, H.R. Doc. No. 61, 99th Cong., 1st Sess., 3, 24 I.L.M. 653.

83. *See Latin America: Ecuador to Get Benefits Under Andean Trade Preferences Act*, 10 Int'l Trade Rep. (BNA) 650, 651 (Apr. 21, 1993) (illustrating Andean Trade Preferences Act's extension of duty-free treatment to eligible products from Peru, Bolivia, Ecuador, and Columbia).

increased substantially. Trade preferences were originally used as purely economic tools. As the Andean Trade Initiative[84] and the work of the GATT illustrate, trade preferences are now utilized for social causes, such as to combat drug trafficking[85] and to promote environmentally sound practices.[86]

Finally, the U.S. Senate sought the views of the UNCTAD as it enacted its GSP regime.[87] The policies of the United States,[88] and those of other countries, are shaped by consultations at the

---

84. The U.S. Andean Trade Act permits preferential treatment. *See United States Andean Trade Preference Act* (Decision of Mar. 19, 1992), *reprinted in* BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Supp. 39, at 385–87 (1993). The operative provision of this decision states:

> The CONTRACTING PARTIES, acting pursuant to the provisions of paragraph 5 of Art. XXV of the General Agreement, decide that: (1) Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Art. 1 of the General Agreement shall be waived, until 4 December 2001, to the extent necessary to permit the Government of the United States to provide tariff preferences to eligible imports of Andean Countries benefitting from the provisions of the Act, without being required to extend the same tariff preferences to like products of any other contracting party.

Id. at 386.

85. *See* 19 U.S.C. § 3204 (Supp. IV 1992) (requiring U.S. International Trade Commission to report Andean Trade Preferences Act's effectiveness "in promoting drug-related crop eradication" in beneficiary countries).

86. *See Review of the Implementation, Maintenance, Improvement and Utilization of the Generalized System of Preferences, Report of the UNCTAD Secretariat*, U.N. TDBOR, Special Comm. on Preferences, Provisional Agenda Item 3, at 23, U.N. Doc. TD/B/SCP/6 (1994) (stating that "[i]t has been proposed that it should be possible to encourage sustainable development in developing countries by granting extra-preferences for export products produced in a relatively clean way, in the framework of a 'green GSP'").

87. *Renewal of the Generalized System of Preferences, 1984: Hearings on S. 697 Before the Subcomm. on Int'l Trade of the Senate Comm. Finance*, 98th Cong., 2d Sess. 328–47 (1984) (submission of J. Pronk, Deputy Secretary-General of the UNCTAD).

88. Issues involving the U.S. GSP are litigated in American courts with foreign interests as parties against the United States. *See* Torrington Co. v. United States, 764 F.2d 1563, 1565 (Fed. Cir. 1985) (suggesting that the GSP statute "represents the United States' participation in a multinational effort to encourage industrialization in lesser developed countries through international trade"). Through case law, the norms and principles of GSPs have become part of the corpus of American customs law. *See id.* at 1569 n.6 (stating that "[w]hether a substantial transformation [also a GSP element] has occurred is of importance in many other areas of customs law and reference to cases from these other area is often helpful"); *see also* Azteca Milling Co. v. United States, 890 F.2d 1150, 1151 (Fed. Cir. 1989) (explicating aspects of a GSP rules of origin). *See generally* International Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745, 746–48 (D.C. Cir. 1992) (discussing GSP and its relationship with Federal Circuit Court of Appeals). Commentators have noted the importance of the trend toward adjudicating international issues in domestic courts. *See* John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 18 GEO. L.J. 535, 547 (1993) (recognizing pattern of developing international common law). Adjudication by domestic courts helps develop an international common

UNCTAD and with other multilateral organizations. The UNCTAD Special Committee on Preferences, which is the stated fulcrum for continuing the EU GSP,[89] remains a viable institution for multilateral negotiations on trade preferences. The Special Committee exercises some power in promoting GSPs as an institution in world trade. The states have expressed a clear intent to reflect international agreements in their domestic legislation. At a meeting of the UNCTAD reviewing the continuing viability of GSPs, developed and developing countries reaffirmed their commitment to the continuance of the GSP.[90]

The law of trade preferences, because of its wide acceptance, its preciseness, and its practice by states, has become hard law. On preferential trade, Wolfgang Benedek has noted:

> With respect to its legal status, preferential treatment of developing countries according to development needs has evolved from an optional standard of international economic law to a general principle of international economic law, if not international law in general. Certainly, it is a fundamental principle of international development law. The principle is manifest in a number of fields of international economic and development law, but it has reached its highest significance in international trade law.[91]

---

law. *Id.* This international exchange of ideas and growth of the law is important in international economic issues. *Id.* at 548.

89. *See, e.g.*, Council Regulation 3833/90 of Dec. 20, 1990 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Agricultural Products Originating in Developing Countries, 1990 O.J. (L 370) 86. The regulation states in part:

> Whereas the positive role played by this system in improving access for developing countries to the markets of the preference-giving countries was recognized at the ninth session of the UNCTAD Special Committee on Preferences; whereas it was there agreed that the objectives of the system of generalized preferences would not be fully achieved by the end of 1980, that consequently it should be prolonged beyond the initial period; an overall review of the system has started in 1990 . . . .

Id. Council Regulation 3667/93 of Dec. 20, 1993, 1993 O.J. (L 338) 1 extended Council Regulation 3833/90 into 1993.

90. *GSP: UNCTAD Countries Reaffirm GSP Benefits but U.S. Warns GSP Is Not Aid Program*, 9 Int'l Trade Rep. (BNA) 938, 938 (May 27, 1992). During the otherwise contentious 21st session of the Special Committee on Preferences, developed countries and developing countries agreed on the validity of the GSP's aims. The author observed those meetings.

91. Wolfgang Benedek, *Preferential Treatment of Developing Countries in International Trade: Past Experiences and Future Perspectives*, *in* FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 75–76 (Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., 1988).

C. *The GATT and the Genesis of a Generalized System of Preferences*

In 1947 and 1948, representatives of fifty-three nations drafted the Havana Charter,[92] which would have established the International Trade Organization (ITO). The ITO would have been a sister organization to both the International Bank for Reconstruction and Development (also known as the World Bank) and the International Monetary Fund. The United States, however, then leader of world trade, withdrew from the ITO, effectively killing the organization.[93]

During the Havana Charter negotiations, the United States and twenty-five other countries signed a stop-gap agreement that put many of the Havana Charter's provisions into operation. The stop-gap measure became a permanent trade organization called the General Agreement on Tariffs and Trade (GATT).[94] The GATT became the central body of substantive international trade law.[95]

The contracting parties to the GATT recognized in its Preamble

> that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.[96]

To achieve this goal, the GATT relied on the MFN doctrine and on the principle of reciprocity. These doctrines have acted as lightning rods for developing countries' criticisms, and the paucity of concern for developing countries expressed in the agreement has exposed the GATT to charges that it is a "rich man's club." These allegations do not necessarily indicate that the GATT failed to rec-

---

92. Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/CONF 2/78.

93. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 14 (1970).

94. As of January 6, 1994, GATT membership had risen from its original 23 members to 115 members. *GATT Membership, Contracting Parties to the GATT*, URUGUAY ROUND UPDATE, Jan. 1994, at 23.

95. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 27 (1989); John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 15 (1992).

96. GATT, *supra* note 11, pmbl., 61 Stat. at A11, 55 U.N.T.S. at 194.

ognize the special needs of developing countries. Indeed, Article XVIII[97] permits developing countries to restrict imports in the interest of economic development policies and programs.[98] Although other provisions were designated to assist developing countries, they simply did not go far enough.[99]

The GATT promotes free trade. However, the increasing number of developing countries that acceded to the GATT brought new challenges. Old notions of reciprocity did not take into account the emergence of a large number of states without many concessions to reciprocate in the conventional sense.[100] The GATT agreement's MFN doctrine is a metaphor for the laissez-faire economists' notion that the most efficient country should dominate world trade.[101] Its basis is the principle of comparative advantage, which holds that nations generate more wealth by specializing in the production of what they produce best.

As the GATT existed, developing countries lacked confidence that it was capable of serving their needs. They wanted three major principles incorporated into the GATT: (1) nonreciprocity, which would enable them to protect their industries at home; (2) a pulling together of markets among developing countries; and (3) access to developed-country markets without tariffs.[102]

---

97. Article XVIII of the GATT states: "The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development." GATT, *supra* note 11, art. XVIII, para. 1, 61 Stat. at A53, 55 U.N.T.S. at 252, *amended by* Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade, 8 U.S.T. 1767, 1778, 278 U.N.T.S. 168, 186.

98. *Id.*

99. *See* DETLEV F. VAGTS, TRANSNATIONAL BUSINESS PROBLEMS 25 (1986) (acknowledging that such provisions, even liberally applied, have proven severely inadequate). According to Vagts, the "large, and growing, gap between the standards of living in the developed and less developed countries has produced deep concern and discontent in the latter group and caused it to seek relief through new trade policies and measures." *Id.*

100. *See Towards a New Trade Policy for Development: Report By the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Econ. U.N. Doc. E/CONF.46/3 at 28–39 (1964) (noting that 1960–61 GATT Tariff Conference produced limited benefits for less developed countries).

101. *See* Loretta F. Smith, Comment, *The GATT and International Trade*, 39 BUFF. L. REV. 919, 933 (1991) (discussing GATT's philosophy, which centers on liberalism).

102. *See* DETLEV F. VAGTS, TRANSNATIONAL BUSINESS PROBLEMS 25, 26 (1986) (explaining creation of tariff shelters to foster growth in infant industries).

In 1964, Part IV of GATT was instituted. Part IV purports to dispense with reciprocity in the case of developed-developing country trade.[103] A pulling together of markets is slowly occurring,[104] and the development of trade preferences is hardening as a norm of international law.

III. THE GENERALIZED SYSTEM OF PREFERENCES

A. *History and Normative Development of the GSP*

Recognizing that trade was a critical part of world development, the U.N. General Assembly launched the "United Nations Development Decade" in December 1961. The U.N. resolution called attention to the negative effects of developed-country protectionist policies. It also encouraged the developed countries to make all efforts "to facilitate the necessary expansion of their trade and to attain a satisfactory coordination of efforts in the field of trade towards economic development."[105]

Developing countries, frustrated with the gradualism of the GATT, looked elsewhere for progress. They turned to the UNCTAD.

---

103. *But see* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 237–38 (1970) (suggesting that Part IV of GATT is rather insignificant).

104. Examples include: The Andean Common Market, the Central American Common Market, the Caribbean Common Market, the East Caribbean Common Market, the Economic Community of Central African States, the Economic Community of West African States, and the Association of South East Asian Nations. The Southern Latin American Common Market and Customs Union (MERCOSUR), which came into being in March 1991, will create a customs union and common market in the area in 1995. *GATT: Southern Latin American Common Market to Cause Problems for Uruguay,* 9 Int'l Trade Rep. (BNA) 1186, 1186 (July 8, 1992). The Organization of African Unity has announced plans for an African Economic Union. A worldwide system of trade preferences has emerged, sponsored by the developing countries under the aegis of the UNCTAD. This system, called the Global System of Trade Preferences (GSTP), is a trading agreement under which developing countries would exchange trade concessions. In a 1988 conference in Belgrade, 46 developing countries exchanged concessions on over 1,300 tariff items in an effort to promote South-South trade. *See generally* Robert E. Hudec, *The Structure of South-South Trade Preferences in the 1988 GSTP Agreement: Learning to Say MFMFM, in* 1 DEVELOPING COUNTRIES AND THE GLOBAL TRADING SYSTEM: THEMATIC STUDIES FROM A FORD FOUNDATION PROJECT 210, 210–37 (John Whalley ed., 1989).

105. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 95 (1990) (quoting *International Trade as Primary Instrument for Economic Development,* U.N. G.A. Res. 1701 (XVI) (1961).

1. UNCTAD

The UNCTAD was designed to serve as a forum for developing countries' trade-related development issues.[106] The UNCTAD was set up as a permanent organ of the U.N. General Assembly in December 1964, and it meets every four years.

In the UNCTAD, negotiations were conducted by the bloc approach, with "the Group of 77" representing the developing countries.[107] The Group of 77 is composed of at least 128 members, representing most developing countries.[108] The UNCTAD is the leading forum for the development of international norms of trade-preference law for developing countries, and it was in the UNCTAD that the idea of a GSP was established. Secretary-General Robert Prebisch's 1964 work, *Towards a New Trade Policy for Development*,[109] is cited as the intellectual impetus for GSPs.[110]

2. UNCTAD I

The UNCTAD held its first meeting from March to June of 1964 in Geneva, Switzerland. Developing countries used this body to advance their long-held arguments for a new world order. The Secretary-General's report "exercised an enormous degree of influence over the conference proceedings."[111] During the conference, delegates voted on several general principles. General Principle Eight contained the then-emerging normative content of the GSP:

> International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from

---

106. Grant B. Taplin, *Revitalizing UNCTAD*, FIN. & DEV., June 1992, at 36, 37.

107. In the UNCTAD, decisions were made using the bloc approach. There were four lists. African and Asian countries and Yugoslavia fell under "List A." "List B" contained the developed capitalist countries. The Latin American and Caribbean countries were under "List C." "List D" included the socialist countries of Eastern Europe. Countries on Lists A and C formed the Group of 77. MARC WILLIAMS, THIRD WORLD COOPERATION: THE GROUP OF 77 IN UNCTAD 60 (1991).

108. *See id.* at 78–80 (listing members of Group of 77).

109. *Towards a New Trade Policy for Development: Report By the Secretary-General of the United Nations Conference on Trade and Development*, U.N. Econ., U.N. Doc. E/CONF.4613 (1964).

110. *See* MARC WILLIAMS, THIRD WORLD COOPERATION: THE GROUP OF 77 IN UNCTAD 43–47 (1991) (explaining Secretary-General Prebisch's overwhelming influence in UNCTAD negotiations and his tireless lobbying for generalized scheme).

111. *Id.*

> measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them.[112]

Most developing and socialist countries voted to adopt General Principle Eight. Most developed countries abstained or voted against it.[113] However, "[i]t provided impetus to an ongoing process of persuasion and pressure, and reinforced the position of those who believed that the developed countries should be doing more for the less-developed ones."[114]

During UNCTAD I, the countries unanimously adopted a recommendation calling for trade policies conducive to development.[115] Another recommendation called for a committee of representatives of industrialized and developing countries to discuss how preferences should operate, the doctrine of nonreciprocity, and the differences of principle among them.[116] The work of the committee kept the issue of trade preferences alive and galvanized the developing countries.

---

112. *Principles Governing International Trade Relations and Trade Policies Conducive to Development*, Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 Mar.-16 June 1964: Final Act and Report, Annex A.I.3, at 20, U.N. Doc. E/CONF.46/141, Vol. I (1964).

113. *See id.* listing countries voting for, countries voting against, and countries abstaining from vote).

114. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 80 (1982).

115. *Principles Governing International Trade Relations and Trade Policies Conducive to Development*, Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 Mar.-16 June 1964: Final Act and Report, Annex A.I.3, at 26 n.29, U.N. Doc. E/CONF.46/41, Vol. I (1964).

116. *Measures by the Developed Countries with Market Economies for Expansion and Diversification of Exports of Manufactures and Semimanufactures by Developing Countries*, Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 Mar.-6 June 1964: Final Act and Report, Annex A.III.6, at 39–40, U.N. Doc. E/CONF.46/141, Vol. I (1964).

3. The OECD and UNCTAD II

UNCTAD II took place in 1968 in New Delhi, India. Preparations had been made to carve out a GSP acceptable to both developed and developing countries. In 1965, the industrialized countries created a special group within the Organization for Economic Cooperation and Development (OECD)[117] to study preferential trade relations with developing countries. The United States's formal withdrawal of opposition to the basic principle of a GSP in 1967[118] greatly facilitated the work of the OECD. The group confirmed Secretary-General Prebisch's report: preferences were needed to stimulate developing-country trade.[119] By 1968, all the developed countries had fundamentally accepted the principle of preferences.[120] The details, however, remained unresolved.

4. Resolution 21(II)

During UNCTAD II, the parties unanimously adopted a resolution in favor of establishing a generalized system of nonreciprocal and nondiscriminatory preferences benefitting developing countries.[121] An international consensus on trade preferences for developing countries had emerged.[122] The consensus held that preferences should be applied to all developing countries, that nonreciprocity was the principle for interaction, and that preference-granting countries may not discriminate against developing

---

117. The OECD was founded to promote the economic welfare of its members. *See* Anne W. Branscombe, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 1001 n.67 (1983) (recognizing OECD's promotion of social and economic welfare and listing OECD member states).

118. *See* ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 325 (1991) (reporting United States withdrawal of opposition to principles of GSPs).

119. *See Renewal of the Generalized System of Preferences: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 98th Cong., 1st Sess. 6 (1983) (statement of Ambassador William E. Brock, U.S. Trade Representative) (stating that assistance to developing countries encourages diversification and expansion of exports).

120. *See id.* (noting that United States joined other industrialized countries supporting preferences in 1968).

121. *Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed Countries*, U.N. CTAD, 2d Sess., Vol. I, Annex, Agenda Item 11, at 38, U.N. Doc. TD/97/Annexes (1968).

122. *See* R. Krishnamurti, *Tariff Preferences in Favour of Developing Countries*, 4 J. WORLD TRADE L. 447, 447 (1970) (detailing developments surrounding UNCTAD II in New Delhi and emergence of consensus on trade preferences for developing countries).

countries.[123] The objectives of the emerging scheme for developing countries were to increase export earnings, promote industrialization, and accelerate the developing countries' rates of economic growth.[124] UNCTAD II's Resolution 21(II) also called for the establishment of a special committee on preferences as a subsidiary organ of the Trade and Development Board.[125] This special committee formulated the modalities of the GSP.

Resolution 21(II) is significant because, for the first time, the idea of nonreciprocal preferences had obtained international consensus. The Resolution's normative role was to fix the objectives and principles underlying preferential treatment.

5. Agreed Conclusions of the Special Committee on Preferences

The Special Committee on Preferences held sessions from 1968 through 1970. After considering the revised submissions of the OECD, the Committee arrived at a set of "Agreed Conclusions." The Trade and Development Board adopted the report of the Special Committee and its Agreed Conclusions.[126]

Part IX, Paragraph 2 of the Agreed Conclusions states the legal effect of the agreement:

> The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:
> (i) the tariff preferences are temporary in nature;
> (ii) their grant does not constitute a binding commitment and in particular, it does not in any way prevent

---

123. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 82 (1982).

124. *Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed Countries*, U.N. CTAD, 2d Sess., Vol. I, Annex, Agenda Item 11, at 38, U.N. Doc. TD/97/Annexes (1968).

125. *Id.*

126. *United Nations Conference on Trade and Development: Generalized System of Preferences*, Decision 75 (S-IV), June 21, 1971, 10 I.L.M. 1083, 1083 (entered into force July 1, 1971); *see* R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. WORLD TRADE L. 45, 45 (1971) (stating that UNCTAD's efforts resulted in generalized system of preferences).

(a) their subsequent withdrawal in whole or in part; or

(b) the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff negotiations;

(iii) their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the GATT.[127]

The agreed procedure involved obtaining an illustrative proposal from each preference-giving country that indicated their approach to the GSP. Each country submitted a proposal detailing the scope and nature of its particular scheme, and the developing countries either accepted the proposal or requested modifications.[128]

The Agreed Conclusions were a body of unilateral offers to developing countries and were considered informal conclusions in the nature of a "memorandum of understanding."[129] Juridically, the conclusions constitute an international agreement.[130] As such, the parties are bound by the principle of good faith in agreements, which is a fundamental aspect of international law.[131]

Furthermore, if principles forcing the emergence of the historic concessions are considered, a simple textual analysis provides an inadequate basis for explaining the resolution. The premise underlying the agreements—that developing countries need tariff preferences to advance their development—remains valid. It is practically impossible for a country seeking to completely withdraw benefits to show, in good faith, that development has occurred.

As the International Court of Justice has stated, "[o]ne of the basic principles governing the creation and performance of legal

---

127. *United Nations Conference on Trade and Development: Generalized System of Preferences*, Decision 75 (S-IV), June 21, 1971, 10 I.L.M. 1083, 1089 (entered into force July 1, 1971).

128. *See* ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 83–86 (1982) (detailing adoption process for Agreed Conclusions).

129. *See id.* at 86 (positing that Agreed Conclusions were informed agreement between states).

130. *See id.* at 87 (concluding from "formal legal point of view" that Agreed Conclusions were international agreement).

131. *See id.* at 115 (recognizing principle of good faith as cornerstone of international law).

obligations, whatever their source, is the principle of good faith."[132] Accordingly, preference-granting countries, having agreed in principle that preferences are needed for development, would breach the obligation of good faith by withdrawing concessions before development is attained. Beyond this consensus, the Agreed Conclusions may not bind developed countries. However, the Agreed Conclusions, aided by the changing international environment and the international community's effort toward attaining development, continued the evolution of norms of trade preferences for developing countries.

6. The GATT Waiver

The emerging law of preferences was contrary to the MFN principle. Without a waiver, other developed countries could claim the developing countries' benefits.[133] Therefore, the GATT, as the corpus of international trade law, would have to be amended or a waiver procured for any preferences to legally operate.

In 1971, through a postal ballot, the contracting parties called for a waiver that would enable the GSP to apply within the GATT's framework. Article XXV, Paragraph 5 of the Agreement permits such a waiver of its terms in exceptional circumstances.[134] The decision of the contracting parties, adopted on June 25, 1971,[135] states in relevant part:

> [W]ithout prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject

---

132. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268. *See generally* Michael Virally, Review Essay, *Good Faith in Public International Law*, 77 AM. J. INT'L L. 130, 132 (1983).

133. *See* Hector G. Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341, 359–63 (1974) (criticizing waivers).

134. Article XVIII, Paragraph 5 of the GATT provides:

> In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote
>
> (a) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
>
> (b) prescribe such criteria as may be necessary for the application of this paragraph.

GATT, *supra* note 11, art. XXV, para. 5, 61 Stat. at A68–69, 55 U.N.T.S. at 272–74.

135. *Waivers: Generalized System of Preferences*, GATT Doc. L/3545 (Decision of June 25, 1971), *reprinted in* 18 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (1972).

> to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties.[136]

The Preamble recognizes, among other things, that "the promotion of the trade and export earnings of developing countries for the furtherance of their economic development"[137] constitutes a primary aim of the contracting parties. The language of the waiver restricts the development of a mandatory preferences norm.[138] The waiver itself is of dubious juridical quality;[139] however, its result—paving the way for the GSP—is of monumental normative importance. According to Hector G. Espiell, a participant in the negotiations:

> No one will remember in the future the timid and hypocritical paragraphs in the preamble to this draft. Instead, the decision itself and the principles and ideas in the present-day doctrine of international law which forced UNCTAD to adopt it will be remembered.[140]

7. The Enabling Clause

Developing countries, unsatisfied with the waiver procedure, did not consider the ten-year grant the permanent legal structure that they sought. In the Tokyo Round of Multilateral Trade Negotiations, the Trade Negotiations Committee established a "framework group" to help improve the international framework for "differential and favorable treatment" of developing countries.

---

136. *Id.* at 25.

137. *Id.* at 24.

138. Hector G. Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341, 359–61 (1974).

139. *Id.* at 360; *see* ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 89 (1982) (stating that "Article 25:5 is juridically ill-suited . . . for the accommodation of the GSP within the framework of the GATT").

140. Hector G. Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341, 361 (1974).

The contracting parties adopted the "Enabling Clause" as a result of the group's negotiations.[141] The Clause waived the GATT's MFN principle and devised a permanent legal framework for the differential and more favorable treatment of developing countries in international trade relations.

Although "permanent," the framework at first was not considered binding on the developed countries. It permits the developed countries to aid developing countries without the problems of the MFN doctrine.[142] The principles leading to this development may be described as normative. Governments were hesitant at the onset of the GSP because of the shifting sands of national economic welfare, administrative costs of enforcement, and lack of experience with generalized preferences. However, since the establishment of the GSP, no economy has been damaged, and the difficulties forcing the institution of the framework are still present. Thus, the legal principles leading to the establishment of a permanent GSP framework have acquired some force.

B. *Structure of the GSP*

The Agreed Conclusions contain the six major elements of the GSP and provide the criteria for evaluating each of the various offers. GSPs usually (1) provide for beneficiaries, (2) cover a wide range of semi-manufactured and manufactured goods, (3) define safeguard mechanisms, (4) state rules of origin, (5) address the GSP and other preferences, and (6) discuss institutional arrangements.

---

141. *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Decision of Nov. 28, 1979), *reprinted in* 26 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 203 (1980). The first paragraph states:

> 1. Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

Id.

142. *See generally* Abdulqawi A. Yusuf, *Differential and More Favorable Treatment: The GATT Enabling Clause*, 14 J. WORLD TRADE L. 488, 488 (1980) (summarizing effect of GATT enabling clause).

1. Beneficiaries: What Is a Developing Country?

No straightforward definition of the term "developing country" has emerged.[143] Part IV of the GATT mentions, but does not define, the concept of "less developed countries."[144] Books and articles also do not attempt a definition,[145] and the GATT leaves this matter to countries to determine. Moreover, scholars have questioned the usefulness of the term.[146]

Several bases have been used to isolate developing countries. Such countries usually are former colonies and are dependent on primary products exportation, but they differ in size, level of development, composition of trade, and indebtedness. By 1964, however, Greece, Portugal, and Spain were among the countries that originally declared themselves developing countries under the GATT, but then changed their position after joining the EU.[147]

Other categories have been suggested to replace that of developing countries. One method calls for creation of five non-mutually exclusive categories based on nations' income: newly industrialized countries; middle-income, oil-importing countries; middle-income countries; low-income countries; and underpopulated, oil-exporting countries.[148] Another method suggests classifying

---

143. The terms "developing countries," "less developed countries," and "Third World" have similar meanings and are used interchangeably.

144. GATT Part IV, *supra* note 17, arts. 36–38, 17 U.S.T. at 1978–87, 572 U.N.T.S. at 322–36.

145. *See generally* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987) (failing to attempt definition of developing countries). *See generally* Lyn MacNabb & Robert Weaver, Comment, *The General Agreement on Tariffs and Trade (GATT): Has Agriculture Doomed the Uruguay Round?* 26 LAND & WATER L. REV. 761 (1991) (discussing "less developed countries" throughout Comment, but never explaining how term is defined).

146. *See, e.g.*, SIDNEY GOLT, THE GATT NEGOTIATIONS 1973–79: THE CLOSING STAGE 29 (1978) (stating that "the problem of producing a resounding package of benefits for the developing countries considered as a unified mass may therefore turn out to be as intractable as ever, and may illustrate once again the unhelpfulness of this categorization for concrete action on specific policies"). *But see* KATHRYN L. LIPTON, AGRICULTURE, TRADE, AND THE GATT: A GLOSSARY OF TERMS § 12 (USDA, ERS and Agric. Info. Bull. No. 625, 1991) (defining developing countries as countries without strong industrial base that depend primarily on agriculture).

147. DIANA TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT 8 n.1 (1987).

148. *See* Anne O. Krueger, *Global Trade Prospects for the Developing Countries*, 15 WORLD ECON. 457, 465–68 (1992) (emphasizing difficulty in attempting to generalize about groups of countries).

nonindustrialized countries as "developed, newly developing, and less developed countries."[149]

International agencies have added to the cacophony. The OECD distinguishes countries based on their gross national product (GNP). The organization lists developing countries in three ways: low-income countries and territories with per capita GNPs under $700; low middle-income countries and territories with per capita GNPs between $700 and $1,300; and upper middle-income countries and territories with per capita GNPs above $1,300.[150] The World Bank uses a similar nomenclature, but distinguishes countries based on different standards. The World Bank standards are: low-income countries and territories with per capita GNPs under $500; low middle-income countries and territories with per capita GNPs between $500 and $2,000; and upper middle-income countries and territories with per capita GNPs between $2000 and $6000.[151]

The primary thrust of the UNCTAD's work concerns developing countries. As such, the UNCTAD faced the vexing question of defining a developing country. Membership in the Group of 77 could not suffice.[152] The countries rejected this standard because it would exclude four members of the OECD that considered themselves developing countries: Greece, Turkey, Spain, and Portugal.

---

149. Roshani M. Gunewardene, *GATT and the Developing World: Is a New Principle of Trade Liberalization Needed?*, 15 MD. J. INT'L L. & TRADE 45, 67 (1991) (favoring adoption of tiered system of four categories—developed, newly developing, developing, and less developed—without defining these terms).

150. P. Ebow Bondzi-Simpson, *Overview: Confronting the Dilemmas of Development Through Law* (citing ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, EXTERNAL DEBT STATISTICS: THE DEBT AND OTHER EXTERNAL LIABILITIES OF DEVELOPING CMEA AND CERTAIN OTHER COUNTRIES AND TERRITORIES (1989)), *in* THE LAW AND ECONOMIC DEVELOPMENT IN THE THIRD WORLD 1–2 (P. Ebow Bondzi-Simpson ed., 1992).

151. *Id.* at 2.

152. However, the Group of 77 declared in 1968 that all its members considered themselves developing countries entitled to all benefits that might accrue. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 105 (1982); *see* F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 60 (1990) (concluding that "in only one respect does there seem to be agreement: the term 'developing countries' includes all the members of the so-called 'Group of 77,' *i.e.*, the over one hundred countries integrating the Third World").

Israel, not a member of the Group of 77, also elected developing-country status.[153]

The UNCTAD grappled with the question, developing a juridical principle within the context of international trade-preference law. The juridical principle is called "self-election."[154] "The self-election principle presumes that no country will claim developing status unless there are *bona fide* grounds for it to do so and that such a claim would be relinquished if those grounds ceased to exist."[155] The principle has worked well, resulting in "gradually expanded and harmonized" developing-country lists.[156] The OECD has stated that, "as for beneficiaries, donor countries would in general base themselves on the principle of self-election."[157] Following the adoption of the self-election principle, the Group of 77 categorized all of its members as developing countries.[158]

A safeguard exists: Developed countries may decline to grant preferences on "compelling" grounds.[159] However, this component of the self-election principle engenders developed-country arbitrariness and discrimination.[160]

The GATT endorsed the self-election principle when it granted a waiver of the Article I MFN Clause so that GSP schemes could

153. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 105 n.37 (1982).

154. *Id.* at 104.

155. *Id.* at 105.

156. TRACY MURRAY, TRADE PREFERENCES FOR DEVELOPING COUNTRIES 34 (1977).

157. *See* R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. WORLD TRADE L. 45, 51 (1971) (quoting OECD Document TD/B/AC.5/24 and noting that prospective preference-giving countries had not developed list of countries which would be entitled to benefits).

158. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 105 n.37 (1982).

159. R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. WORLD TRADE L. 45, 54 (1971).

160. *See* Abdulqawi A. Yusuf, *"Differential and More Favourable Treatment": The GATT Enabling Clause*, 14 J. WORLD TRADE L. 488, 494 (1980) (noting that self-election is open to varied interpretations and thus may be source of discrimination).

operate. Effected under Article XXV, Paragraph 5 in 1971,[161] the waiver was made a permanent legal framework in 1979.[162]

The self-election principle has its difficulties, as it has not produced clear definitions. Some countries grant and receive preferences. For example, Poland,[163] Bulgaria, the Czech Republic, Hungary, the Slovak Republic, and the Russian Federation each receive preferences under some systems and grant preferences under others.[164] A related problem is the absence of a multilateral basis for graduation—the point at which a country has developed sufficiently so that the gains of preferential treatment cannot accrue to it.

In the absence of international standards, developed countries often advance their own unilateral standards. In practice, these standards may frustrate the goals of the GSP. Although developing countries call for the abolition of graduation,[165] no strong consensus advocates such a result.[166] In substance, a group of experts reviewing GSPs has accepted graduation as a fact of life.[167] As

---

161. *Waivers: Generalized System of Preferences*, GATT Doc. L/3545 (Decision of June 25, 1971), *reprinted in* 18 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (1972).

162. *See Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Decision of Nov. 28, 1979) (stating that "[n]otwithstanding the provisions of Article 1 of the General Agreement, Contracting Parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties"), *reprinted in* 26 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 203 (1980).

163. *Draft Report of the Special Committee on Preferences on Its Twenty-First Session*, U.N. Conference on Trade and Development, 21st Sess., Agenda Item 8, at 8, U.N. Doc. TD/B/SCP/L.3/ Add.2, (1994) (noting that "[t]he representative of Poland stated that his country simultaneously benefitted and granted GSP treatment").

164. Interview with UNCTAD official, in Geneva, Switzerland (May 31, 1994). The Russian Federation is a beneficiary developing country in a few GSP systems such as those of the United States and the EU. *Id.*

165. *See UNCTAD Countries Reaffirm GSP Benefits but U.S. Warns GSP Is Not Aid Program*, 9 Int'l Trade Rep. (BNA) 938, 938 (May 27, 1992) (noting that recipient countries feared graduation could produce discriminatory results).

166. This holds true even among Group of 77 delegates. During the Group of 77 meetings on May 19, 1994, many of the delegates expressed a lack of optimism. However, since the matter was going before the Trade and Development Board, which has powers to effect broad changes in the GSPs, the chairman of the Group of 77, His Excellency Hugo Cubino of Chile ultimately prevailed, convincing the Group of 77 to take a maximalist position.

167. *See Review of the Implementation, Maintenance, Improvement and Utilization of the Generalized System of Preferences*, U.N. Conference on Trade and Development, 21st Sess., Agenda Item 3, at 3, U.N. Doc. TD/B/SCP/9 (1994) (noting the use of country-and product-specific bases for graduation). If the fundamental jurisprudential basis for prefer-

such, the group suggests that graduation be reformed with a mechanism "which would be transparent, objective, predictable and broadly agreed within a multilateral framework."[168]

Despite the difficulties with graduation and with defining developing countries, the laws of trade preferences are generalizable. A case-by-case analysis under concrete circumstances is inevitable with self-election as a guiding principle. In the case of the least developed countries, the norm of preferential treatment is undeniable.

2. Product Coverage

Developed countries prosper in the world's tariff systems because their industries are specialized and sophisticated.[169] Developed countries escalate tariff rate increases with the degree of product processing.[170] This means low or zero tariffs on raw materials and steady increases through intermediate goods to final products.[171] For example, raw rubber attracts a small tariff, but automobile tires made from rubber may attract a higher tariff. As a result of the escalating tariff, the developing-country industrial products cannot compete in the developed countries. Developing countries are confined to supplying raw materials as industrialization is discouraged.[172] A principal aim of the GSP is to stop this trend by developing a vast industrial base through trade in the de-

---

ential treatment is that non-equals should not be treated equally, then graduation is consistent with this way of thinking. Treating unequal developing states equally cannot produce justice. Efforts, then, should properly be shifted to finding multilaterally sound ways for graduating.

168. *Review of the Implementation, Maintenance, Improvement and Utilization of the Generalized System of Preferences,* U.N. Conference on Trade and Development, 21st Sess., Agenda Item 3, at 3, U.N. Doc. TD/B/SCP/9 (1994). Concerning country graduation, the group recommends that "it should be based on GDP per capita combined with a number of criteria, including sectoral diversification, and it should incorporate a warning period." *Id.* at 4.

169. M. Raza Behnam, *Development and Structure of the Generalized System of Preferences*, 9 J. WORLD TRADE L. 442, 443 (1975).

170. *Id.*

171. *Id.*

172. *See, e.g.*, Beverly M. Carl, *Current Trade Problems of the Developing Nations, in* LEGAL ISSUES IN INTERNATIONAL TRADE 100, 111 (Peter Sarcevic & Hans van Houtte eds., 1990); *Introduction* to, COMMODITY TRADE OF THE THIRD WORLD vii (Cheryl Payer ed., 1975) (stating that former colonies supply essential raw materials to rich nations who are chief consumers).

veloping countries. Therefore, product coverage under the various countries' GSPs is a critical determination.

Developed countries eliminated or substantially reduced tariffs on most developing-country manufactured or semi-manufactured exports. Many developing countries called for similar reductions in processed and semi-processed agricultural products. Although the schemes reduced the tariff rates for these products, they did not completely eliminate the tariffs.[173]

According to Abdulqawi Yusuf:

> With regard to primary products, it was generally agreed that the GSP was not in principle intended to cover them. At the same time, it was recognized by all Parties that distinguishing primary from processed goods raised delicate problems. Thus, the eventual inclusion of such products in the GSP was left to the discretion of individual preference-giving countries.[174]

3. Safeguard Measures

Although developing countries objected to many safeguard measures, the OECD nations stood firm. Developed countries have a right, they maintained, to apply safeguard measures whenever necessary to prevent disruption or serious injury to national or third-party producers.[175] This right, it was understood, would not be lightly undertaken.[176] Safeguard measures would only be undertaken in exceptional circumstances and after consideration of the aims of the GSP.[177]

---

173. *See* M. Raza Behnam, *Development and Structure of the Generalized System of Preferences*, 9 J. WORLD TRADE L. 442, 445 (1975) (providing table that illustrates percentages of reduction in various areas).

174. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 107 (1982); *see* Ndiva Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT'L L.J. 291, 303 (1988) (explaining that "export-oriented industrialization" requires developing countries to shift from primary products toward manufacturing).

175. *See* R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. WORLD TRADE L. 45, 54 (1971) (noting that, although developed countries reserve right to alter GSP through safeguard mechanisms, only exceptional circumstances warrant such changes).

176. *Id.* at 45, 54.

177. *Id.*

Hence, all GSP schemes have provisions permitting the grantor state to completely or partially withdraw preferential tariff treatment when the product in question threatens domestic producers as a result of its imperfection. This ability to unilaterally withdraw benefits is a cardinal feature of GSP schemes and is widely cited as a major weakness.[178]

4. Rules of Origin

Rules of origin under preferential trade arrangements are established to confine trade-preference benefits to designated beneficiaries.[179] Rules of origin would not be necessary if tariffs were the same for every country.[180] With proper application of the rules, only products of the beneficiary country would qualify for preferential treatment. According to the UNCTAD:

> The main purpose of rules of origin is to ensure that the benefits of preferential tariff treatment under the Generalized System of Preferences (GSP) are confined to products which have *bona fide* been taken from, harvested, produced, or manufactured in the preference-receiving countries of export. Products which originate in third countries, *e.g.*, in preference-giving countries, and merely pass in transit through, or undergo only a minor or superficial process in a preference-receiving country are not entitled to benefit from GSP tariff treatment.[181]

To facilitate the principles of the GSP, the rules of origin are expected to facilitate, not frustrate, the benefits of the system. In

---

178. *See* discussion *infra* Part VII; *see also* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162, 1206 (1987) (criticizing threat of withdrawal of GSP benefits to advance foreign policy goals); D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: "Instant Reply" or a Real Change?*, 6 J. INT'L L. & BUS. 1035, 1043–44 (1984) (discussing limitations on GSP status and presidential discretion to withdraw benefits).

179. For recent works concerning rules of origin, see *Possible Improvements to the Generalized System of Preferences*, U.N. Doc. UNCTAD/ITD/8 (1994); *Consultations on Harmonization and Improvement of the Rules of Origin; Review of Past Discussions, Recent Developments and Possible Ways Forward: Report of UNCTAD Secretariat*, U.N. Doc. TD/B/SCP/8 (1994); *Generalized System of Preferences: Digest of Rules of Origin*, U.N. Doc. UNCTAD/TAP/133/ Rev. 6, U.N. Doc. INT/84/A01 (1990).

180. *See* Hironori Asakura, *The Harmonized System and Rules of Origin*, 27 J. WORLD TRADE L. 5, 5 (Aug. 1993) (explaining that number of preferences vary according to method used to determine eligibility).

181. *Generalized System of Preferences: Digest of Rules of Origin*, U.N. Doc. UNCTAD/TAP/133/Rev. 6 at 2, U.N. Doc. INT/84/A01 (1990).

principle, the rules of origin should ensure equal access among preference-giving countries, be uniform, and be simple to administer. Had rules of origin met these laudable standards, a difficult problem with the GSP would have been solved.[182] Developing and developed countries are working towards simplification, harmonization, and liberalization of rules of origin.[183] However, until this happens, the rules of origin remain fragmented, and the trade lawyer must put the pieces together.

Rules of origin have three major components: (1) the origin component; (2) the consignment standards component; and (3) the documentary standards component. A product that meets these standards is an originating product.

a. Origin Component

The origin component categorizes products according to whether they were wholly obtained in the beneficiary developing country. Developed countries' preferential tariff rates for wholly obtained products attempt to ensure the imported product originates from the beneficiary country without foreign component parts. The imported product should be wholly manufactured, completely grown, or otherwise entirely obtained without imported component parts.

---

182. The rules of origin present one of the most difficult problems in the GSP relationship of developing and developed countries. During the 21st session of the Special Committee on Preferences, one of the agenda items was "consultation on harmonization and improvement and utilization of the generalized system of preferences." *United Nations Conference on Trade and Development, Adoption of the Agenda and Organization of Work*, U.N. Doc. TD/B/SCP/5 (May 16, 1994). Based on the author's personal observations of the meetings, this agenda item took most of the Special Committee's time.

183. *See Consultations on Harmonization and Improvement of the Rules of Origin: Review of Past Discussions, Recent Developments and Possible Ways Forward*, U.N. Doc. TD/B/SCP/8 at 19 (1994) (recognizing that preference-giving and preference-receiving countries previously agreed on the "need for substantial improvement of GSP rules of origin through their harmonization, simplification, and where possible, liberalization"). The pace of improvements has been slow. *Id.* at 8. However, the GATT Uruguay Round has called for harmonization of the preferential rules with the multilaterally agreed, non-preferential rules of origin. *See id.* at 17 (noting that "[t]he Common Declaration with regard to Preferential Rules of Origin annexed to [the WTO] Agreement takes over many of the rules established by the Agreement itself regarding clarity of definition of origin criteria, transparency and predictability of the application of those rules"). The Final Act of the Uruguay Round provides for an Agreement on Rules of Origin covering nonpreferential rules. A common declaration with regard to preferential rules of origin is annexed to the Final Act. The common declaration is a foundation for the future development of harmonization.

Thus, the addition of a very small quantity of imported material could cause a product to lose its wholly obtained status.

Examples of products wholly obtained in a beneficiary country include: mineral extracts of the country's soil and seabed; vegetables planted, harvested in that country, and the products made from such vegetables; livestock and fish born and bred in the country, and products obtained from such livestock or fish; and waste or scrap resulting from manufacturing in the country.[184] These products are almost always granted preferential treatment if other standards, such as country participation, are met.

The second type of origin rules regulate products that are not wholly obtained. Products with any import content, including content of unknown origin, are not wholly obtained. To qualify for preferential treatment under the GSP, they must undergo "substantial transformation" or "sufficient working or processing" to ensure that their growth or manufacture occurred in the beneficiary country.

Unfortunately, sufficient working or processing is defined by the law of the preference-giving country. The complexity of the problem becomes clear when one considers that sixteen different GSP systems exist, with sixteen different sets of rules of origin, administered by twenty-eight[185] preference-giving countries.[186] Add the rules of origin for nonpreferential trade and those for special preferences and a labyrinth of laws emerge. Furthermore, those who

---

184. *Generalized System of Preferences: Digest of Rules of Origin*, U.N. Doc. UNCTAD/TAP/133/Rev. 6, U.N. Doc. INT/84/A01 (1990).

185. Only one set of rules applies to the EU countries.

186. The GSP-granting states are: Australia, Austria, Bulgaria, Canada, Czech Republic, the European Union, Finland, Hungary, Japan, New Zealand, Norway, Poland, Slovak Republic, Sweden, Switzerland, Russian Federation, and the United States of America. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, DIGEST OF SCHEMES, U.N. Doc. UNCTAD/TAP/136/Rev. 7 (1990) (describing all GSP programs). *See generally* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, JAPAN'S GSP 1994/95 U.N. Doc. UNCTAD/ITP/11/Rev. 4 (1993); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK ON THE SCHEMES OF AUSTRIA, FINLAND, NORWAY, SWEDEN, AND SWITZERLAND, U.N. Doc. UNCTAD/TAP/177/Rev. 6 (1990); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK ON THE SCHEME OF CANADA, U.N. Doc. UNCTAD/TAP/247/Rev. 2 (1990); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK ON THE SCHEME OF NEW ZEALAND, U.N. Doc. UNCTAD/TAP/258/Rev. 2 (1989); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK ON THE SCHEME OF AUSTRALIA, U.N. Doc. UNCTAD/TAP/259/Rev. 1 (1989).

must suffer through this labyrinth are often single, small-to-medium scale businesspersons operating in developing countries. Although the rules of origin vary, the difficulties revolve around a single question: When is a product sufficiently transformed?

States use two criteria to determine transformation. The first is the process criterion—an assessment of the degree of processing undertaken in the beneficiary country.[187] The second is the percentage criterion—an assessment of the degree of value added in the beneficiary country.[188] To qualify for preferential treatment under the process criterion, the resulting product must differ from all imported inputs used to produce it.[189] Thus, bearing in mind that rules of origin seek to assist genuine development in beneficiary countries, the product exported under the GSP must have undergone complete transformation from the components used in producing it. Countries using the percentage criterion may be further divided into two types: (1) those countries that prescribe a must-use minimum percentage on the value of domestic materials;[190] and (2) those that prescribe a percentage ceiling on the maximum value of imported material that may be used in the manufacture of a qualifying product.[191]

As percentages and processes vary across countries, there is no substitute for studying the complex tariff laws of subject countries or for contacting competent customs officials. Differences among rules of origin present important disadvantages to the system.

---

187. *See, e.g., Generalized System of Preferences: Digest of Rules of Origin*, U.N. Doc. UNCTAD/TAP/133/Rev. 6 at 5, U.N. Doc. INT/84/A01 (1990). The process criterion is applied by the EU, Austria, Finland, Japan, Norway, Sweden, and Switzerland. *Id.* at 6. Importantly, these refer to the GSP rules of origin. One of the complexities of rules of origin is that they differ by the type of trade relationship. The EU's Lomé Convention has a significant percentage component to its rules of origin.

188. *Id.* at 8. The United States, Australia, Canada, New Zealand, Bulgaria, Czechoslovakia, Hungary, Poland, and the Russian Federation use the percentage criterion. *Id.* Again, the rules of origin are not always consistent. For example, the North American Free Trade Agreement, to which the United States is signatory, applies the process criterion.

189. *Id.* at 6.

190. *Id.* at 8. The United States, Australia, and New Zealand use the minimum percentage approach. *Id.* Percentages vary from Australia's 50% to the United States's 35% requirement. *Id.* at 8, 10.

191. *Id.* at 8. Canada, Bulgaria, Czechoslovakia, Hungary, Poland and the Russian Federation use the percentage ceiling approach. *Id.*

However, the force of these disadvantages is compromised by the increasing harmonization and simplification efforts.

The rules of origin in Bulgaria, Czechoslovakia, Hungary, Poland, and the Russian Federation are harmonized.[192] The vicissitudes of international economics have not permitted these rules to lead the other preference systems, but they prove that harmonization is achievable. Although it does not govern preferential trade, the agreement reached on rules of origin within the context of the Uruguay Round exemplifies progress in the area of harmonization.

b. Consignment Standards

As a general rule, the beneficiary developing country must directly transport the product to the developed-country destination to qualify under the GSP as an originating product.[193] This is the direct-consignment rule. There are, however, a few exceptions. For example, Australia does not have consignment standards.[194] Exceptions to the general rule are also justifiable if the beneficiary country is landlocked or if the sale occurs at exhibitions or trade fairs.[195]

The consignment standards satisfy authorities that products shipped from beneficiary developing countries are the same at the port of disembarkation. In other words, this standard discourages the manipulation, exchange, dilution, or third-country trade of products after the officials in the beneficiary developing country have certified their contents.

c. Documentary Standards

Adequate documentation of origin and consignment is the final requirement of the rules of origin. Generally, a Combined Declaration and Certificate of Origin is used, which is frequently re-

192. *Generalized System of Preferences: Digest of Schemes*, U.N. CTAD/TAP/136/Rev. 7 at 15 n.11, U.N. Doc. INT/84/A01 (1990).

193. *Generalized System of Preferences: Digest of Rules of Origin*, U.N. CTAD/TAP/133/Rev. 6 at 14, U.N. Doc. INT/84/A01 (1990).

194. *Id.* at 14.

195. *Id.* at 14–16, 28, 30. For example, the goods of a developing-country beneficiary may be on sale during a trade fair in a third country, even a developed country such as Switzerland. If sold there, the goods are shipped directly to the developed preference country. Technically, such a sale would violate the direct-consignment rule without this exception.

ferred to as "Form A." The form is signed by the exporter, who must describe his products in detail. It is then countersigned by the responsible government agency confirming that the declaration of the exporter is correct. Form A is important to proving direct-consignment when the goods have gone through a third country. However, a bill of lading, a customs certificate issued by the country of transit showing that the goods were not altered, or a supplier's invoice may suffice in some instances.

5. The GSP and Other Preferences

Developed countries having colonies in the developing countries always gave preferences to their own colonies. As the GSP scheme came into being, questions were presented regarding the legality of special preferences because such preferences discriminate among developing countries. Originally, the United States called for the abolition of preferences as a prerequisite to eligibility for U.S. GSP benefits. However, the United States later retreated from this view.[196]

General Principle Eight, adopted at the first UNCTAD session, resolves special preferences as follows:

> Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guarantying at least equivalent advantages to the countries concerned come into operation.[197]

Furthermore, the UNCTAD Special Committee on Preferences generally concluded:

> Developing countries which will be sharing their existing tariff advantages in some developed countries as a result of the introduction of the generalized system of preferences will expect the new access in

196. Pressure from the United States caused the EU to discontinue the colonial practice of reverse preferences. This meant that EU goods would no longer receive preferential treatment in the developing countries where the EU countries exported their products. Increasing international opinion against reverse preferences played a substantial part. Lomé I formally eliminated the practice.

197. *Proceedings of the United Nations Conference on Trade and Development*, U.N. Doc. E/CONF.46/141 at 20 (1964).

other developed countries to provide export opportunities to at least compensate them.[198]

In other words, the GSP and special preferences may coexist.

6. Institutionalized Arrangements

The Special Committee on Preferences was established as a permanent organ of the UNCTAD during UNCTAD III in Santiago, Chile. The Committee is charged with reviewing GSP schemes for effectiveness. As the legislative arm of GSPs, the Committee reviews expert reports, makes recommendations to the Trade and Development Board, and debates the direction of the GSP program. The UNCTAD Secretariat acts as the executive arm, although the unilateral tending nature of preferences limits the scope of the Secretariat's activities.

Currently, the direction of the UNCTAD includes advising developing countries of all the laws affecting international trade, including those concerning antidumping and countervailing duties, rules of origin, and antitrust. The UNCTAD approach of treating trade laws as a whole illustrates the futility in separating special from generalized preferences.

IV. History of Special Preferences

Because GSP schemes coexist with several special preferences, an understanding of special preferences is necessary to appreciate the range of trade preferences. This Part discusses the contemporary development of trade preferences.

Trade preferences have existed for a very long time.[199] They even predated the GATT. For example, the United States had a preferential tariff arrangement with Cuba.[200] The Commonwealth of Nations, an association of states formerly under British rule, also had an elaborate preferential regime. Although the GATT's MFN Clause endeavored to stamp out the spread of preferences, devel-

198. R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. World Trade L. 45, 51 (1971) (quoting UNCTAD Special Committee on Preferences).

199. Detlev F. Vagts, Transnational Business Problems 26 n.11 (1986).

200. *See* General Agreement on Tariffs and Trade, Guide to GATT Law and Practice 828 (1994) (providing list of waivers granted by GATT for nations to effect preferences).

oped countries asked for and received waivers under Article XXV, Paragraph 5.[201]

In 1948, the United States received a waiver to grant duty-free treatment to imports from certain Pacific states formerly under Japanese rule.[202] Italy followed suit by establishing preferential tariff arrangements for the benefit of Libya and Somalia.[203] Finally, Australia sought a waiver to create yet another preferential regime for Papua New Guinea.[204]

Although the GATT provides for waivers and other limited derogations from the MFN doctrine, no group of countries sought to establish a comprehensive regime of preferences until the Treaty of Rome established the European Economic Community (EEC) in 1957.[205] Under the EEC, Europeans instituted a massive preferential scheme constructed to conform to Article XXIV of the GATT. The EEC asked the GATT contracting parties for approval.

Part IV of the Treaty of Rome established this system of preferences between the original six European states and former colonies.[206] These countries were called the Associated Overseas Territories. According to Article 131 of the Treaty, this bloc sought to "promote the economic and social development of the [colonies] . . . and to establish close economic relations between them and the Community as a whole."[207] Under this arrangement, the developing-country partners would have duty-free access to European states. Additionally, these developing-country members could assess tariffs against European imports to their respective countries. The EEC (now known as the EU) purported that this access was consistent with Article XXIV of the GATT. However, most members of the GATT group assigned to study the Treaty's compliance with the GATT disagreed.[208]

---

201. *Id.*

202. *Id.* at 837.

203. *Id.* at 832.

204. *Id.* at 828.

205. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

206. *Id.* at 65.

207. *Id.*

208. *See The European Economic Community: Reports Adopted on 29 November 1957* (delineating reasons that certain portions of Treaty of Rome were incompatible with Article XXIV of GATT), *reprinted in* 6 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 70, 91–101 (1958).

The GATT's notoriously vague Article XXIV[209] frustrated any clear reading. The GATT's Intercessional Committee, charged with determining whether the Treaty complied with the GATT, failed to make a firm decision. In one example of pragmatism, the Intercessional Committee found that "it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Article XXIV of the General Agreement."[210] Thus, the EEC declared victory and moved on.

By 1964, the EEC, with the independent former colonies, signed Yaounde I.[211] This new agreement continued to provided for free trade, financial assistance, and technical assistance among members. When Yaounde I expired in 1970, the participants returned to sign Yaounde II, and even more developing countries took part. When Yaounde II expired in 1975, the Lomé Conventions followed,[212] and still more developing countries participated. The joining of Great Britain, and its bandwagon of commonwealth states, with the EEC greatly facilitated this broader base of participation.

V. THE U.S. SCHEME

A. *The U.S. GSP*

The U.S. GSP is codified at 19 U.S.C. §§ 2461-2466 (the GSP Statute).[213] The GSP Statute authorizes the President to "provide duty-free treatment for any eligible article and any beneficiary developing country."[214] In doing so, the President must evaluate whether the action furthers the economic development of the de-

209. Article XXIV is also one of the longest articles in the GATT agreement. It purports to define a customs union and a free trade area.

210. GATT, *Customs Union and Free-Trade Areas: The Treaty Establishing the European Economic Community, reprinted in* 7 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 69, 70 (1959).

211. Yaounde I was named after the capital city of Cameroon, in which it was signed.

212. *See generally* ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC REGULATIONS 311–13 (1991) (tracing development of Yaounde I and II into Lomé Conventions).

213. 19 U.S.C. §§ 2461-2466 (1988 & Supp. IV 1992).

214. *Id.* § 2461 (1988).

veloping countries.[215] The President must also consider the extent to which other developed countries are implementing GSPs,[216] the anticipated impact of imports on U.S. producers,[217] and the developing countries' competitiveness.[218]

1. Beneficiaries

Section 2462 of the GSP Statute defines beneficiaries as those so designated by the President.[219] However, thirteen countries and all members of the EU cannot be presidentially designated.[220] Additionally, the President may not declare the following as beneficiaries: (1) a communist country, except in the very rare case in which such a country is a member of both the GATT and the International Monetary Fund and the country is not controlled by international communism; (2) any member of the Organization of Petroleum Exporting Countries (OPEC); (3) any country that affords preferential treatment to the products of a developed country, other than the United States, which hurts U.S. commerce; (4) any country that has nationalized or expropriated U.S. property, including trademarks and patents; (5) any country that ignores arbitral awards in favor of the United States; (6) any country that harbors terrorists; and (7) any country that ignores internationally recognized worker rights.[221] Despite these restrictions, a considerable number of developing countries and territories may benefit from the U.S. GSP scheme.[222]

---

215. *Id.* § 2461(1).

216. *Id.* § 2461(2).

217. 19 U.S.C. § 2461(3) (1988).

218. *Id.* § 2461(4).

219. *Id.* § 2462(a). Section 2462(a) provides in relevant part:

> (1) For purposes of this title, the term "beneficiary developing countries" means any country with respect to which there is in effect an Executive order by the President of the United States designating such country as a beneficiary developing country for purposes of this title. Before the President designates any country as a beneficiary developing country for purposes of this title, he shall notify the House of Representatives and the Senate of his intention to make such designation together with the considerations entering into such decision.

Id.

220. *Id.* § 2462(b) (1988 & Supp. IV 1992).

221. 19 U.S.C. § 2462(b)(7) (1988).

222. *GSP: USTR Adds 83 European Products to GSP List Resulting from Special Review*, 9 Int'l Trade Rep. (BNA) 1053, 1053 (June 17, 1992); *see* EXPORT PRACTICE: CUSTOMS AND INTERNATIONAL TRADE LAW 606–08 (Terence P. Stewart ed. 1994) (listing beneficiaries of U.S. GSP scheme.

The GSP Statute lists seven factors that the President must consider in the exercise of his power to designate developing countries. They include: (1) the beneficiary country's expressed desire to be so designated; (2) the beneficiary country's level of economic development, based on GNP and living standards; (3) the beneficiary country's receipt of other developed countries' GSP benefits; (4) the extent to which U.S. products are assured a market in the developing country; (5) the country's protection of copyrights, trademarks, and patents; (6) the beneficiary country's promotion of investments and service trade; and (7) the country's protection of internationally recognized worker rights.[223] After consideration of all relevant factors, the President "may withdraw, suspend, or limit the application of the duty-free treatment accorded."[224]

2. Product Coverage

The President provides the International Trade Commission (ITC) with a list of articles that will become part of the GSP scheme.[225] The ITC is subsequently required to determine the probable economic effect of duty-free entry into the United States of each article on the list. After this investigation, the ITC advises the President. The President then designates the articles "he considers appropriate to be eligible articles for purposes of this title by Executive Order or Presidential Proclamation."[226]

3. Safeguard Measures

The GSP Statute contains many safeguard measures. The President is not allowed to designate the following articles as eligible under the scheme: (1) textile and apparel; (2) watches, except those that the President determines after public notice and comment will not "cause material injury" to watch or watch-strap businesses in U.S. interests; (3) import-sensitive electronic articles; (4) import-sensitive steel articles; (5) footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; (6) import sensitive semi-manufactured and manufactured glass products; and (7)

223. 19 U.S.C. § 2462(c)(1)-(7) (1988).
224. *Id.* § 2464(a).
225. *Id.* § 2463(a).
226. *Id.*

any other articles the President determines to be import sensitive.[227]

4. Rules of Origin

GSP treatment applies to an eligible article that is the growth, product, or manufacture of a beneficiary developing country if:

> (1) [that article] is imported directly from a beneficiary developing country into the customs territory of the United States; and
>
> (2) the sum of (A) the cost of value or the materials produced in the beneficiary developing country or any 2 or more countries which are of the same association of countries which is treated as one country under section 2462(a)(3) of this title, plus (B) the direct costs of processing operations performed in such beneficiary developing country or such member countries is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.[228]

In other words, unless a product is wholly the manufacture of the developing-country beneficiary, it must undergo a "dual transformation" to receive GSP benefits. Dual transformation is accomplished when the constituent parts of the products are the manufacture of a nonbeneficiary state. A "substantial transformation" occurs when a manufacturing process results in "an article of commerce which has a distinctive name, character, or use."[229] Dual transformation requires "two successive substantial transformations."[230] Thus, the U.S. percentage system creates a layer of complication requiring judicial analysis and interpretation.[231]

In *Torrington Co. v. United States*,[232] the United States Court of Appeals for the Federal Circuit upheld the dual transformation requirement.[233] The *Torrington* court applied the dual transformation doctrine to sewing machine needles exported from Portugal to the United States.[234] A nonbeneficiary country had imported the

227. 19 U.S.C. § 2463(c) (1988).
228. *Id.* § 2463(b) (1988 & Supp. IV 1992).
229. Torrington Co. v. United States, 764 F.2d 1563, 1568 (Fed. Cir. 1985).
230. *Id.* at 1567.
231. *Id.*
232. 764 F.2d 1563 (Fed. Cir. 1985).
233. *Torrington Co.*, 764 F.2d at 1567.
234. *Id.* at 1566.

wire used in producing the needles to Portugal.[235] To satisfy the requirements of the U.S. GSP scheme, the Portuguese importers were required to show that (1) they incorporated material produced in Portugal in the manufacture of the needles, and (2) the direct cost of producing the needles in Portugal exceeded 35 percent of their appraised value.[236]

The court held that the dual transformation took place and the 35 percent threshold was met when two critical manufacturing processes separated the three phases of needle production.[237] In the production chain, wire (imported from a non-GSP beneficiary) was transformed to swages, and then to needles.[238] The last two transformations occurred in Portugal. The court reasoned that "the swages in this case were no longer wire; they had a new name by which they were known in the trade; they had new characteristics, including a new shape and size."[239] The transformation of swage to needles, the court noted, was "clearly a significant manufacturing process."[240] Although dual transformation may be criticized as nebulous, its purpose of assisting development in developing countries illustrates the practice of states in legally pursuing the development process.

5. Other Limitations

The following limitations also serve as safeguards for U.S. industry. However, the reason cited for their enactment is the need to redistribute benefits among developing countries, especially the least developed ones.

a. Competitive-Needs Limits

A country designated as an eligible developing country with respect to an article could lose its eligibility by exporting too much of that article. Eligibility depends on the flow of the product to the United States exceeding the "ratio to $25,000,000 as the gross national product of the United States for the preceding calendar year

235. *Id.*
236. *Id.* at 1565.
237. *Torrington Co.*, 764 F.2d at 1568.
238. *Id.*
239. *Id.* at 1569.
240. *Id.* at 1571.

bears to the gross national product of the United States for calendar year 1974."[241] For example, if the current GNP is two times the 1974 GNP, the limit for the current year would be $50 million. The President may undertake this inquiry whenever the President chooses.[242] Generally, preferences with respect to a particular product may be lost, but the beneficiary country's GSP status may not be revoked.

When a single eligible country imports 50 percent of the approved value of total imports of that article into the United States, the beneficiary status of that article is lost. This concept is known as product graduation. The concept of country graduation occurs when a country exceeds a given level of GNP, and the United States ousts it from the system.

b. The Review Process

The GSP Statute also mandates an annual review of recipient countries by the President.[243] This review is designed to determine whether "a beneficiary developing country has demonstrated a sufficient degree of competitiveness with respect to any eligible article."[244] If the President finds a sufficient degree of competitiveness has been achieved, a stricter standard is triggered. This stricter standard entails (1) using 1984 as the base year for calculation of the export limit, and (2) limiting the total import percentage to 25 percent (instead of 50 percent) of all U.S. imports.[245] If the country fails to pass these stricter standards, the country loses its GSP status.

The President, however, may waive the 25 percent requirement unless the imports equal 30 percent of all imports of the product. Whether a beneficiary nation opens its border to American commerce and protects American property—intellectual or otherwise—will carry "great weight" in a presidential waiver decision.[246] One section of the GSP Statute empowers the United States to

241. 19 U.S.C. § 2464(c)(1)(A) (1988).
242. *Id.* § 2464(c)(1).
243. *Id.* § 2464(c)(2)(A).
244. *Id.* § 2464(c)(2)(B).
245. 19 U.S.C. § 2464(c)(2)(B) (1988).
246. *Id.* § 2464(c)(3)(B).

assist GSP beneficiaries in balancing the need for agricultural export with the food needs of their people.[247]

6. Criticisms of the U.S. GSP

The U.S. GSP's exclusion of beneficiaries based on political and ideological differences has been questioned. The eligibility criteria contained in 19 U.S.C. § 2462 appear to force the political and ideological will of the United States on beneficiaries.[248] Additionally, the annual review of the U.S. GSP, as well as other countries' GSP systems, breeds instability. Planning is difficult. A long-term review period, perhaps five years in length, would better promote stability.

Because any country may request inclusion of any article, the U.S. system is praised as one of the more open schemes. However, the competitive-needs criteria and the possibility of unilateral withdrawal restrict the actual volume of goods exported into the United States through the GSP.[249] Furthermore, the safeguard measures restrict the movement of goods and create unilateral power in the United States to withdraw benefits. This uncertainty makes it difficult for developing countries to plan.

The U.S. rules of origin require more than substantial transformation. They call for double substantial transformation. The complexity places a heavy burden on developing-country beneficiaries. Not surprisingly, complex litigation has emerged. Additionally, the provisions for competitive limits, graduation, and waiver essentially ask for reciprocity in dealing with developing countries. This approach contradicts the UNCTAD Special Committee's Agreed Conclusions and distorts the norm of international trade-preference law.

Although the U.S. program is unstable at times, there is no serious threat of discontinuing the system.[250] The U.S. GSP expired in

247. *Id.* § 2466.

248. *See supra* Part III(E)(5). The waiver provisions, however, permit the United States to effect some balance and equity in the GSP Statute's administration.

249. *See Possible Improvements to the Generalized System of Preferences*, U.N. Doc. UNCTAD/ITD/8 at 8 (1994) (stating that "the larger schemes, [like] those of the EU and the United States, . . . have the greatest range of excluded products").

250. *See Consultation on Harmonization and Improvement of the Rules of Origin*, U.N. TDBOR, Special Comm. on Preferences, 21st Sess., Provisional Agenda Item 4, at 3, U.N. Doc. TD/B/SCP/8 (1994) (explaining that minimizing preference limitations, with-

July 1993, but was renewed until September 30, 1994[251] and renewed again until July 31, 1995.[252] The current administration continues to struggle with the task of extension beyond 1995.[253]

B. *The Caribbean Basin Economic Recovery Act*

To better discharge its responsibilities toward attaining a new world economic order, the United States enacted the Caribbean Basin Economic Recovery Act (CBERA)[254] in 1983.[255] The CBERA, which is the American response to the Lomé Conventions, is the most generous tariff-preferences program in the United States.[256] The U.S. approach to development emphasizes reliance on market forces differently than the welfarist-tending EU approach.[257] Consequently, some of the features found in the Lomé Conventions do not exist in the CBERA. The CBERA provides duty-free market access for almost all qualified imports from beneficiary countries and is organized like the GSP Statute.

The aims of the CBERA include: (1) to assist the maintenance of a stable political and economic climate in the Caribbean region because such a climate is necessary to the security and economic interests of the United States;[258] (2) to stimulate the Caribbean re-

---

drawals, and restrictions, as well as harmonizing and simplifying rules of origin, will provide greater predictability and stability in GSP schemes).

251. *See Trade Subcommittee Approves Administration GSP Program*, 11 Int'l Trade Rep. (BNA) 782, 782 (May 18, 1994) (noting that unless renewed, GSP would expire September 30, 1994), *available in* LEXIS, Itrade Library, Intrad file; *Administration Submits Legislation to Extend GSP Program, Fast Track*, 10 Int'l Trade Rep. (BNA) No. 17, at 686 (Apr. 28, 1993) (explaining that administration sought one-year extension of GSP which expired on July 4, 1993), *available in* LEXIS, Itrade Library, Intrad file.

252. *See Special Report: Trade Outlook for 1995*, 12 Int'l Trade Rep. (BNA) 150, 150 (Jan. 18, 1995) (reporting retroactive renewal of U.S. GSP for 10 months until July 31, 1995).

253. *See id.* (stating that budget constraints will pose greatest obstacle for 1995 extension of U.S. GSP benefits).

254. Pub. L. No. 98-67, 97 Stat. 384 (1983) (codified as amended at 19 U.S.C. § 2701-2706 (1988 & Supp. IV 1992)).

255. Congress raised and expanded the CBERA by enacting the Caribbean Basin Economic Recovery Expansion Act (CBEREA) of 1990, Pub. L. No. 101-382, 104 Stat. 655 (codified at 19 U.S.C. § 2701 (Supp. IV 1992)). The CBERA, as revised by the CBEREA, forms the basis of the following discussion.

256. *Report by the Government of the United States of America, in* 2 GATT: TRADE POLICY REVIEW UNITED STATES 9, 25 (1992).

257. GEORGE A. BERMANN ET AL., CASES & MATERIALS ON EUROPEAN COMMUNITY LAW 951 (1993).

258. 19 U.S.C. § 2701 (Supp. IV 1992).

gion's exports;[259] and (3) to demonstrate the American commitment to development of the Caribbean region.[260]

1. Beneficiaries

Under the CBERA, the President may consider twenty-seven listed countries geographically located in the Caribbean area as beneficiary countries.[261] However, inclusion on that list does not guarantee beneficiary status. A beneficiary country must not be communist and must not have seized property, contract rights, copyrights, or patents of a U.S. citizen or business "the effect of which is to nationalize, expropriate, or otherwise seize ownership of" such property.[262]

Furthermore, to be a beneficiary under the CBERA, the country must recognize arbitral awards favoring a U.S. citizen or business, must not provide preferential market access to the goods of another developed country, must be signatory to an extradition treaty with the United States, and must promote international worker rights.[263] Except for the provisions barring a beneficiary country from providing preferential access to other developed countries and from mandating an extradition treaty, the President may waive any of the foregoing conditions.[264]

In determining which of the twenty-seven countries are to receive benefits, the President must consider eleven factors, four more than those considered when designating a beneficiary developing countries under the GSP Statute. The eleven factors are: (1) the beneficiary country's desire to be so designated; (2) economic conditions; (3) openness of markets to the United States; (4) application of GATT principles; (5) the beneficiary country's use of export subsidies; (6) the degree by which the country's trade policies contribute to the revitalization of the region; (7) the degree to

259. *Id.*

260. *Id.*

261. *Id.* § 2702(b) (1988 & Supp. IV 1992). The listed countries are: Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Cayman Islands, Montserrat, Netherlands Antilles, St. Christopher-Nevis, the Turks and Caicos Islands, and the British Virgin Islands. *Id.*

262. 19 U.S.C. § 2702(b)(1)-(2) (Supp. IV 1992).

263. *Id.* § 2702(b)(3)-(4), (6)-(7).

264. *Id.* § 2702(b) (1988 & Supp. IV 1992).

which such countries seek self-help measures in solving economic problems; (8) the degree of worker rights afforded in the country; (9) the country's protection of foreigners' trademarks and patents, including movie and television copyrights; (10) the measures taken by the country to prohibit piracy of Americans' works; and (11) the country's willingness to cooperate with the United States to achieve the goals of the CBERA.[265] Clearly, the goals of the CBERA are to consolidate its influence over the Caribbean region and to enforce American free-trade philosophy.[266]

2. Product Coverage

Duty-free treatment is extended to any article that is not expressly excluded by the CBERA, subject to the requirements of the Tax Reform Act of 1986.[267] Hence, almost all products originating in the beneficiary nations are afforded duty-free treatment.[268] However, textiles and apparel, footwear, tuna, petroleum, watches, and watch parts are not covered.[269] Furthermore, the CBERA severely restricts importation of sugar and beef products.[270]

3. Safeguard Measures

The major safeguard measures under the CBERA are stated in Section 2702(e):

> The President may . . .
>
> (A) withdraw or suspend the designation of any country as a beneficiary country, or
>
> (B) withdraw, suspend, or limit the application of duty-free treatment under this chapter to any article of any country, if, after such designation, the president determines that as a result of changed cir-

---

265. *Id.* § 2702(c).

266. *See* Rudiger L. Breitenecker, Note, *The Caribbean Basin Initiative—An Effective U.S. Trade Policy Facilitating Economic Liberalization in the Region: The Costa Rican Example*, 23 LAW & POL'Y INT'L BUS. 913, 913 (1992) (commenting on United States's goals in influencing Caribbean region).

267. 19 U.S.C. § 2703(a) (1988 & Supp. IV 1992).

268. *See* Wolfgang Benedek, *The Caribbean Basin Economic Recovery Act: A New Type of Preference in GATT?*, 20 J. WORLD TRADE L. 29, 42 (1986) (discussing duty-free treatment for most products of beneficiary countries).

269. 19 U.S.C. § 2703(b) (1988 & Supp. IV 1992).

270. *Id.* § 2703(c) (1988).

cumstances such country would be barred from designation as a beneficiary country . . . .[271]

Additionally, the CBERA's reporting provision requires the ITC to "prepare, and submit to the Congress and to the President, a report regarding the economic impact of this Act on United States industries and consumers."[272] The vast safeguard measures under the CBERA demonstrate that it is largely unilateral—a limitation by no means restricted to the U.S. system.

Many GATT contracting parties considering the United States's application for a waiver of the MFN doctrine were concerned about the safeguard measures the President could undertake for political and ideological reasons.[273] The United States was eventually granted the waiver,[274] and in practice, it has not abused the safeguard provisions.

4. Rules of Origin

The rules of origin applicable under the GSP Statute also apply to the CBERA.[275] Broadly, only the "growth, product, or manufacture of beneficiary countries," shipped directly to the United States, may qualify for duty-free entry.[276] Alternatively, the goods must be substantially transformed within the beneficiary developing country. At least 35 percent of the appraised value of the entire product must be added in one or more beneficiary countries.[277]

---

271. *Id.* § 2702(e)(1).

272. *Id.* § 2704(a).

273. *See United States-Caribbean Basin Economic Recovery Act (CBERA)*, GATT Doc. L/5708 (Report adopted Nov. 6–8 and 20, 1984) (describing far-reaching implications of non-commercial criteria as prerequisite for granting trade preferences), *reprinted in* 31 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 180, 183 (1985).

274. *See Caribbean Basin Economic Recovery Act*, GATT Doc. L/5779 (Decision of Feb. 15, 1985) (granting extension of duty-free treatment to eligible imports of Caribbean Basin countries until September 30, 1995), *reprinted in* 31 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 20, 22 (1985).

275. *See supra* Part V(A)(4).

276. 19 U.S.C. § 2703(a)(1)(a) (1988).

277. *Id.* § 2703(a)(1)(b). Appraised value is determined at the time the product enters the United States. *Id.*

CBERA is a tariff-reduction scheme. In practice, it shields beneficiary countries from the harsher competitive-needs limitations of the GSP Statute.[278]

5. CBERA and the GATT

To fully activate the CBERA without violating GATT rules, the United States asked the GATT contracting parties to waive the MFN principle enshrined in Article I. The GATT empaneled a committee to examine whether the CBERA was in conformity with the GATT.[279] Members of the committee raised the following concerns: (1) the CBERA did not include every country in the region; (2) non-commercial considerations for qualifying existed; (3) the President's power was too broad and discretionary; and (4) twelve years was too long for the waiver being sought.[280]

The United States prevailed. In 1985, the GATT contracting parties granted a waiver to the United States based on the provisions of Article XXV, Paragraph 5.[281] The decision of the contracting parties stated:

---

278. *See* W. Charles Sawyer & Richard L. Sprinkle, *Caribbean Basin Economic Recovery Act: Export Expansion Effects,* 18 J. WORLD TRADE L. 429, 431 (1984) (discussing U.S. tariff elimination on trade flow).

279. Article XXV, Paragraph 5 of the GATT permits waivers of GATT obligations in exceptional circumstances. The United States also based the application on the GATT organization's 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. *United States-Caribbean Basin Economic Recovery Act (CBERA)*, GATT Doc. L5708 (Report adopted Nov. 6-8 and 20, 1984), *reprinted in* 31 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 180, 181 (1985). The Decision had waived MFN obligations for developed countries assisting developing countries. Moreover, the Decision mandated that such assistance should not discriminate against other developing countries that are not targets of the assistance. Some contracting parties' representatives argued that CBERA would not benefit all developing countries in the region and therefore would fall short of the Decision's intent. *Id.* at 183.

280. *Id.* at 183–84.

281. *Caribbean Basin Economic Recovery Act*, GATT Doc. L/5779 (Decision of Feb. 15, 1985), *reprinted in* 31 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 20, 22 (1985). Article XXV, Paragraph 5 of the GATT provides:

> In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote
>
> (a) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
>
> (b) prescribe such criteria as may be necessary for the application of this paragraph.

> [T]he provisions of paragraph 1 of Article 1 of the General Agreement shall be waived, until 30 September 1995, to the extent necessary to permit the Government of the United States to provide duty-free treatment to eligible imports of Caribbean Basin countries benefitting from the provisions of the Act, without being required to extend the same duty-free treatment to like products of any other contracting party.[282]

VI. THE EU SCHEME

A. *The EU GSP*

In 1971, the Council of Ministers of the European Communities adopted regulations for the implementation of a GSP.[283] The legal basis for the EU scheme is Article 113 of the Treaty of Rome.[284] The system, like that of the United States, is reauthorized annually.[285] The GSP scheme for 1991 was based on EU Council Regulations 3831/90,[286] 3832/90,[287] and 3833/90.[288] These provisions

---

GATT, *supra* note 11, art. XXV, para. 5, 61 Stat. at A68–69, 55 U.N.T.S. at 272–74.

282. *Caribbean Basin Economic Recovery Act*, GATT Doc. L/5779 (Decision of Feb. 15, 1985), *reprinted in* 31 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 20, 22 (1985). The Act is now part of the corpus of American law.

283. Resolution Following the Advice of the European Parliament on Proposals by the Commission of the European Communities to the Council Related to the Rules and Decisions Concerning the Implementation of Generalized Systems of Preferences in Favour of Developing Countries, 1971 J.O. (C 66) 1.

284. Article 113 of the Treaty of Rome states:

> 1. After the expiry of the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalization, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies.
>
> 2. The Commission shall submit proposals to the Council for the putting into effect of the common commercial policy.

Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 113, paras. 1 & 2, 298 U.N.T.S. 11, 60.

285. *See* P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES: AFTER THE COMING INTO FORCE OF THE SINGLE EUROPEAN ACT 797 (Laurence W. Gormley ed., 1989).

286. Council Regulation 3831/90 of 20 December 1990 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Industrial Products Originating in Developing Countries, 1990 O.J. (L 370) 1.

287. Council Regulation 3832/90 of 20 December 1990 Applying Generalized Tariff Preferences for 1991 in Respect of Textile Products Originating in Developing Countries, 1990 O.J. (L 370) 39.

were extended to 1992 by Council Regulation 3587/91[289] and were again extended for 1993,[290] 1994,[291] and 1995.[292]

1. Beneficiaries

More than 148 independent countries are beneficiaries under the EU GSP and that number is increasing. All members of the Group of 77 are included.[293] Estonia, Latvia, Lithuania, and Albania were admitted in 1992.[294] In 1993, the Ukraine, Belarus, Moldova, Russia, Georgia, Armenia, Azerbaijan, Kazkhstan, Turkmenistan, Uzbekistan, Tajistan, and Kyrgystan became beneficiaries.[295] Countries are not excluded on the basis of ideology or protection of worker rights.

The EU system, like others, differentiates among beneficiaries; the most benefits are awarded to the least developed states.[296] The

---

288. Council Regulation 3833/90 of 20 December 1990 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Agricultural Products Originating in Developing Countries, 1990 O.J. (L 370) 86.

289. Council Regulation 3587/91 Extending into 1992 the Application of Regulations 3831/90, 3832/90, 3833/90, and 3835/90 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Products Originating in Developing Countries, 1991 O.J. (L 341) 1.

290. Council Regulation 3917 of 21 December 1992 Extending into 1993 the Application of Regulations 3831/90, 3832/90, 3833/90, 3834/90, 3835/90, and 3900/91 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Products Originating in Developed Countries, and Adding to the List of Beneficiaries of Such Preferences, 1992 O.J. (L 396) 1.

291. Council Regulation 3668/93 of 20 December 1993 Extending into 1994 the Application of Regulation 3917/92 Applying Generalized Tariff Preferences for 1994 in Respect of Certain Products Originating in Developing Countries, and Adding to the List of Beneficiaries of Such Preferences, 1993 O.J. (L 338) 22, 23.

292. Council Regulation 3281/94 of 19 December 1994 Applying a Four-Year Scheme of Generalized Tariff Preferences (1995 to 1998) in Respect of Certain Industrial Products Originating in Developing Countries, 1994 O.J. (L 348)1; Council Regulation 3282/94 of 19 December 1994 Extending into 1995 the Application of Regulations 3833/90, 3835/90, and 3900/91 Applying Generalized Tariff Preferences in Respect of Certain Agricultural Products Originating in Developing Countries, 1994 O.J. (L 348) 57.

293. MARC WILLIAMS, THIRD WORLD COOPERATION: THE GROUP OF 77 IN UNCTAD 60–63 (1991).

294. Council Regulation 282/92 of 3 February 1992 Supplementing and Amending Regulations 3587/91 and 3588/91 extending into 1992 the Application of Regulations 3831/90, 3832/90, 3833,90, 3834/90, and 3835/90 Applying Generalized Tariff Preferences for 1991 in Respect of Contain Products Originating in Developing Countries, 1992 O.J. (L 31) 1.

295. TRADE RELATIONS EC-EFTA, COOPERS & LYBRAND EUROPE, EC COMMENTARIES 5, Nov. 25, 1993, *available in* LEXIS, Europe Library, Alleur File.

296. *European Update Main Text: Trade and Commercial Policy*, 1991 WL 11744, at *42–44, Apr. 8, 1993 *available in* EURUPDATE.

inclusion of textiles as a product covered under the GSP should further enlarge the number of beneficiaries.[297]

2. Product Coverage

The community member states are, in principle, committed to completely eliminating tariffs for industrial and semi-industrial goods. However, ceilings and other restrictions are imposed. Products such as textiles, shoes, and petrochemical and steel products are eligible for duty-free entry.[298]

Products covered under the EU's Common Agricultural Policy are excluded. The ceilings relate to all "preferential imports" including, for example, imports flowing through the Lomé Convention. When ceilings are exceeded, the products are subject to MFN tariffs.

3. Safeguards

Product coverage is controlled by the nature of the safeguards it invites. Sensitive industrial goods are specially guarded to protect domestic producers. Some products are semi-sensitive; they are placed on a watch list and a quota is imposed. When the quota is exceeded, "consultations" with the importing country are made. Non-sensitive goods have no duties or quotas, but are subject to quarterly statistical surveillance. The EU safeguard measure is explained in Regulation 1634/92:

> Where the increase of preferential import of these products, originating in one or more beneficiary countries, causes or threatens to cause economic difficulties in the community or a region of the community, the levying of customs duties may be reintroduced, once the Commission has had an appropriate exchange of information with the member states.[299]

---

297. Council Regulation 1028/93 of 26 April 1993 Supplementing Regulation 3917/92 Extending into 1993 the Application of Regulations 3831/90, 3832/90, 3833/90, 3834/90, 3835/90, and 3900/91 Applying Generalized Tariff Preferences for 1991 in Respect of Certain Products Originating in Developing Countries and Adding to the List of Beneficiaries of Such Preferences, 1993 O.J. (L 108) 1.

298. *European Update Main Text: Trade and Commercial Policy*, Apr. 8, 1993, 1991 WL 11744, at *43 *available in* EURUPDATE.

299. Commission Regulation 1634/92 of 24 June 1992 Reintroducing the Levying of Customs Duties Applicable to Products Falling Within CN Code 2929 90 00, Originating in Brazil, to Which the Preferential Tariff Arrangements of Council Regulation 3831/90 Apply, 1992 O.J. (L 171) 13.

4. Rules of Origin

To qualify under the EU GSP, the EU rules of origin mandate that: (1) the goods be shipped directly from the beneficiary country to the EU; (2) the goods be wholly obtained in the country concerned or have undergone acceptable transformation in the beneficiary country—the resulting finished product is classified differently from the parts used in making it; and (3) adequate documentary evidence exist to prove to EU customs authorities that the goods being imported should receive GSP tariffs.[300]

5. Criticisms of the EU GSP

The EU system hinders long-term planning for both importers and exporters. The annual review process precludes a guarantee for projects lasting over a year. The volume limits, tariff quotas, ceilings, and other safeguards militate against stability. A review-free, five-year period has been recommended for all GSPs.[301] This option appears to be reasonable and should be further explored.

The product coverage is capable of improvement. The EU GSP has a multitude of exclusions in sectors where developing countries have a competitive advantage. Expansion of the EU GSP to more cover agricultural goods would particularly help the least developed countries.

The safeguards, quantitative restrictions, and graduation standards cause uncertainty and are often colored by nationalism. However, governments have generally defended graduations and limitations as redistributionist measures that help the less competitive countries to benefit from the system. Empirical findings that limitations do not improve the ability of the less competitive to take advantage of the system compromise the force of this argument.[302] Nonetheless, the jurisprudential value and the moral and political impact of this position are difficult to dismiss. The way forward is to strengthen technical assistance for the less competi-

300. ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 125–26 (1982).

301. *See Possible Improvements to the Generalized System of Preferences*, U.N. Doc. UNCTAD/ITD/8 (1994), at 28 (recommending five-year duration for all schemes to eliminate unpredictability caused by annual changes to quotas and ceilings).

302. *See id.* at 31 (explaining that limiting tariff-free exports from more developing countries to the EU does not increase exports by lesser developing countries).

tive countries,[303] a job that the UNCTAD Secretariat must undertake.[304]

The rules of origin are complex and could be simplified. The complexity of the rules and their adverse impact for utilization should raise concerns. However, the resolve of the EU and other countries to harmonize the rules of origin is a progressive step forward. Furthermore, if properly implemented, the principle behind the rules—keeping out unqualified imports—may benefit development.

B. *The Lomé Conventions*

In 1975, nine EU countries entered into Lomé I with forty-six African, Caribbean, and Pacific nations.[305] These nations are collectively called the ACP countries. Lomé II came in 1979 with more EU members and fifty-eight ACP members.[306] Lomé III, signed by ten EU countries and sixty-six ACP countries in 1984, was followed in 1989 by Lomé IV, the current EU special-preference plan.[307] Sixty-eight ACP states and the twelve EU countries joined in Lomé IV.[308] The number of states grew with the volume of transfers from the EU to the developing countries.

The Lomé Conventions go beyond GSP schemes; they transcend trade and involve a partnership touching all aspects of development. The Lomé Conventions are an outgrowth of the colonial preferential policies between the imperialist powers and their colo-

---

303. *See generally Technical Assistance in Connection With the Generalized System of Preferences: Technical Cooperation Activities on the Generalized System of Preferences and Other Trade Laws 1993*, at 13-20, U.N. Doc. TD/B/SCP/7 (1994) (reviewing activities of Secretariat in providing training during 1993).

304. *See id.* at 9 (noting that UNCTAD has 30 requests for training activities which are not undertaken as result of insufficient funds).

305. *See generally* K.R. Simmonds, *The Lomé Convention and the New International Economic Order*, 13 COMMON MKT. L. REV. 315–34 (1976) (discussing Lomé Convention signed in 1975).

306. Lomé II Convention, Final Act, Oct. 31, 1979, 19 I.L.M. 327, 330–31 (1980).

307. *See generally* Kenneth R. Simmonds, *The Fourth Lomé Convention*, 28 COMMON MKT. L. REV. 521 (1991) (defining effective date of Lomé IV as March 1, 1990, and generally discussing its import); Kenneth R. Simmonds, *The Third Lomé Convention*, 22 COMMON MKT. L. REV. 389 (1985) (reviewing principal features of third Lomé Convention signed in 1984).

308. African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, art. 1, 29 I.L.M. 783, 788 [hereinafter Lomé IV].

nies.[309] Following the Treaty of Rome, the former colonies became associated states. When Britain joined the EU in 1972, the scope of the association expanded as former British colonies became part of the scheme.

1. The Provisions of Lomé IV

The substantive provisions of the Lomé IV Convention are divided into five parts. A discussion of each part follows.

a. Fundamental Objectives of the Convention

Part One of Lomé IV contains the general principles underlying cooperation. The EU and the ACP entered into the Convention "to promote and expedite the economic, cultural, and social development of the ACP states."[310] This was done with a view to "a more just and balanced international economic order."[311] The Convention was in the nature of a contract, "legally binding" the ACP countries and the EU.[312]

Lomé IV calls for the promotion of sustainable development,[313] human rights,[314] rural development, food security, rational management of natural resources, and agricultural productivity.[315] There is no reciprocity: "[C]ooperation shall be aimed at supporting development in the ACP states."[316] The ACP states' products have free access to the EU, with limited restrictions for agricultural products and for the safeguard clause.[317]

b. Twelve Areas of Cooperation

Part Two of the Lomé Convention, which delineates the areas of cooperation, is subdivided into twelve titles: Environment, Agricultural Cooperation, Food Security and Rural Development, De-

309. *See generally* Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1, 22–29 (1992) (discussing decolonization and beginning of Lomé).

310. Lomé IV, *supra* note 308, art. 1, 29 I.L.M. at 814.

311. Lomé IV, *supra* note 308, art. 1, 29 I.L.M. at 814.

312. Lomé IV, *supra* note 308, art. 2, 29 I.L.M. at 814.

313. Lomé IV, *supra* note 308, art. 4, 29 I.L.M. at 814.

314. Lomé IV, *supra* note 308, art. 5, 29 I.L.M. at 814.

315. Lomé IV, *supra* note 308, art. 6, 29 I.L.M. at 814–15.

316. Lomé IV, *supra* note 308, art. 113, 29 I.L.M. at 815.

317. Lomé IV, *supra* note 308, art. 25, 29 I.L.M. at 817.

velopment of Fisheries, Cooperation on Commodities, Industrial Development, Manufacturing and Processing, Mining Development, Energy Development, Enterprise Development, Development of Services, Trade Development, Cultural and Social Cooperation, and Regional Cooperation.[318]

c. Instruments of ACP-EU Cooperation

Part Three of the Convention establishes the instruments to implement the provisions of Part Two. Part Three is further divided into four titles: Trade Cooperation, Cooperation in the Field of Commodities, Development Finance Cooperation, and General Provisions for the Least Developed, Landlocked, and Island ACP States.[319]

Concerning trade cooperation, products exported from ACP states to the EU will be exported free of customs duties, charges, or quantitative restrictions. With respect to agricultural goods, the EU reserves the right to withdraw benefits if such withdrawal is required for the implementation of its own agricultural policy.[320]

Cooperation in the field of commodities relates to the stabilization of export earnings (STABEX), special undertakings on sugar, and a special financing facility for mining products (SYSMIN). STABEX, limited to agricultural products, is an innovative program designed to protect poor ACP countries against losses due to fluctuations in international commodities trade.[321] A pattern of instability is found in world commodities trade.[322] STABEX attempts to rectify instability of export earnings for the poorest states.[323] Upswings in export earnings do not compensate for the damage brought by downward fluctuations even if the upward and downward movements appear equal.[324] Lomé IV expands the

318. Lomé IV, *supra* note 308, arts. 155–166, 29 I.L.M. at 819–44.

319. Lomé IV, *supra* note 308, arts. 328–337, 29 I.L.M. at 845–81.

320. *See* I.K. Minta, *The Lomé Convention and the New International Economic Order*, 27 How. L.J. 953, 957 (1984) (describing EU's Common Agricultural Policy as "perhaps the most complicated protectionist regime in world trade").

321. Lomé IV, *supra* note 308, art. 186, 29 I.L.M. at 848.

322. Willy Brandt, North-South: A Program For Survival: The Report of the Independent Commission on International Development Issues Under the Chairmanship of Willy Brandt 141–46 (1980).

323. Lomé IV, *supra* note 308, art. 186, 29 I.L.M. at 848.

324. *Rationale for the Stabilization of Export Earnings*, STABEX Beneficiaries Handbook (Fourth ACP-EEC Convention of Lomé, 1990), at Annex 2, 1–2.

products and countries that may qualify under the STABEX program.

The EU also agreed to purchase and import sugar at guaranteed prices from exporting ACP states. This undertaking, the details of which are contained in a side agreement, applies to specific quantities of cane sugar.[325]

A SYSMIN is provided to assist mining activities and export of mining products of the developing countries by grants instead of loans.[326] Qualified beneficiaries are (1) those countries that derive more than 15 percent of their export earnings from one of a specified list of mining products, or (2) those countries in which 20 percent of their export earnings depend on covered mining products.[327]

Article 220 outlines the objectives of the development finance agreement. The main objective of Article 220 is to "support and promote the efforts of ACP states to achieve long-term, self-determined, self-reliant and self-sustained integrated social, cultural and economic development on the basis of mutual interest and a spirit of interdependence."[328] Specifically, this provision was included to help ACP countries with structural adjustment and the policies advocated by the International Monetary Fund and the World Bank.[329] These policies have depreciated the quality of life in many countries.[330] Provision is made to help developing countries with debt serving and management, emergency assistance, and with investment protection.[331]

Article 330 of the Lomé IV Convention lists forty-four states as least developed. The Council of Ministers,[332] established by the

---

325. Lomé IV, *supra* note 308, art. 213, 29 I.L.M. at 852.

326. Lomé IV, *supra* note 308, art. 214, 29 I.L.M. at 853.

327. Lomé IV, *supra* note 308, art. 215, 29 I.L.M. at 853. The specified mining products include copper, phosphates, manganese, bauxite and aluminum, tin, iron ore, and uranium. *Id.*

328. Lomé IV, *supra* note 308, art. 220, 29 I.L.M. at 855.

329. *See* Kenneth R. Simmonds, *The Fourth Lomé Convention*, 28 COMMON MKT. L. REV. 521, 537 (1991) (calling structural adjustment programs "the principal innovation").

330. *See id.* (citing political and social unrest as effects of this policy).

331. *Id.* at 539–42.

332. A quorum of the Council of Ministers is made up of half the members of the Council of the European Communities, one member of the Commission of the European Communities, and two-thirds of the members representing the governments of the ACP states that are present. Lomé IV, *supra* note 308, art. 339, 29 I.L.M. at 882.

Convention,[333] determines which states are listed. There are fourteen landlocked ACP states;[334] all but Zambia and Zimbabwe are also listed as least developed. The Council of Ministers also decides which states are landlocked or island states. There are twenty-six island ACP states,[335] to which other special provisions apply.

d. Operation of the Institutions

Under Part Four of the Convention, the Council of Ministers is composed of members of the Council of the European Communities, at least one member of the Commission of the European Communities, and a representative of the ACP states. The office of President of the Council is held alternately by a member of the Council of the European Communities and a member of the government of an ACP state.[336] The Council meets once a year. Additionally, the Convention provides for a Committee of Ambassadors.[337] The Committee makes recommendations to the Council of Ministers, to which the Committee is answerable, and supervises any committee established by the Council. The Committee of Ambassadors meets at least twice a year. Furthermore, a Joint Assembly[338] convenes twice a year and makes recommendations to the Council.

The dispute settlement mechanism is straightforward.[339] Disputes between member states or between the ACP members and the EU are resolved by the Council of Ministers. Between meetings of the Council, the Committee of Ambassadors attempts to settle the matter. If the Committee fails, it refers the matter to the

333. Lomé IV, *supra* note 308, art. 338, 29 I.L.M. at 882.

334. Lomé IV, *supra* note 308, art. 333, 29 I.L.M. at 881. The fourteen states are: Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe. *Id.*

335. Lomé IV, *supra* note 308, art. 336, 29 I.L.M. at 881. The listed states are: Antigua and Barbuda, Bahamas, Barbados, Cape Verde, Comoros, Dominica, Dominican Republic, Fiji, Grenada, Haiti, Jamaica, Kiribati, Madagascar, Mauritius, Papau New Guinea, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sao Tomé and Príncipe, Seychelles, Solomon Islands, Tonga, Trinidad and Tobago, Tuvalu, Vanuatu, and Western Sahara. *Id.*

336. Lomé IV, *supra* note 308, art. 340, 29 I.L.M. at 882.

337. Lomé IV, *supra* note 308, art. 346, 29 I.L.M. at 882.

338. Lomé IV, *supra* note 308, art. 350, 29 I.L.M. at 883.

339. Lomé IV, *supra* note 308, art. 352, 29 I.L.M. at 884.

Council in the next meeting. The Council's failure to resolve a dispute, triggers the "good offices procedure."[340] If that procedure fails, the Council calls in independent arbitrators.

e. Final Provisions

Part Five of the Convention provides for a ten-year duration commencing March 1, 1990.[341] Furthermore, the final provisions set out the procedure for third-party accession, enable the automatic inclusion of Namibia at the gaining of its independence, and sanction negotiations and transitionary measures.

2. The Rules of Origin Under Lomé IV

The EU's rules of origin have their own protocol.[342] A product is considered to be "originating in the ACP state if it has been either wholly obtained or sufficiently worked or processed in the ACP states."[343] All the ACP states are considered one territory.[344] If products used for the manufacture of a good comes from one or more ACP states, the last country where processing took place is considered the country of origin.[345] A list of "wholly obtained" goods is provided.[346]

For products that are not wholly obtained, a twenty-six page list defining products that are "sufficiently worked" to obtain originating status is annexed to the Convention. In general, goods are deemed to have undergone sufficient processing when the product being exported is classified in a tariff heading differently from any of the product's component parts.[347] However, if the change in

340. The good offices procedure allows the Secretary-General to use the influence of his office to facilitate resolution.

341. Lomé IV, *supra* note 308, art. 366, 29 I.L.M. at 885.

342. Lomé IV, *supra* note 308, Protocol 1, 29 I.L.M. at 887. A protocol is a side agreement.

343. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 1, 29 I.L.M. at 887.

344. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 6, 29 I.L.M. at 888.

345. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 7, 29 I.L.M. at 888.

346. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 2, 29 I.L.M. at 887.

347. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 3, 29 I.L.M. at 887–88. The provision states in part that "non-originating materials are considered to be sufficiently worked or processed when the product obtained is classified in a heading which is different from those in which all the non-originating materials used in its manufacture are classified."

tariff heading is accomplished by a simple process, originating status is not conferred.[348]

Goods must be directly consigned.[349] Because all ACP countries are treated as one territory, transshipment or warehousing of goods in a non-ACP state before transportation to the destination is prohibited. An exception is made if the goods remain under the watch of customs authorities in the country of transshipment. Proof of this surveillance is required to obtain originating status.[350]

---

348. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 3, 29 I.L.M. at 888. This article lists insufficient processes that may not confer origin:

> [T]he following shall be considered as insufficient working or processing to confer the status of originating products, whether or not there is a change of heading:
>
> (a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);
>
> (b) simple operations consisting of removal of dust, sifting or screening, sorting classifying, matching (including the making-up of sets of articles, washing, painting, cutting-up);
>
> (c)(i) changes of packaging and breaking up and assembly of consignments;
>
> (ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards etc., and all other simple packaging operations;
>
> (d) affixing marks, labels and other like distinguishing signs on products or their packages;
>
> (e)(i) simple mixing of products of the same kind where one or more components of the mixture do not meet the conditions laid down in this Protocol to enable them to be considered as originating either in an ACP State, in the Community or in the [overseas country or territory];
>
> (ii) simple mixing of products of different kinds unless one or more components of the mixture meet the conditions laid down in the Protocol to enable them to be considered as originating either in an ACP State, in the Community, or in the OCT and provided that such components contribute in determining the essential characteristics of the finished product;
>
> (f) simple assembly of parts of articles to constitute a complete article;
>
> (g) a combination of two or more operations specified in subparagraphs (a) to (f);
>
> (h) slaughter of animals.

Id.

349. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 10, 29 I.L.M. at 889.

350. Lomé IV, *supra* note 308, Protocol 1, tit. I, art. 10(2), 29 I.L.M. at 889. The following must be produced:

> (a) a through bill of lading issued in the exporting beneficiary country covering the passage through the country of transit;
>
> (b) or a certificate issued by the customs authorities of the country of transit:
>
> —giving an exact description of the goods,
>
> —stating the dates of unloading and reloading of the goods or of their embarkation or disembarkation, identifying the ships used,

Furthermore, to obtain originating status, goods must be accompanied by adequate proof of origin.[351] However, certain small quantities of products to private persons are exempt from proof-of-origin requirements.[352] Unfortunately, proof-of-origin forms used for the Lomé Convention cannot be used for GSP transactions or vice versa.

Finally, the Customs Cooperation Committee, consisting of representatives from the EU and the ACP states, may waive any requirements that are otherwise part of this protocol "where the development of existing industries or the creation of new industries justifies them."[353] The Lomé IV rules of origin may be revised annually if requested by the contracting parties.[354]

3. Safeguards

Articles 177 through 180 contain the Convention's safeguard provisions. The main operative part states:

> Should application of this chapter result in serious disturbances in a sector of the economy of the Community or of one or more of the Member States, or jeopardize their external financial stability, or if difficulties arise which may result in a deterioration thereof, the Community may take, or may authorize the Member State concerned to take safeguard measures.[355]

Although this safeguard provision has existed throughout the history of the Lomé Conventions,[356] it has never been used.[357] Nevertheless, it is a source of anxiety for developing countries who benefit from the EU special-preference scheme.[358]

—certifying the conditions under which the goods remained in the transit country;
(c) or failing these, any substantiating documents.

Id.

351. Lomé IV, *supra* note 308, Protocol 1, tit. II, art. 12, 29 I.L.M. at 889.

352. Lomé IV, *supra* note 308, Protocol 1, tit. II, art. 22(1), 29 I.L.M. at 891.

353. Lomé IV, *supra* note 308, Protocol 1, tit. III, art. 31(1), 29 I.L.M. at 892.

354. Lomé IV, *supra* note 308, Protocol 1, tit. V, art. 34, 29 I.L.M. at 894.

355. Lomé IV, *supra* note 308, art. 177 (1), 29 I.L.M. at 846.

356. *See* Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1, 46 (1991) (emphasizing large amount of ink "spilled" on Lomé safeguard clause).

357. *See id.* (noting that no safeguard measures have ever been invoked against ACP products during 15-year history of Lomé).

358. *See, e.g.*, P. Kenneth Kiplagat, *Fortress Europe and Africa Under the Lomé Convention: From Policies of Paralysis to a Dynamic Response*, 18 N.C. J. INT'L L & COM.

Critics of the Lomé Conventions contend that the benefits of the program, although greater than those under the EU GSP scheme, are still small.[359] They see the STABEX program, for example, as a measure confining developing countries in the role of raw-material suppliers to industrialized countries. Furthermore, by preferring some developing countries over others, the Conventions cause rifts among developing countries. Additionally, some of the programs and institutions are said to be fragmented and ineffective.[360]

VII. VALUE OF THE U.S. AND EU SCHEMES TO DEVELOPING COUNTRIES

A. *The GSP Schemes*

Both the U.S. and EU systems have received mixed reviews.[361] The preponderance of views holds that, although the systems have not generated spectacular results, they have been useful.[362] No

---

REG. 589, 608 (1993) (noting that safeguard clause has "been effectively used as a device to impose quotas on ACP exports").

359. *See* Michael Davenport, *Africa and the Unimportance of Being Preferred*, 30 J. COMMON MKT. STUD. 232, 239–46 (1992) (stating that impact by any standard is minor, if not insignificant).

360. *See* Kenneth R. Simmonds, *The Fourth Lomé Convention*, 28 COMMON MKT. L. REV. 521, 544 (1991) (stating that Lomé IV is "still fragmented and often timid").

361. *See* TRACY MURRAY, TRADE PREFERENCES FOR DEVELOPING COUNTRIES 22 (1977) (noting that "impact of tariff preferences favouring the developing countries on world welfare, as traditionally measured by the concepts of trade creation and trade diversion, is likely to be negligibly small"); Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67, 72 (contending that "economic value of the [GSP] programs was less than anticipated"); Beverly M. Carl, *Current Trade Problems of the Developing Nations* (asserting that "[a]lthough the GSP [system] has stimulated some additional trade, the results are rather disappointing"), in LEGAL ISSUES IN INTERNATIONAL TRADE 100, 112 (Petar Sarcevic & Hans van Houtte eds., 1990). *But see* F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 109 (1990) (suggesting that GSP provided developing countries access to previously unavailable markets); Tamotsu Takase, *The Role of Concessions in the GATT Trading System and Their Implications for Developing Countries*, J. WORLD TRADE L., Oct. 1987, at 77 (stating that "in the current world economic and trade situation, a large number of countries thus need differential, and more favourable, trade treatment such as the GSP"). *Compare* R. Krishnamurti, *The Agreement on Preferences: A Generalized System in Favour of Developing Countries*, 5 J. WORLD TRADE L. 45, 45–46 (1971) (referring to agreement on GSPs as great achievement) *with* Brian Hindley, *The UNCTAD Agreement on Preferences*, 5 J. WORLD TRADE L. 694, 694 (1971) (stating "Mr. Krishnamurti's article . . . expresses what was hoped for, not what has emerged.").

362. *See, e.g.*, ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 342 (1991) (relating that benefits of U.S. GSP, for beneficiary countries, "has not been negligible"). *See*

matter what position one takes, GSP benefits are generally believed to be small.

One of the main difficulties with both schemes is that developing-country benefits are eroded by multilateral tariff reductions under the GATT.[363] For example, following the Tokyo Round, developed-country tariff rates averaged between 5 and 6 percent.[364] In the United States, MFN tariffs were even lower at 4 percent.[365] The reduction of MFN rates erodes the benefits of the GSP regimes.[366] In the long term, if complete elimination of tariffs is achieved, there simply will be no GSP.

A study of the GSP schemes identified six other areas of difficulty encountered by developing countries participating in such schemes.[367] First, both GSP systems impose quantitative and country limitations. The U.S. GSP excludes competitive countries by products and by several discretionary criteria. Also, annual review by the President results in annual country or product exclusions. The graduation principle in the U.S. GSP causes uncertainty for a number of countries. The requirement that countries participating in the U.S. system open their own markets appears to violate Part IV of the GATT by dispensing with reciprocity in developing-developed country trade. The EU GSP subjects sensitive items to individual-country ceilings and quotas.[368] In 1981 a system of country limitations was introduced to limit GSP benefits for highly competitive suppliers.[369]

---

generally Tamotsu Takase, *The Role of Concessions in the GATT Trading System and Their Implications for Developing Countries*, J. WORLD TRADE L., Oct. 1987, at 77 (suggesting ways to improve GSP schemes).

363. *See* Beverly M. Carl, *Current Trade Problems of the Developing Nations* (finding that "Third World nations have not benefitted proportionately from the GATT tariff cuts"), *in* LEGAL ISSUES IN INTERNATIONAL TRADE 100, 111 (Petar Sarcevic & Hans van Houtte eds., 1990).

364. *Id.* at 112.

365. *Id.*

366. *Id.*; ABDULQAWI YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW 98 (1982).

367. Tamotsu Takase, *The Role of Concessions in the GATT Trading System and their Implications for Developing Countries*, J. WORLD TRADE L., Oct. 1987, at 76–77.

368. *Id.*

369. *Id.* at 79.

Second, the systems are frequently modified and lack the stability needed for long-term planning in developing countries.[370] The U.S. scheme expired in July 1993, but was extended through July 31, 1995.[371] The EU scheme terminated in December 1993, but also has been extended into 1995.[372] Moreover, both systems provide for easy discontinuation of benefits. Petitioning to exclude a country or product from the U.S. GSP list involves a simple procedure.[373] The EU modifies its ceilings and quotas annually and hence may easily discontinue benefits. Nevertheless, despite the numerous exclusions of both systems, the trade in agriculture is stable in some markets. This development appears to support the argument of critics who claim that the systems confine developing countries to the role of producing primary commodities.

Third, the country and competitive limitations have escalated as some developing countries develop a measure of competitiveness. This competitiveness results from the emergence of strong industrial sectors in some developing countries.

Fourth, the rules of origin not only are complex, but also restrict GSP benefits. These rules discriminate against countries that are far from developed industrial centers. The requirement in both the U.S. and EU rules of origin that the covered product be transported directly to the United States or the EU is blamed for this discrimination. Smaller states far from the EU and the United States are often forced to transport through larger countries for trade to be profitable.

---

370. *See GSP: Administration Submits Legislation to Extend GSP Program, Fast Track*, 10 Int'l Trade Rep. (BNA) 686, 686 (Apr. 28, 1993) (describing U.S. Trade Representative Mickey Kantor's 1993 legislation submitted to Congress proposing extension of U.S. GSP).

371. *See Special Report: Trade Outlook for 1995*, 12 Int'l Trade Rep. (BNA) 150, 150 (Jan. 8, 1995) (reporting extension of U.S. GSP Statute through July 31, 1995).

372. Council Regulation 3281/94 of 19 December 1994 Applying a Four-Year Scheme of Generalized Tariff Preferences (1995 to 1998) in Respect of Certain Industrial Products Originating in Developing Countries, 1994 O.J. (L 348) 1; Council Regulation 3282/94 of 19 December 1994 Extending into 1995 the Application of Regulations 3833/90, 3835/90, and 3900/91 Applying Generalized Tariff Preferences in Respect of Certain Agricultural Products Originating in Developing Countries, 1994 O.J. (L 348) 57.

373. Each year, the U.S. government invites members of the public to petition for designation of additional articles and to request withdrawal, suspension, or limitation of GSP treatment for specific articles or countries. *See June 1 Is the Deadline for the Submission of Petitions*, 10 Int'l Trade Rep. (BNA) 878, 878 (May 26, 1993) (requesting petitions affecting GSP status and establishing deadline for 1993 petitions).

Fifth, although provisions are made for special tariff treatment for the least developed countries, in reality, their low level of development militates against taking this advantage.

Sixth, the complexity, variations, and uncertainty of both GSP schemes burden the administrative capacities of the less advanced, small, and distant developing countries.

GSP systems have received sympathetic hearing. According to F.V. Garcia-Amador:

> The GSP was never considered by developing countries as a panacea for solving all the problems of economic development. It is a tariff policy whose objective is to promote industrialization and accelerate developing states' economic growth rates through expansion of their exports and export-earnings. Although far from being used to its full potential in terms of helping developing countries, the GSP has provided them access to important markets previously unavailable to them. Equally important is its political significance for developing states, which tend to view preferential tariff treatment as a significant step in the overall struggle for restructuring economic relations among states.[374]

Legally, the GSP and its operation has assisted the evolution of a set of norms for an international law of trade preferences for developing countries. Furthermore, the GSP has helped operationalize at least one aspect of the international law of development, of which the law of trade preferences is a part.

Recognizing that the system could be improved, the UNCTAD Board has initiated a review of the GSP system to be completed by 1995.[375] This review was instigated to address the worsening economic realities in the developing countries.[376] Developing countries seek increased preferential margins, extension of product coverage, elimination of quotas, and simplification of administrative procedures and other restrictive aspects of the GSP

---

374. F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW 109 (1990).

375. *See GSP: UNCTAD Board Calls for GSP Improvements to Account for Third World Conditions*, 10 Int'l Trade Rep. (BNA) 838, 838 (May 19, 1993) (noting Board's decision to review GSP system because of modern economic realities and worsening Third World economic conditions resulting from failed Uruguay Round of trade talks).

376. *Id.*

schemes.[377] In the end, though, both developed and developing countries want the GSP to continue.[378]

B. *CBERA and Lomé: The Special-Preference Schemes*

The special preferences demonstrate the willingness of the EU and the United States to go beyond the GSP to find ways of stimulating development. The CBERA and the Lomé Conventions have several things in common. Both systems provide duty-free access for almost all products of the beneficiary countries. Additionally, trade aspects dominate both approaches, but these aspects are more pervasive with the CBERA than with the Lomé Conventions. Furthermore, both schemes are essentially regional, although the Lomé Conventions are spread across three regions. Finally, thirteen countries benefit from each scheme.[379]

Nevertheless, more differences than similarities exist between the two special-preference schemes. Lomé is a contract.[380] It is a set of agreements negotiated among equal partners.[381] The CBERA is a unilateral action of the United States. Lomé is a holistic development package; it addresses agricultural development, trade, finance, and aid. The CBERA is hardly more than a tariff elimination measure.

Lomé transfers (grants, loans, or other aid) are concessional. That is, the transfers are spent by the transferee government for the best purposes it sees fit.[382] The CBERA is highly structured and its operations are heavily conditional. Lomé is open to all who qualify no matter what their economic, political, or ideological inclinations. The CBERA refuses to deal with communists and is filled with other discretionary and mandatory criteria for disqualifi-

---

377. *Id.*

378. *Id.*

379. These countries are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Lucia, St. Vincent and the Grenadines, Surinam, Trinidad and Tobago, and St. Christopher-Nevis. *See* 19 U.S.C. 2702(b) (1988); *Minutes of the Signing of the Fourth ACP-EEC Convention, reprinted in* 120 THE COURIER 179, 182–86 (1990).

380. Lomé IV, *supra* note 308, art. 1, 29 I.L.M. at 814; *see* Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1, 29 n.118 (1991).

381. Lomé IV, *supra* note 308, art. 2, 29 I.L.M. at 814.

382. Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1, 29 (1991).

cation. Lomé provides for social and cultural cooperation. It also provides for the famous STABEX and SYSIM. Although the United States previously shunned special preferential trade agreements, under the CBERA it has now decided to accept them. This decision evidences the growing norm of trade preferences for developing countries in international economic relations.

The usefulness of the CBERA has been questioned.[383] Its "trade not aid" philosophy appears dubious since the United States transfers more money in nontrade foreign aid measures than in trade measures.[384] The safeguard measures in the CBERA guarding U.S. industries against injury could lead to "little or no benefit to the countries of the Caribbean Basin."[385] On the whole:

> The Caribbean Basin Economic Recovery Act may well be misnamed. In quantitative terms the increase in economic activity in the region attributable to the CBERA will in all probability be minuscule. Even these small benefits in trade may be reduced if beef exports are restricted. Thus the potential contribution of the CBERA to "economic recovery" in the region is questionable.[386]

The CBERA is now a permanent arrangement.[387] On the other hand, the fall of communism and the emergence of economically weak East European countries have caused a shift in European development policy.[388] Indications suggest that the Lomé Conventions may be subsumed into a general European development

---

383. W. Charles Sawyer & Richard L. Sprinkle, *Caribbean Basin Economic Recovery Act: Export Expansion Effects,* 18 J. WORLD TRADE 429, 435 (1984); *see also* William P. Corbett, Jr., *A Wasted Opportunity: Shortcomings of the Caribbean Basin Initiative Approach to Development in the West Indies and Central America*, 23 LAW & POL'Y INT'L BUS. 951, 951 (1992) (stating that "the Caribbean Basin Initiative . . . has yielded neither sustained economic development . . . nor significant profit opportunities").

384. W. Charles Sawyer & Richard L. Sprinkle, *Caribbean Basin Economic Recovery Act: Export Expansion Effects*, 18 J. WORLD TRADE L. 429, 435 (1985).

385. *Id.* at 436.

386. *Id.* at 435.

387. *See Generalized System of Preferences: Renewal Faces Hurdles,* 10 Int'l Trade Rep. (BNA) 164, 164 (Jan. 27, 1993) (explaining that since CBERA was made permanent in 1990, it is not subject to phaseout like other U.S. unilateral trade-preference programs).

388. *See* Interview with Manuel Marín, European Development Commission President (claiming no general model for development exists and stressing human rights and democracy as backbone of development cooperation policy) *in Human Rights Are the Backbone of Our Cooperation Policy*, 137 THE COURIER 2, 5 (1993).

policy.[389] However, any news of the death of the Convention is highly exaggerated.[390] The expansion of the EU is sure to produce major adjustments, but the Convention is widely recognized as the international instrument that best incorporates the principles of the new international economic order.[391]

VIII. HAVE THE COUNTRIES DISCHARGED THE DUTIES PLACED ON THEM BY THE RIGHT TO DEVELOPMENT?

A. *The Duty*

Apart from the U.N. Charter, several U.N. General Assembly pronouncements contain the legal bases for the duty imposed on developed countries to maintain preferential regimes aiding developing countries' advancement. Several historic instruments enunciate these duties.

For example, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States* provides in relevant part that "[s]tates should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries."[392] Moreover, Article 4(n) of the *Declaration on the Establishment of a New International Economic Order* calls for "[p]referential and nonreciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible."[393] Finally, Article 9 of the *Charter of Economic Rights and Duties of States* mandates that "[a]ll states have the responsibility to co-operate in

389. *See* Amadou Traore, *Much Manoeuvering in Luxembourg: ACP-EEC Joint Assembly Discusses the Future of the Lomé Conventions*, 136 THE COURIER 7, 8 (1992) (reporting that dismantling of Convention had been contemplated by ACP states at one time).

390. Jacques Delors, *Meeting Point: "Without Confidence, People Can Never Work Together for Any Common Cause,"* 145 THE COURIER 3, 5 (1994) (stating that Convention is "certainly the most structured and ambitious of all international cooperation agreements, and the whole thing is to be preserved in its entirety").

391. *See* I.K. Minta, *The Lomé Convention and the New International Economic Order*, 27 How. L.J. 953, 973 (1984) (noting that Lomé Convention presently represents most comprehensive agreement concerning North-South economic relations).

392. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, U.N. GAOR, 25th Sess., 1883d plen. mtg., *reprinted in* 9 I.L.M. 1292, 1296 (1970).

393. *Declaration on the Establishment of a New International Economic Order*, U.N. GAOR Ad Hoc Comm., 6th Sess., Agenda Item 7, at 4, U.N. Doc. A/RES/3201(S-VI), *reprinted in* 13 I.L.M. 715, 718 (1974).

the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries."[394]

B. *Are the Preference Systems Consistent with International Law Imposing a Duty on Developed Countries to Assist Developing Countries?*

The preference systems are generally consistent with the law of trade preferences. However, there is much room for improvement. First, the requirement by the United States that those participating in U.S. programs partake of a particular ideology is inconsistent with the law of trade preferences.[395]

Second, because they punish developing countries for being competitive, the ceilings in the EU GSP and the agricultural-goods-export restrictions of the Lomé Convention violate aspects of the duty to assist development. As a result, developing countries are unable to exercise effective control over their resources.[396]

Third, the complex rules of origin of the EU and U.S. systems constrain trade. They vary by country and by the type of trade. To this extent, they reduce the ability of developing countries to benefit from assistance. Nevertheless, rules of origin are a useful tool. They operate to prevent more advanced countries from frustrating the goal of preferences by using developed countries as minimal packaging warehouses. Accordingly, rules of origin inevitably build checks and balances into the system. These rules should be simplified to provide greater guidance.

Fourth, the tendency for GSP schemes to benefit granting countries more than developing countries implies a de facto reciprocity of oppressive proportions. Testifying before the U.S. Senate, U.S. Trade Representative William Brock stated:

> I think first of all I would state that based on conviction that this program has been of enormous benefit to the United States . . . . If

---

394. U.N. GAOR 2d Comm., 29th Sess., Agenda Item 48, U.N. Doc. A/RES/3281 (XXIX), *reprinted in* 14 I.L.M. 251, 256 (1975).

395. *Declaration on the Establishment of a New International Economic Order*, U.N. GAOR Ad Hoc Comm., 6th Sess. Agenda Item 7, U.N. Doc. A/RES/3201 (S-VI), *reprinted in* 13 I.L.M. 715, 717 (1974).

396. *See* Costa R. Mahalu, *Human Rights and Development: An African Perspective*, 1 LEIDEN J. INT'L L. 15, 18–19 (1988).

> you've looked at the foreign sector, for example—we have some members of this committee who represent their States—last year we brought in, I think, $721 million worth of agricultural products under GSP. We exported in that same year to those same countries $15 billion worth of agricultural products, or 20 to 1 cost-benefit ratio. That's not bad. That's good business.[397]

The gains by developed countries from the GSP and related schemes provide political justification for the continuance of trade preferences. Although provisions in the preferential trade laws that call for open-market access to developing countries may be criticized as interfering in the domestic affairs of other nations, a developing country which closes its markets to the forces of international trade may breach an international-law duty of good faith.

IX. CONCLUSION

The history of preferences may be traced to special arrangements granted by developed countries to their former colonies. Over time, these preferences widened by means of the GSP and other developments in the quest for a new international economic order. Developed countries have accepted the duty to assist developing countries' progress. As evidenced by the United States's adoption of trade preferences, by the increase in the number of beneficiaries under the U.S. and EU schemes, and by approval of these schemes by the GATT, trade preferences for developing countries are hardening as a norm of international law.

Trade preference schemes are not consistent with all the U.N. resolutions and declarations regarding the right to development. However, developed countries have extensively complied with specific portions of these U.N. declarations that address the development of trade preference law. The nature of international law often precludes the precision that exists in domestic law.

Developed countries have room to improve their rules of origin, safeguard measures, and beneficiary lists for the full utilization of the benefits of preferential trade. The quest for improvement of the preferential trade systems should not, however, obscure the ad-

---

397. *Renewal of the Generalized System of Preferences: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 98th Cong., 1st Sess. 4–5 (1983) (statement of Ambassador William Brock, U.S. Trade Representative). *Contra* GATT Part IV, *supra* note 17, 17 U.S.T. at 1983–84, 572 U.N.T.S. at 328–30.

vancements made thus far. If peace and security are best obtained under conditions of economic and social progress, then the international community is moving in the right direction by continuing to support trade preferences.