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Trade Preferences for Developing Countries and the WTO

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Summary

World Trade Organization (WTO) Members must grant immediate and unconditional most-favored-nation (MFN) treatment to the products of other Members with respect to tariffs and other trade-related measures. Programs such as the Generalized System of Preferences (GSP), under which developed countries grant preferential tariff rates to developing country products, are facially inconsistent with this obligation because they accord goods of some countries more favorable tariff treatment than that accorded to goods of other WTO Members. Because such programs have been viewed as trade-expanding, however, Contracting Parties to the General Agreement on Tariffs and Trade (GATT) provided a legal basis for one-way tariff preferences and certain other preferential arrangements in a 1979 decision known as the Enabling Clause. In 2004, the WTO Appellate Body ruled that the Clause allows developed countries to offer different treatment to developing countries, but only if identical treatment is available to all similarly situated GSP beneficiaries. Where WTO Members' preference programs have provided expanded benefits, the WTO has on occasion waived Members' WTO obligations. A number of trade preference bills have been introduced in the 109th Congress, including proposed extensions of the GSP and Andean preference programs, each of which is set to expire in 2006. Among these are H.R. 5070, which would extend the GSP and Andean preferences for one year and expand and extend textile benefits under the African Growth and Opportunity Act (AGOA); H.R. 6076 and S. 3904, which would extend until 2008 the GSP, Andean preferences, and a third-country fabric provision for lesser-developed beneficiaries expiring in 2007; and H.R. 6142, which would extend the GSP and the AGOA third-country fabric provision until 2008 and expand textile and apparel benefits for Haiti. This report will be updated.

Trade Preferences and GATT MFN Requirements

As parties to the General Agreement on Tariffs and Trade (GATT) 1994, World Trade Organization (WTO) Members must under Article I:1 of the GATT grant immediate and unconditional most-favored-nation (MFN) treatment to the products of other Members with respect to customs duties and import charges, internal taxes and

regulations, and other trade-related matters. Thus, whenever a WTO Member accords a benefit to a product of one country, whether it is a WTO Member or not, the Member must accord the same treatment to the like product of all other WTO Members.¹ Tariff preference programs for developing countries are facially inconsistent with this obligation as the favorable treatment provided by the granting country to the goods of a specific group of countries is not extended to all WTO Members. Since preference programs have been viewed as vehicles of trade liberalization and economic development for developing countries, however, GATT Parties have accommodated them in a series of joint actions.

In 1965, the GATT Parties added Part IV to the General Agreement, an amendment that recognizes the special economic needs of developing countries and asserts the principle of nonreciprocity. Under this principle, developed countries forego the receipt of reciprocal benefits for their negotiated commitments to reduce or eliminate tariffs and restrictions on the trade of less developed contracting parties.² Because of the underlying MFN issue, GATT Parties in 1971 adopted a waiver of Article I for the Generalized System of Preferences (GSP), which allowed developed contracting parties to accord more favorable tariff treatment to the products of developing countries for 10 years.³ The GSP was described in the decision as a “system of generalized, nonreciprocal and nondiscriminatory preferences beneficial to the developing countries.”

At the end of the GATT Tokyo Round in 1979, developing countries secured adoption of the Enabling Clause, a permanent deviation from MFN by joint decision of the GATT Contracting Parties. The Clause states that notwithstanding GATT Article I, “contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties” and applies this exception to: (1) preferential tariff treatment in accordance with the GSP; (2) multilateral nontariff preferences negotiated under GATT auspices; (3) multilateral arrangements among less developed countries; and (4) special treatment of the least-developed countries “in the context of any general or specific measures in favour of developing countries.”⁴ To describe the GSP, the Clause refers to the above-quoted description in the 1971 waiver. The Enabling Clause has since been incorporated into the GATT 1994.⁵

¹ While the WTO uses the term “most-favored-nation” to describe nondiscriminatory trade treatment, U.S. law has since 1998 referred to this treatment as “normal trade relations” (NTR) status. *See* P.L. 105-206, § 5003. This report uses the WTO terminology.

² Edmond McGovern, *International Trade Regulation* ¶ 9.212 (updated 1999)[hereinafter McGovern]. Part IV is generally viewed as nonbinding, though some have argued otherwise with regard to certain of its provisions. *Id.*; John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *Legal Problems of International Economic Relations* 1171 (4th ed. 2002).

³ GATT, *Generalized System of Preferences*; Decision of 25 June 1971, L/3545 (June 28, 1971).

⁴ GATT, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*; Decision of 28 November 1979, L/4903 (Dec. 3, 1979). In 1999, the WTO General Council waived GATT Article I:1 until June 30, 2009, to allow developing country Members to provide preferential tariff treatment to products of least-developed countries, without being required to do so for like products of other Members. *Preferential Tariff Treatment for Least-Developed Countries*; Decision on Waiver, WT/L/304 (June 17, 1999).

⁵ Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, ¶ 1(b)(iv); *see* WTO Appellate Body Report, *infra* note 15, at ¶ 90.3.

WTO Waivers for Preferential Trade Agreements

The European Union had argued in the GATT that it could further deviate from Article I:1 MFN requirements for nonreciprocal free trade with developing countries under GATT Part IV, discussed above, as well as Article XXIV, which provides an MFN exception for customs unions and free trade areas meeting specified conditions. At issue was the Lomé IV Convention, a preferential, nonreciprocal trade arrangement between the EEC and African, Caribbean and Pacific (ACP) countries. The Convention extended beneficial tariff and quota treatment to ACP imports as well as development assistance to ACP countries. GATT panels concluded in unadopted 1993 and 1994 panel reports that such a deviation was not justified under either provision.⁶ Regarding the Article XXIV claim, the 1994 report concluded that because the Lomé Convention involved non-GATT Parties, the Article did not cover the agreement and thus could not be used to justify the inconsistency with Article I of trade preferences for bananas imported from ACP countries.⁷ The European Communities (EC) subsequently obtained a temporary waiver of GATT Article I:1 for the Lomé agreement; a waiver was later granted for the successor ACP-EC Partnership (Cotonou) Agreement until December 31, 2007.⁸

WTO Waivers for U.S. Preference Programs⁹

The United States holds a waiver of Article I:1 obligations for tariff preferences accorded the former Trust Territories of the Pacific Island (TTPDI); the waiver expires December 31, 2006.¹⁰ U.S. waivers for tariff preferences under the Caribbean Basin Economic Recovery Act (CBERA) and the Andean Trade Preference Act (ATPA), each of which pertained solely to GATT Article I:1 obligations, expired December 31, 2005, and December 4, 2001, respectively.¹¹ The United States does not hold a waiver for preferences authorized in the African Growth and Opportunity Act (AGOA), which are available to sub-Saharan African countries through September 30, 2015.¹²

⁶ McGovern, *supra* note 2, ¶ 9.212.

⁷ Panel Report, *EEC — Import Regime for Bananas*, ¶¶ 156-164, DS38/R (1994), as reprinted in 34 Int'l Legal Materials 180 (1995).

⁸ GATT, L/7604 (December 19, 1994); WTO, WT/L/436 (December 7, 2001).

⁹ For further information on current U.S. trade preference programs, see CRS Report 97-389, *Generalized System of Preferences*, by Vivian C. Jones; CRS Report RL32895, *Textile Exports to Trade Preference Regions*, by Bernard A. Gelb; CRS Report RS21772, *AGOA III: Amendment to the African Growth and Opportunity Act*, by Danielle Langton.

¹⁰ United States — Former Trust Territory of the Pacific Islands; Decision of 14 October 1996, WT/L/183 (Oct. 18, 1996). The waiver covers the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau.

¹¹ Council for Trade in Goods, Caribbean Basin Economic Recovery Act; Draft Decision, G/C/W/21/Rev.1 (Oct. 23, 1995); Council for Trade in Goods, Andean Trade Preference Act; Draft Decision, G/C/W/54 (Sept. 4, 1996); World Trade Organization, WTO Analytical Index; Guide to WTO Law and Practice 87 (1st ed. 2003).

¹² African Growth and Opportunity Act, P.L. 106-200, Title I, 19 U.S.C. §§ 3701 *et seq.*, as (continued...)

In February 2005, the United States submitted requests for new GATT waivers for the following preferential tariff programs through their current expiration dates: (1) CBERA, as amended by the United States-Caribbean Trade Partnership Act (through September 30, 2008); (2) ATPA, as amended by the Andean Trade Promotion and Drug Eradication Act (through December 31, 2006); and (3) AGOA (through September 30, 2015).¹³ These programs extend duty-free treatment that in some cases is subject to quantitative restrictions and, consequently, the requests seek waivers not only of GATT Article I:1 but also of GATT Article XIII, paragraphs 1 and 2, which require nondiscrimination in administering quotas. The waivers are still pending, with questions on the programs having been raised by Brazil, China, India, Pakistan, and Paraguay¹⁴

WTO-Legality of Non-trade Conditions in Preference Programs

In *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, the WTO Appellate Body (AB) explained how developed country WTO members may design preferential-tariff programs within the requirements of the Enabling Clause.¹⁵ The dispute between India and the European Communities (EC) stemmed from an EC Regulation which awarded tariff preferences to a closed group of 12 beneficiary countries on the condition that they combat illicit drug production (the Drug Arrangements). India brought the claim alleging that the Drug Arrangements were inconsistent with GATT Article I:1 and unjustified by the Enabling Clause.

The initial dispute panel, in a report issued on December 1, 2003, concluded that the EC was in violation of its WTO obligations, with one panelist dissenting on procedural grounds.¹⁶ Addressing the nature of the Enabling Clause and its procedural implications, a two member majority first concluded that the Enabling Clause functions as an exception to the GATT Article I:1 MFN obligation and that, consequently, the burden of proof rests on the party that invokes the Enabling Clause as a defense (¶ 7.53). The lone dissenter argued that the MFN obligation does not apply to the Enabling Clause and that India did not properly bring the claim under the Clause (¶¶ 9.15, 9.21). Employing a broad reading of the term “non-discriminatory” in the Clause’s description of the GSP, the panel concluded that developed countries were required to provide “identical tariff preferences”

¹² (...continued)

amended by § 3108 of the Trade Act of 2002 (P.L. 107-210), the AGOA Acceleration Act of 2004 (P.L. 108-274), and the Miscellaneous Trade and Technical Corrections Act of 2004 (P.L. 108-429).

¹³ See Request for a Waiver; Caribbean Basin Economic Recovery Act, G/C/W/508 (Jan. 3, 2005); Request for a Waiver; Andean Trade Preferences Act, G/C/W/510 (Jan. 3, 2005) and G/C/W/510/Add.1 (Mar. 15, 2005); and Request for a Waiver; African Growth and Opportunity Act (AGOA), G/C/W/509 (Jan. 3, 2005).

¹⁴ See *Minutes of the Meeting of the Council for Trade in Goods*, May 9, 2006, at 3-11, G/C/M/84 (June 29, 2006); Mar. 10, 2006, at 3-13, G/C/M/83 (May 1, 2006); Nov. 10, 2005, at 9-12, G/C/M/82 (Nov. 28, 2005).

¹⁵ Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004).

¹⁶ Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003).

under GSP schemes to “all developing countries” (¶ 7.161). Applying this standard, the panel then ruled that the Drug Arrangements were inconsistent with GATT Article I:1 and could not be justified under the Clause (¶ 7.177). The European Communities appealed.

The Appellate Body report, issued on April 7, 2004, first addressed the relationship between GATT Article I:1 and the Enabling Clause. The AB upheld the panel’s findings that the Enabling Clause is an exception to GATT Article I:1 and that the Clause does not exclude the applicability of Article I:1 (¶¶ 99-103). The AB explained that the Enabling Clause is to be read together with Article I:1 in the procedural sense, since a challenged measure, such as the Drug Arrangements, is “submitted successively to the test of compatibility with the two provisions.” In other words, when the Enabling Clause is implicated, the dispute panel first examines whether a measure is consistent with Article I:1, “as the general rule,” and, if it is found not to be so, the panel then examines whether the measure may be justified under the Clause (¶¶ 101-102).

Noting the “vital role” played by the Enabling Clause “in promoting trade as a means of stimulating economic growth and development” and the intent of WTO Members through the Clause to encourage the adoption of preference schemes, the AB found that the Clause was not a typical GATT exception or defense (¶ 106, 114). Thus, the AB modified the panel’s finding and held that, unlike the ordinary practice with respect to GATT exceptions, under which exceptions are invoked only by the responding party, “it was incumbent upon [complainant] India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994” and to identify specific provisions of the Clause which it believed were violated by the respondent’s measure (¶¶ 115, 123)(emphasis in original). At the same time, the burden of justifying GSP schemes under the cited Enabling Clause provisions still rests on a respondent (¶ 125). In application, the AB found that India sufficiently raised the issue, thereby placing the burden on the EC to justify the Drug Arrangements under the Clause.

Most importantly, the AB reversed the panel’s substantive decision regarding the breadth of acceptable preference programs under the Enabling Clause. The AB found instead that developed countries can grant preferences beyond those provided in their GSP to developing countries with particular needs, but only if identical treatment is available to all similarly situated GSP beneficiaries (¶ 173). The AB elaborated that similarly situated GSP beneficiaries are all GSP beneficiaries that have the “development, financial, and trade needs” to which the treatment is intended to respond (¶ 173). In reaching this conclusion, the AB reversed the panel’s reading of the term “non-discriminatory” as used to define the GSP in the Enabling Clause. Even under the more expansive view of the Enabling Clause, however, the AB upheld the Panel’s ruling that the EC failed to prove the Drug Arrangements were in fact “non-discriminatory” (¶ 189). Two factors led the AB to its conclusion: (1) the closed list of beneficiary countries in the Drug Arrangements could not ensure that the preferences would be available to all GSP beneficiaries suffering from illicit drug production and trafficking, and (2) the Drug Arrangements did not set out objective criteria that distinguished beneficiaries under the Drug Arrangements from other GSP beneficiaries (¶¶ 187, 188).

Before the WTO Dispute Settlement Body adopted the ruling, the U.S. WTO representative stated, according to meeting minutes, that the United States was pleased that the Appellate Body had “reversed the Panel’s finding that the Enabling Clause required developed countries under their GSP programs to provide *identical* preferences

to *all* developing countries” and that the AB’s decision “would help maintain the viability of GSP programs.”¹⁷ The United States raised concerns, however, about the AB’s finding that complainant India needed to raise the Clause, but that the EC bore the burden of proving that the Drug Arrangements were consistent with the Clause. The United States questioned the legal basis for this “hybrid approach” suggesting that difficulties might ensue in allowing the complaining party to set the burden of proof for the respondent.

Trade Preference Legislation in the 109th Congress

S. 191 (Smith) and H.R. 886 (Kolbe) would offer preferential market access for goods produced in certain least-developed countries.¹⁸ The eligible duty-free goods would include textiles, even though they are excluded from the GSP. The pending bills also incorporate the criteria for eligibility in AGOA. H.R. 3175 (McDermott) would extend through September 30, 2015, an AGOA provision that authorizes duty-free treatment of apparel assembled in lesser-developed AGOA beneficiaries regardless of the origin of the fabric. The provision, under which preferential treatment is granted in annually decreasing amounts, is set to expire September 30, 2007 (19 U.S.C.A. § 3721(b)(3)(B)(i)). The bill would also authorize duty-free treatment of over-quota agricultural products from AGOA beneficiary countries, but with a formula for the possible imposition of a safeguard tariff in the event the unit import price of a good is lower than an annual trigger price. S. 1937 (DeWine) and H.R. 4211 (Meek) would amend the CBERA to accord duty-free treatment to certain textiles from Haiti, provided the President certifies that Haiti meets a variety of eligibility requirements, including eliminating barriers to U.S. trade and investment, combating corruption, and protecting internationally recognized worker and human rights.¹⁹ H.R. 5070 (Rangel) would, *inter alia*, extend the GSP and the Andean trade preference programs for one year, and extend until December 31, 2007, the AGOA third-country fabric provision for lesser-developed African countries. H.R. 6076 (Rangel) and S. 3904 (Baucus) would extend the GSP and Andean preferences, as well as the above-described AGOA benefit, until 2008. H.R. 6142 (Thomas) would also extend the GSP until 2008, with tightened rules for competitive need limitations waivers; extend the AGOA third-country fabric provision until 2008, with an amended rule of origin thereafter; and expand textile and apparel benefits for Haiti. The GSP and Andean programs are set to expire on December 31, 2006.²⁰

¹⁷ Dispute Settlement Body, *Minutes of Meeting*, Apr. 20, 2004, ¶¶ 58-59, WT/DSB/M/167 (May 27, 2004)(emphasis in original).

¹⁸ Countries that could be designated as beneficiaries include Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao People’s Democratic Republic, Maldives, Nepal, Samoa, Solomon Islands, Timor-Leste (East Timor), Tuvalu, Vanuatu, Yemen, and Sri Lanka.

¹⁹ For further information, *see* CRS Report RS21839, *Haitian Textile Industry: Impact of Proposed Trade Assistance*, by Bernard A. Gelb.

²⁰ Current beneficiaries of the Andean trade preference program, 19 U.S.C.A. §§ 3201 *et seq.*, are Bolivia, Colombia, Ecuador, and Peru. All but Bolivia have been engaged in free trade agreement (FTA) negotiations with the United States, with negotiations having been concluded with Colombia and Peru. It has been U.S. policy to remove a beneficiary country from a tariff preference program once it becomes a party to a U.S. FTA.