

THE CONSEQUENCES OF THE  
WTO APPELLATE BODY DECISION IN  
*EC—TARIFF PREFERENCES FOR THE AFRICAN  
GROWTH OPPORTUNITY ACT AND  
SUB-SAHARAN AFRICA*

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I. INTRODUCTION

In December 2002, the Government of India initiated a claim at the World Trade Organization (WTO) against the European Community (EC),<sup>1</sup> alleging that the EC's special tariff preference arrangement to combat drug production and trafficking (the Drug Arrangements) violated the Most Favored Nation (MFN) principle of Article I:1<sup>2</sup> of the General Agreement on Tariffs and Trade 1994 (GATT) and that the scheme was not justified under the Enabling Clause, under which developed countries are allowed to grant preferential tariff treatment to developing countries.<sup>3</sup> Under the Drug Arrangements, twelve specified Generalized System of Preferences (GSP) beneficiary countries<sup>4</sup> were granted greater tariff reduc-

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1. "EC" is used to refer to the European Community and the European Economic Community. With the conclusion of the Maastricht Treaty in 1992, the European Economic Community changed its name to the European Community.

2. The MFN principle requires "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country [to] be accorded immediately and unconditionally to the like product originating in or destined for territories of all other contracting parties." General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I:1, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

3. Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 1.3, 2.1, 3.1, WT/DS246/R (Dec. 1, 2003) [hereinafter *EC—Tariff Preferences I*].

4. These countries include: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and

tions than those offered to other developing countries pursuant to the EC's GSP.<sup>5</sup> India—an EC GSP beneficiary, though not a designated country under the Drug Arrangements—argued that such disparate treatment was a violation of the EC's WTO obligations.

The WTO Panel agreed with India, holding that the Enabling Clause requires that “identical tariff preferences under GSP schemes be provided to all developing countries without differentiation” except in the cases of least-developed countries (LDCs) and implementation of a priori limitations.<sup>6</sup> In one broad stroke the Panel required developed countries to hold open their GSP schemes to all developing countries (even those developing countries not deemed by developed countries to be GSP beneficiaries) or to none at all.

The decision caused politicians and scholars to question the future of trade preference regimes. In a letter to then U.S. Trade Representative Robert B. Zoellick, Senator Max Baucus wrote:

If upheld on appeal, this sweeping decision could have serious consequences . . . . All U.S. trade preference programs impose eligibility conditions on developing countries . . . . Removing the ability of developed countries to impose these sensible conditions on preference programs jeopardizes the willingness of those countries to maintain such programs at all.<sup>7</sup>

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Venezuela. Council Regulation 2501/2001, Annex I, 2001 O.J. SPEC. ED. (L 346) 13-18 (EC) [hereinafter Council Regulation 2501/2001].

5. *Id.* art. 10, at 5. The Drug Arrangements entirely suspend, with few exceptions (shrimp and chewing gum), *ad valorem* tariffs for a wide range of textiles, apparel, and agricultural goods. *Id.* Annex IV.

6. *EC—Tariff Preferences I*, *supra* note 3, ¶¶ 7.161, 7.176. A priori limitations are used to exclude certain imports from developing countries where the products concerned have reached a certain competitive level in the market of the preference-granting country. *Id.* ¶ 7.116.

7. Christopher S. Rugaber, *U.S. Trade Preferences for Poor Countries Threatened by WTO's Decision*, *Baucus Says*, WTO REP., Dec. 17, 2003; see also Third-Party Oral Statement of the United States at the Second Meeting of the Panel, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246 (July 9, 2003) (“Placing the burden on developed countries to defend actions they take to benefit developing countries under the Enabling Clause would create a disincentive for developed countries to consider taking the voluntary action permitted under the Enabling Clause.”).

Ambassador Zoellick himself warned African trade ministers that the Panel decision could threaten preferential treatment that the United States grants sub-Saharan African nations through the African Growth and Opportunity Act (AGOA).<sup>8</sup> At least one prominent trade scholar speculated that an affirmation of the Panel's decision could cause U.S. trade policy to shift from granting trade preferences to developing countries to imposing trade-reducing sanctions, as a means of achieving U.S. aims.<sup>9</sup>

The EC appealed the Panel's decision to the WTO Appellate Body. In *EC—Tariff Preferences II*, the Appellate Body reversed the Panel's central holding, finding that the Enabling Clause does not require developed countries to offer GSP preferences to all developing countries. It further found that the Clause permits developed countries to treat developing countries within its GSP system differently, provided "similarly-situated" GSP beneficiaries are offered the same treatment.<sup>10</sup>

Following the Appellate Body decision, the international trade community breathed a collective sigh of relief. The decision was considered a victory for developed countries and their ability to continue to employ their trade preference regimes with minor modifications.<sup>11</sup> However, a detailed reading of the Appellate Body decision reveals that a number of special preference regimes, including the AGOA, probably violate the Appellate Body's interpretation of WTO obligations in *EC—Tariff Preferences II*.<sup>12</sup>

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8. Zoellick Says WTO Decision on EU Preferences Puts AGOA at Risk, *INSIDE U.S. TRADE*, Dec. 12, 2003 [hereinafter *WTO Decision Puts AGOA at Risk*]; 19 U.S.C. §§ 2466a-b, 3701-3706, 3721-3724, 3731-3741 (2000).

9. Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in U.S. Trade Policy*, 4 *CHI. J. INT'L L.* 385, 387 (2003).

10. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 128, 173, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC—Tariff Preferences II*].

11. See Daniel Pruzin, *WTO Appeals Body Reverses Panel, Allows EU to Selectively Choose GDP Beneficiaries*, *WTO REP.*, Apr. 8, 2004.

12. A few observers have noted the possibility that current special preference regimes are incompatible with the Appellate Body's decision. However, they have dismissed the possibility of a WTO challenge as doubtful. See *WTO Ruling Could Affect U.S. Preference Regimes But Challenges Unlikely*, *INSIDE U.S. TRADE*, Apr. 23, 2004.

This article argues that, in light of the Appellate Body decision in *EC—Tariff Preferences II*, trade preferences granted under the AGOA are probably inconsistent with U.S. WTO obligations. Furthermore, any challenge to this inconsistency is likely to have detrimental consequences for economic growth in sub-Saharan Africa.<sup>13</sup>

Part II explains the purpose of granting preferential treatment and the practice's legal foundations under the WTO Agreements, as these legal texts are the subject of the Appellate Body's decision in *EC—Tariff Preferences II*.

Part III sets out to discredit mounting criticism of the AGOA's supposed failure in spurring economic growth in sub-Saharan Africa and to show that the AGOA is a unique and meaningful vehicle for economic growth in this region. I begin by describing the failure of the GSP to accelerate economic growth in developing countries and continue by contrasting the GSP's shortcomings with the success of the AGOA in increasing sub-Saharan African exports to the United States and maintaining steady growth rates for the region over the last five years.

Having established that the AGOA is a significant force in sub-Saharan African development, Part IV analyzes the Appellate Body's findings in *EC—Tariff Preferences II*. Part V describes the three ways, following *EC—Tariff Preferences II*, in which WTO Members can offer preferential treatment to a sub-set of their GSP beneficiaries in a WTO-consistent manner. Part VI examines the WTO compatibility of the AGOA and considers potential arguments the United States might raise in defense of the AGOA. Finally, section VII summarizes the Article and briefly explores the possibility of a WTO Member bringing a WTO claim against the United States regarding the AGOA.

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13. Similar analysis can be done of the United States' two other special preference regimes, the Caribbean Basin Initiative, 19 U.S.C. §§ 2701-2707 (2000), and the Andean Trade Preference Act, 19 U.S.C. §§ 3201-06 (2000).

II. THE ECONOMIC AND LEGAL FOUNDATIONS OF PREFERENTIAL TARIFF TREATMENT UNDER THE WTO AGREEMENTS

In 1964, at the first session of the United Nations Conference on Trade and Development (UNCTAD), Raul Prebisch, UNCTAD's first Secretary-General, proposed the creation of a system of generalized, non-reciprocal trade preferences to benefit developing countries.14 Prebisch argued that granting developing countries preferential access to developed country markets, through preferential tariff rates, would encourage export-oriented growth in manufactures.15 By increasing export-oriented manufacturing growth, developing countries could become less reliant on trade in primary commodities, whose slow long-term growth and price volatility contributed to chronic trade deficits.16 The preference system would aim to "rectify the structural imbalance of [developing countries'] trade" by increasing their export earnings, promoting industrialization, and accelerating developing countries' rates of economic growth.17

A. The Legal Foundations of Preferential Treatment for Developing Countries

In order to effectuate Prebisch's vision of a generalized, non-reciprocal trade preference regime, the Contracting Parties to the GATT agreed in 1971 to waive the Agreement's Article I:1 MFN obligation for a period of ten years. The 1971 Waiver allowed developed countries to accord preferential tariff treatment to developing countries' products without ac-

14. U.N. Conference on Trade and Dev. [UNCTAD], *Towards a New Trade Policy for Development*, E/CONF.46/3 (1964) [hereinafter UNCTAD, *Towards a New Trade Policy*]; see also United Nations, *History of UNCTAD 1964-84*, UNCTAD/OSG/286.

15. GATT Secretariat, *The Generalized System of Preferences: Review of the First Decade*, in LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 1186-87 (John H. Jackson et al ed., 2002) [hereinafter JACKSON, LEGAL PROBLEMS].

16. *Id.*

17. UNCTAD, *Towards a New Trade Policy*, *supra* note 14; UNCTAD, *Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries*, Res. 21 (II) (1968).

cording such treatment to like products from other Contracting Parties.<sup>18</sup>

During the Tokyo Round negotiations in 1979, the Contracting Parties created a more permanent legal basis for granting preferential treatment to developing countries by adopting the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause).<sup>19</sup> The key provision of the Enabling Clause reconstitutes the 1971 Waiver Decision by allowing Contracting Parties to accord preferential tariff treatment to developing countries within their GSP schemes, notwithstanding the MFN provisions of Article I.<sup>20</sup> The Enabling Clause also goes beyond the limits of the 1971 Waiver Decision, permitting preferential treatment for developing countries in the area of non-tariff measures.<sup>21</sup> Finally, the Enabling Clause introduces a principle of graduation, whereby developing countries accept greater obligations under the GATT as their economic situations improve and are graduated from a country's GSP regime once they reach a specified level of economic development.<sup>22</sup>

This legal framework has allowed most developed countries and a handful of middle-income countries to unilaterally grant developing countries preferential access to their markets.<sup>23</sup> However, despite the prevalence of GSP regimes, they have done little to accelerate the economic growth rates of most developing countries.

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18. Generalized System of Preferences, GATT Doc. L/3545 (June 25, 1971).

19. GATT Doc. L/4903 (Nov. 28, 1979) [hereinafter Enabling Clause]. The Enabling Clause, as a decision of the GATT Contracting Parties, became part of the WTO system under provisions of paragraph 1(b)(iv) of the GATT 1994.

20. Enabling Clause, *supra* note 19, ¶¶ 1, 2(a).

21. *Id.* ¶ 2(b).

22. *Id.* ¶ 7.

23. The following countries have GSP regimes: Belarus, Bulgaria, Canada, the EU, Japan, New Zealand, Norway, Russia, Switzerland, and the United States. UNCTAD, *Generalized System of Preferences: List of Beneficiary Countries*, U.N. Doc. UNCTAD/ITCD/TSB/Misc.62 (June 22, 2001) [hereinafter UNCTAD, *List of Beneficiaries*].

B. *The GSP Has Failed to Accelerate Economic Growth in Developing Countries*

While the central underpinnings of Prebisch's recommendation for the creation of the GSP were largely correct,<sup>24</sup> the overall impact of the last thirty years of preferential treatment for developing countries has been meager. Developing countries have increased their share of world merchandise trade from twenty percent in 1973 to only twenty-eight percent twenty-five years later.<sup>25</sup> Even this limited growth is unevenly distributed, with larger developing country exporters, such as China, India, and Brazil, capturing a large share of the trade under developed country GSP regimes.<sup>26</sup> In fact, between 1980 and 1997, LDCs' share of world trade declined from 0.8 percent to 0.51 percent, with the decline in African LDCs' share of trade being particularly notable, in contrast to the relatively stronger performance of Asian LDCs such as Bangladesh, Cambodia, and Laos.<sup>27</sup>

The GSP has fallen short of expectations largely because benefit-granting countries have failed to include meaningful preferential treatment in the areas of production most impor-

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24. Today, developing countries (with a few notable exceptions such as Chile) that continue to trade in primary products have suffered a declining share of world trade, whereas developing countries that diversified into manufactures have expanded their share. Committee on Trade and Development, *Note by the Secretariat: Participation of Developing Countries in World Trade: Recent Developments and the Trade of Least-Developed Countries*, ¶ 4, WT/COMTD/W/65 (Feb. 15, 2000) [hereinafter *Participation of Developing Countries*].

25. *Id.* ¶ 3 ("By 1997, developing countries' share of international merchandise exports had risen to 28 per cent from around 20 per cent in 1973 . . .").

26. For example, fifty-five percent of preference-receiving imports under the EU GSP scheme originate in China (31.8 percent), India (10.3 percent), Brazil (6.8 percent), and Thailand (6.5 percent). WILLIAM R. CLINE, *TRADE POLICY AND GLOBAL POVERTY* 69, 71 (2004). In contrast, LDCs account for only one percent of preference-receiving imports under the EU program. *Id.* at 70. Similarly, under the U.S. GSP scheme, sixty-two percent of preference-receiving imports originate in one of five countries (Brazil, 14.4 percent; Thailand, 16.5 percent; Indonesia, 12.7 percent; the Philippines, 10.8 percent; and India, 8.2 percent). *Id.* at 71.

27. Sub-Committee on Least-Developed Countries, *Note by the Secretariat: Market Access for Exports of Goods and Services of the Least-Developed Countries: Barriers and Constraints*, ¶ 4, WT/COMTD/LDC/W/11/Rev.1 (Dec. 14, 1998); *Participation of Developing Countries*, *supra* note 24, ¶ 14.

tant to the economic development of beneficiary countries, namely textiles, apparel, and agriculture.<sup>28</sup> Also, generally applicable tariff levels in all other sectors are approaching zero, diminishing the utility of preferential treatment by minimizing the difference between GSP tariff rates and generally applicable tariff rates. Finally, the U.S., European Union (EU), and Japanese GSP regimes have short-term renewable mandates, creating uncertainty about continued preferential treatment over the medium to long term, thereby undermining the schemes' incentives for trading with and investing in beneficiary countries.<sup>29</sup>

Inexpensive, unskilled labor in developing countries creates a comparative advantage for those countries in the labor-intensive textiles and apparel sectors. However, since the inception of the GATT, textiles and apparel have been highly guarded areas of production and have been largely exempted from regular GATT obligations.<sup>30</sup> Only as of January 1, 2005, were the textile and apparel sectors fully integrated into the

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28. See CLINE, *supra* note 26, at 68, 73. Poor product coverage is evidenced by the fact that only 64.7 percent of EU imports, 38 percent of U.S. imports and 42.8 percent of Japanese imports from developing countries are eligible for GSP treatment. See *id.* at 70 tbl.2.1 (figures based on 1997 numbers).

29. UNCTAD, *Quantifying the Benefits Obtained by Developing Countries from the Generalized System of Preferences*, ¶ 18, UNCTAD/ITCD/TSB/Misc. 52 (Oct. 7, 1999) (Note by UNCTAD Secretariat) [hereinafter UNCTAD, *Quantifying Benefits from Preferences*], available at <http://www.unctad.org/en/docs/poitcdtsbm52.en.pdf>.

30. In fact, trade in textiles and apparel was regulated under an entirely separate regime until 1995, first under the Short-Term Arrangement Regarding International Trade in Textiles (STA) and subsequently the Long-Term Arrangement Regarding International Trade in Cotton Textiles (LTA) and the Multifibre Arrangement (MFA). See GATT Secretariat, *Textiles and Clothing in the World Economy* (1984), excerpted in JACKSON, *LEGAL PROBLEMS*, *supra* note 15, at 400-01. Until 1995, most of the trade in textiles was subject only to bilateral quotas negotiated under the provisions of the MFA. In 1995, the Agreement on Textiles and Clothing (ATC) began the gradual integration of textiles and apparel into the GATT framework. Agreement on Textiles and Clothing, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, available at [http://www.wto.org/english/docs\\_e/legal\\_e/16-tex\\_e.htm](http://www.wto.org/english/docs_e/legal_e/16-tex_e.htm). During the Uruguay Round negotiations, countries that retained qualitative restrictions on textiles and apparel agreed to phase out those restrictions over a period of ten years. The last quotas were removed January 1, 2005, as provided for by the ATC.

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purview of the GATT and all quotas on textile and apparel products eliminated.<sup>31</sup> Despite this step forward, developing country textile and apparel exports face tariff rate equivalents<sup>32</sup> in developed country markets that are on average about five times higher than tariff rate equivalents for all other manufactures.<sup>33</sup> Developed country protectionism in this sector costs developing countries \$39.8 billion in lost revenues and \$23.8 billion in lost income annually.<sup>34</sup>

Similarly, developed countries have created protectionist measures to limit developing countries' access to their agricultural markets. Agricultural production accounts for approximately twenty-seven percent of Gross Domestic Product (GDP) in developing countries, a similar share of exports, and about fifty percent of employment.<sup>35</sup> Dependency on agriculture is particularly pronounced in LDCs and sub-Saharan Africa.<sup>36</sup> The combination of high tariffs and farm subsidies cause developing countries' agricultural products to face prohibitively high tariff equivalents from the four major industrialized importers (U.S., 19.9 percent; EU, 46.4 percent; Japan, 82.1 percent; and Canada, 52.3 percent).<sup>37</sup> These protective measures cost developing countries \$22.8 billion in lost export revenues

31. *Id.* ¶¶ 2(8)(c), 9. The ATC terminated on January 1, 2005 as provided for in Article 9 of the Agreement. *Id.* art. 9.

32. A tariff rate equivalent translates the protective effect of quotas, subsidies and/or other non-tariff trade restrictions into tariff-equivalents. The tariff rate equivalents used in this article incorporate the effect of non-tariff and tariff barriers into a single tariff rate equivalent representative of the entire level of protectionism in tariff rate terms.

33. According to data compiled by William Cline, the four large industrial-country importers levy the following tariff rate equivalent levels of protection on textiles and apparel and other manufactures respectively: U.S. 10.87 percent, 2.10 percent; EU 11.62 percent, 3.20 percent; Japan 9.20 percent, 1.49 percent; and Canada 16.45 percent, 3.48 percent. CLINE, *supra* note 26, at 127 tbl.3.10.

34. Int'l Monetary Fund & The World Bank, *Market Access for Developing Country Exports—Selected Issues*, at 43 tbl.9 (Sept. 26, 2002) [hereinafter *Market Access for Developing Country Exports*], available at <http://www.imf.org/external/np/pdr/ma/2002/eng/092602.htm>. The removal of MFA quotas will decrease these losses to \$22.2 billion in lost income and \$17.5 billion in lost revenue annually. *Id.* These figures are based on 1997 data. *Id.* at 51.

35. *Id.* at 21.

36. *Id.*

37. CLINE, *supra* note 26, at 123 tbl.3.9.

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and \$8.7 billion in lost income annually.<sup>38</sup> At the conclusion of the Uruguay Round negotiations, the agricultural sector was finally brought under effective GATT disciplines. Despite this achievement, liberalization of the sector has been slow.<sup>39</sup>

The GSP has also failed to garner expected results because the value of GSP tariff preferences continues to diminish as multilateral liberalization at the WTO level causes world tariff levels to approach zero across the board. This is especially true in manufactures, exclusive of textiles and apparel. For example, the United States imposes an aggregate tariff-equivalent level of protection against developing countries of

38. *Market Access for Developing Country Exports*, *supra* note 34, at 32 tbl.5. The IMF/World Bank data determines the cost of agricultural distortions on Organization for Economic Cooperation and Development (OECD) and non-OECD countries. The figures representing the effect on non-OECD countries are a good proxy for the effect of agricultural protections on developing countries as a whole, because the six developing country OECD members (Czech Republic, Hungary, South Korea, Mexico, Poland, and Turkey) have agricultural exports to OECD members that almost equal their imports from OECD members. Shifting their numbers to the "non-OECD" grouping in order to determine the net effect on developing countries would have little effect on the calculation. CLINE, *supra* note 26, at 125 n.26. These figures are based on 1997 data. *Id.* at 125.

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39. The Agreement on Agriculture requires WTO members to convert their non-tariff import restrictions on agricultural products to tariffs and not to use such restrictions in the future except under specified circumstances. JACKSON, *LEGAL PROBLEMS*, *supra* note 15, at 398. The Agreement also mandates a reduction in tariff and subsidy levels for agricultural products. *Id.* However, the reference years for these reductions are 1986-1988, a period with exceptionally high levels of protectionism. *Market Access for Developing Country Exports*, *supra* note 34, at 22. Furthermore, the evidence indicates that for many products, countries artificially inflated the tariff equivalents of their non-tariff barriers, causing these tariff equivalents to be appreciably higher than the true tariff equivalents prevailing during the base period. Julio J. Nogues, *Comment on Andrew Berg & Anna Krueger, Trade Growth, and Poverty, A Selective Survey*, and L. Alan Winters, *Doha and the World Poverty Targets*, at 8, presented at the Annual World Bank Conference on Development Economics (Apr. 29-30, 2002). According to one scholar, even with possibly significant reductions in tariff levels during the Doha Development Round negotiations, levels of protection for some products could be higher at the end of those negotiations than they were before the Uruguay Round negotiations. *Id.* at 5. In any case, developing countries on the whole appear to be receiving lower margins of preference on agricultural goods than on manufactures, including textiles and apparel. UNCTAD, *Quantifying Benefits from Preferences*, *supra* note 29, ¶ 53.

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2.1% on manufactures.<sup>40</sup> Once informational and administrative costs associated with the utilization of tariff preferences are factored into the calculation, the benefit from the preferential treatment can be negligible.<sup>41</sup>

Finally, the uncertainty of continued preferential treatment under many developed country GSP schemes dilutes the schemes' effectiveness.<sup>42</sup> GSP regimes in the United States, European Union, and Canada are based on short-term, renewable mandates rather than long-term frameworks.<sup>43</sup> Critics argue that the uncertainty of continued, long-term preferential market access deters investment that would otherwise flow to beneficiary countries if the GSP scheme were guaranteed for a longer period of time.<sup>44</sup>

40. CLINE, *supra* note 26, at 127 tbl.3.10. The aggregate measures of protection against developing countries for the EU, Japan and Canada are 3.2 percent, 1.49 percent, and 3.48 percent respectively. *Id.*

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41. See CLINE, *supra* note 26, at 74. In fact, of all GSP-eligible products imported from developing countries to the EU, the United States, Japan and Canada, on average only 56.4 percent of these imports receive GSP treatment (EU 55.9 percent; United States, 61.1 percent; Japan 42.5 percent; and Canada 65.9 percent). Committee on Trade and Development, *The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad*, Annex II, WT/COMTD/W/93 (Oct. 5, 2001) [hereinafter *System of Preferences*] (figures based on 1997 numbers).

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42. UNCTAD, *Quantifying Benefits from Preferences*, *supra* note 29, ¶ 18; *System of Preferences*, *supra* note 41, ¶ 18.

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43. The United States is a particularly troublesome example. After its initial authorization, the U.S. GSP program was renewed for a ten-year period in 1984. Since 1993, Congress has allowed the program to lapse several times, preventing medium- and long-term investors from being able to rely on its benefits. Lapses in the program can be attributed to budgetary rules adopted in 1990 requiring any bill that provides for an increase in government expenditures or a decrease in government revenues to include offsetting measures (new taxes, fees, spending cuts, etc.). UNCTAD, *HANDBOOK OF STATISTICS 14* (2005). The Trade Act of 2002 reauthorized the GSP program through 2006. In Canada, the GSP must be renewed every ten years. *System of Preferences*, *supra* note 41, ¶ 22. Similarly, in the EU, the current GSP scheme was adopted in 1995 and expires in 2004. *Id.* ¶ 27.

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44. UNCTAD, *Quantifying Benefits from Preferences*, *supra* note 29, ¶ 18.

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III. SPECIAL PREFERENCE REGIMES AS AN ALTERNATIVE MEANS  
FOR GRANTING PREFERENTIAL MARKET ACCESS TO  
DEVELOPING COUNTRIES: THE AFRICAN  
GROWTH AND OPPORTUNITY ACT

The past twenty years have seen a move by GSP-providing countries to target designated sub-sets of developing countries for preferential access greater than that offered under their general GSP regimes. These special preference regimes have been based on cultural ties,<sup>45</sup> cold war geopolitics,<sup>46</sup> and even anti-drug considerations.<sup>47</sup> Recently, however, the EU, Canada and the United States have moved toward creating special arrangements for the poorest countries in the world. The EU's Everything But Arms (EBA) initiative, Canada's 2003 LDC market access initiative, and the United States' AGOA aim to grant increased market access to the most underdeveloped countries in the world. In this Part, I focus on the AGOA and its effect on economic growth in sub-Saharan Africa.

Congress passed the African Growth Opportunity Act as part of the Trade and Development Act of 2000. The initiative was intended to promote economic development and combat the HIV/AIDS epidemic through preferential tariff treatment as a complement to foreign aid.<sup>48</sup>

The AGOA offers more product coverage than the U.S. GSP scheme to forty-eight designated sub-Saharan African beneficiary countries. To be eligible for such preferential treatment under the AGOA, beneficiaries must be making pro-

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45. The EU created the Lome Convention and the subsequent Cotonou Agreement largely because of cultural ties with the African, Caribbean, and Pacific (ACP) beneficiary states. *See generally* Nsongurua J. Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations*, 38 J. MARSHALL L. REV. 1153 (2005).

46. The United States' Caribbean Basin Initiative (CBI) offers preferential tariff treatment to twenty-four Caribbean and Central American countries. Originally, the CBI was used as a means of deterring the spread of communism in the region. *See* Michael Cornell Dypski, *The Caribbean Basin Initiative: An Examination of Structural Dependency, Good Neighbor Relations, and American Investment*, 12 J. TRANSNAT'L L. & POL'Y 95, 100 (2002).

47. The United States passed the Andean Trade Preference Act as a means of encouraging production alternatives to coca in Bolivia, Colombia, Ecuador and Peru. *See* Ambassador Peter Allgeier, Deputy United States Trade Representative, Testimony on Renewal of the Andean Trade Preference Act before the Senate Finance Committee (Aug. 3, 2001).

48. 19 U.S.C. §§ 3737(a), 3739(a)(7) (2000).

gress toward establishing market-based economies, protecting civil liberties, eliminating barriers to U.S. trade and investment, creating economic policies to reduce poverty, protecting intellectual property, combating corruption, and protecting human rights.<sup>49</sup> Eligibility is reviewed annually.<sup>50</sup> Currently, thirty-seven sub-Saharan African countries are receiving AGOA-enhanced GSP.<sup>51</sup>

The AGOA builds on the preferences already offered under the U.S. GSP regime. The Act adds 1,835 tariff line items<sup>52</sup> to the 4,650 already eligible for duty-free entry under the GSP program,<sup>53</sup> exempts beneficiary countries from competitive-need limitations (CNLs),<sup>54</sup> and relaxes rules of origin requirements for eligible imports.<sup>55</sup> Most importantly, the initiative provides duty-free and quota-free access for eligible apparel articles, provided that beneficiaries establish effective visa systems for monitoring against transshipment and counterfeiting.<sup>56</sup> For AGOA beneficiaries, the removal of quotas

49. 19 U.S.C. § 3703 (2000).

50. 19 U.S.C. § 2466a(a)(2) (2000).

51. U.S. TRADE REP. [USTR], COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT 1 (2005) [hereinafter 2005 COMPREHENSIVE REPORT].

52. AGOA-designated products, which were previously statutorily excluded from the GSP, include watches, electronic articles, steel articles, footwear, luggage, handbags, flat goods, work gloves and leather wearing apparel, and semi-manufactured and manufactured glass products. UNCTAD, HANDBOOK OF STATISTICS 18 (2005).

53. There are currently a total of 10,500 product categories at the 8-digit level in the Harmonized Tariff System of the United States. CLINE, *supra* note 26, at 71.

54. Under the U.S. GSP scheme, CNLs allow for the withdrawal of GSP treatment when a GSP beneficiary exports a quantity of a GSP-eligible article to the United States in an amount that exceeds a certain dollar value that is adjusted annually or in a quantity that accounts for 50% or more of the value of the total imports of the article to the United States. 19 U.S.C. § 2463(c)(2)(A)(i) (2000). Twenty-eight countries currently have CNL related ineligibilities, some beneficiaries facing hundreds of product restrictions (e.g., India has 775 product exclusions). CLINE, *supra* note 26, at 72.

55. USTR, 2004 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT 8, 18 (2004) [hereinafter 2004 COMPREHENSIVE REPORT]; 19 U.S.C. §§ 2466a(b)(2), 2463(c)(2)(D) (2000).

56. 19 U.S.C. § 3722(a) (2000). Eligible articles include: apparel made from U.S. yarns and fabrics; apparel made of sub-Saharan African yarns and

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functionally moved forward, by five years, the 2005 elimination of textile and apparel quotas pursuant to the Agreement on Textiles and Clothing (ATC).<sup>57</sup> In addition to preferential market access, the AGOA encourages debt relief, technical assistance, and the creation of a free trade agreement between the United States and AGOA beneficiaries.<sup>58</sup>

In 2004, Congress passed the AGOA Acceleration Act of 2004, which, *inter alia*, extends the life of the program through September 2015.<sup>59</sup>

#### A. *The AGOA's Effect on Economic Growth in Sub-Saharan Africa*

Some commentators have expressed skepticism about the AGOA's potential for effectuating economic growth in sub-Saharan Africa.<sup>60</sup> They argue that the AGOA provides the LDCs of sub-Saharan Africa with only minor additions to the preferential treatment they already receive under the U.S. GSP regime.<sup>61</sup> Currently, the U.S. scheme offers all designated LDCs duty-free entry of an additional 1,783 product categories

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fabrics (subject to a cap); apparel made in a designated LDC from third-country yarns or fabrics until 2007 (subject to a cap); certain cashmere and merino wool sweaters; apparel made of yarns and fabrics not produced in commercial quantities in the United States; eligible hand-loomed, hand-made or folklore articles; and otherwise eligible articles containing non-AGOA produced collars, cuffs, drawstrings, padding/shoulder pads, waistbands, belts attached to garments, straps with elastic, and elbow patches. 19 U.S.C. §§ 3721(b), 3721(d) (2000). Currently the following countries are qualified for textile and apparel benefits: Benin, Botswana, Cameroon, Cape Verde, Cote d'Ivoire, Ethiopia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. 2004 COMPREHENSIVE REPORT, *supra* note 55, at 123.

57. CLINE, *supra* note 26, at 91-92.

58. 19 U.S.C. §§ 2723, 3731, 3732(b) (2000). The United States is currently in negotiations aimed at creating a FTA with the five AGOA beneficiaries who make up the Southern African Customs Union (SACU). 2005 COMPREHENSIVE REPORT, *supra* note 51, at 5.

59. 19 U.S.C. § 2466b (2000).

60. UNCTAD, *The African Growth and Opportunity Act: A Preliminary Assessment*, UNCTAD/ITCD/TSB/2003/1 (Apr. 2003), available at [http://www.unctad.org/en/docs/itcdtsb20031\\_en.pdf](http://www.unctad.org/en/docs/itcdtsb20031_en.pdf) [hereinafter UNCTAD, *African Growth Act*].

61. Designated LDCs already receive duty-free entry into the United States on an additional 1,783 product categories. UNCTAD, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements* 13, U.N. Doc.

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beyond the 4,650 categories offered to other GSP beneficiaries. Critics argue that virtually all dutiable items the United States currently imports from sub-Saharan African LDCs are already eligible for duty-free treatment under the provisions of the general GSP program.<sup>62</sup> As thirty out of forty-eight possible AGOA beneficiaries already receive LDC treatment under the U.S. GSP scheme, the additional AGOA preferences do little for these countries. In fact, critics argue that the AGOA dilutes the benefits that LDC's receive under the U.S. GSP regime by extending AGOA treatment to non-LDC AGOA beneficiaries.<sup>63</sup>

Critics also argue that export increases attributed to the AGOA are artificially inflated by oil exports. The vast majority of sub-Saharan African exports receiving AGOA treatment are oil products, accounting for eighty-nine percent of the total exports to the United States from AGOA beneficiaries in 2004.<sup>64</sup> Critics argue that these exports would have entered the United States absent the AGOA, as generally applicable tariff rates on oil imports—less than 0.5 percent of the product's value—are not prohibitively high.<sup>65</sup> Thus, critics argue that the increase in AGOA beneficiary exports since the Act's passage is attributable in large part to an accounting sleight-of-hand, whereby oil exports that would have entered the United States in any case are improperly attributed to the AGOA's effectiveness in creating export-led growth.

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UNCTAD/ITCD/TSB/2003/8 (2003) [hereinafter UNCTAD, *Trade Preferences*].

62. UNCTAD, *African Growth Act*, *supra* note 60, at 8.

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63. *Id.*

64. Calculated from data available on U.S. Int'l Trade Comm'n, Interactive Tariff and Trade Web, <http://dataweb.usitc.gov/> (last visited Mar. 16, 2005) [hereinafter Interactive Tariff and Trade Web] (on file with author). Figures were calculated using the accumulative custom values for HTS chapter 27.

65. UNCTAD, *African Growth Act*, *supra* note 60, at 9. Prior to the passage of the AGOA, the overwhelming majority of AGOA oil exports to the United States that were subject to tariffs faced rates of either \$0.0525 per barrel or \$0.105 per barrel. *See* Interactive Tariff and Trade Web, *supra* note 64; U.S. Int'l Trade Comm'n, Harmonized Tariff Schedule of the United States, ch. 27, subheading 2709.00 (2005), *available at* [http://www.usitc.gov/tata/hts/bychapter/index\\_2005.htm](http://www.usitc.gov/tata/hts/bychapter/index_2005.htm). At 2001 oil prices, these tariffs amounted to about 0.2 to 0.4 percent *ad valorem*. *Id.*

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Even taking these criticisms into account, the AGOA appears to be playing a significant role in sub-Saharan African economic growth.<sup>66</sup> As noted, fuel products did account for eighty-nine percent of 2004 imports from AGOA-eligible countries. However, AGOA non-oil exports to the United States amounted to \$2.35 billion (exclusive of exports covered by the GSP) in that year—a three-fold increase from 2001.<sup>67</sup> In particular, imports of apparel from AGOA countries have increased by 176 percent since the passage of the initiative, rising from \$584 million in 1999 to \$1.6 billion (exclusive of GSP) in 2004.<sup>68</sup> These gains are attributable to the AGOA’s preferential tariff treatment of sub-Saharan African textiles and apparel and the Act’s high utilization rate by LDC AGOA beneficiaries.<sup>69</sup> Imports of vehicles and parts also have risen rapidly since the Act’s inception, increasing 424 percent from 1999 to 2003 (from \$121 million to \$634 million, exclusive of GSP).<sup>70</sup> These gains simply cannot be attributed to the GSP

66. CLINE, *supra* note 26, at 270.

67. See Interactive Tariff and Trade Web, *supra* note 64; cf. 2005 COMPREHENSIVE REPORT, *supra* note 51, at 1 (“Non-oil AGOA imports totaled \$3.5 billion, an increase of 22 percent from 2003.”). In 2004, total AGOA imports were \$21,986,472,000 with \$19,633,981,000 coming from oil exports. In 2001, the figures are \$7,579,158,000 and \$6,827,422,000 respectively. Figures were calculated by the author using the accumulative custom values for HTS chapter 27.

68. See Interactive Tariff and Trade Web, *supra* note 64; U.S. Trade and Investment with Sub-Saharan Africa, Fourth Annual Report, USITC Pub. 3650, Inv. No. 332-415, at 1-6 tbl.1.1 (Dec. 2003) [hereinafter USITC Pub. 3650]. Figures were calculated using the accumulative custom values for HTS chapters 61-62.

69. After an initial adjustment period, utilization rates of preferential treatment under HTS chapters 61 and 62 (apparel) rose to 92.3 and 96.4 percent respectively among AGOA beneficiaries with textile certification. UNCTAD, *Trade Preferences*, *supra* note 61, at 19 tbl.10.

70. See Interactive Tariff and Trade Web, *supra* note 64. In 2004, vehicle and parts imports fell to \$422 million and year-to-date totals indicate further decreases for 2005. *Id.* However, this decline in vehicle and part imports has coincided with a strengthening of the South African rand vis-à-vis the U.S. dollar over the last twenty-six months, which saw the rand strengthen from 8.344 rand to the dollar during the first quarter of 2003 to 5.645 at the end of fourth quarter of 2004, marking the strongest performance by the rand since 1998. *Country Risk Service South Africa at a Glance: 2005-2006*, THE ECONOMIST INTELLIGENCE UNIT, Feb. 2005, at 8; *Country Risk Service South Africa at a Glance: 2003-2004*, THE ECONOMIST INTELLIGENCE UNIT, June 2003, at 7; *Country Risk Service South Africa at a Glance: 2001-2002*, THE ECONOMIST

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scheme. As a share of the total value of vehicle and part imports receiving preferential treatment under the U.S. GSP/AGOA regime, AGOA imports increased from 6.4 percent in 1999 to thirty-one percent in 2004.<sup>71</sup> Finally, comparing the seven quarters preceding passage of the AGOA with the seven quarters succeeding it, the ratio of U.S. non-oil imports from AGOA beneficiaries to those from other non-OECD countries rose by 3.8 percent.<sup>72</sup>

Despite these promising trends, critics of the AGOA cite beneficiary countries' real GDP growth rates, which lagged behind developing country averages. Since the AGOA was implemented, sub-Saharan Africa's real growth rate has remained constant at about 3.1 percent per year, at times well below the developing country average (*see* Table 1).

TABLE 1 – REAL GDP GROWTH 1997 – 2004 PERCENTAGE CHANGE FROM PREVIOUS YEAR, EXCEPT INTEREST RATES AND OIL PRICES<sup>73</sup>

	1997	1998	1999	2000	2001	2002	2003	2004 <sup>e</sup>	2005 <sup>a</sup>	2006 <sup>a</sup>
Developing World	4.8	1.6	3.2	5.2	2.9	3.4	5.2	6.1	5.4	5.1
Sub-Saharan Africa	3.5	2.4	2.1	3.2	3.2	3.1	3.0	3.2	3.6	3.7
EC	N/A	2.7	2.4	3.7	1.5	0.9	0.5	1.8	2.1	2.3

a. Forecast

e. Estimate

INTELLIGENCE UNIT, Oct. 2000, at 6. South Africa is the only AGOA beneficiary currently exporting vehicles and parts to the United States under the AGOA. Thus, a weak dollar explains the drop in sector exports. *See* Interactive Tariff and Trade Web, *supra* note 64.

71. In 1998 through 2000, sub-Saharan African vehicle and part exports to the United States accounted for 5.6, 6.4, and 6.5 percent respectively of the total customs value of vehicle and part imports receiving GSP treatment. In the years 2001-2004, sub-Saharan African vehicle and part imports to the United States under the AGOA and the GSP accounted for 30, 53, 41 and 31 percent respectively of the total customs value of vehicle and part imports receiving GSP or AGOA treatment. *Id.* Figures calculated by the author.

72. CLINE, *supra* note 26, at 92-93.

73. Compiled from World Bank Global Economic Prospects, 1998/99, 2000, 2001, 2002, 2003, 2004.

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TABLE 2 – SUB-SAHARAN AFRICAN EXPORTS TO THE UNITED STATES 1996 - 2004<sup>74</sup>

	1996	1997	1998	1999	2000	2001	2002	2003	2004 <sup>a</sup>
	In Billions of Dollars								
Total Exports to the U.S.	15.1	16	13.4	13.8	22.2	21	18.2	25.5	28.5

a. Data from January—October 2004.

Notwithstanding the AGOA, the EC remains sub-Saharan Africa’s primary trading partner. In 2002, forty-three percent of sub-Saharan Africa’s total exports were to the EC.<sup>75</sup> Thus, absent extraordinary circumstances, one would expect a decrease in sub-Saharan African growth rates when EC rates of growth decline. As the AGOA came into effect, EC rates of growth declined considerably from 3.7 percent in 2000 to a low of 0.5 percent in 2003 (*see* Table 1). The fact that sub-Saharan African growth remained consistent rather than declining during those years is in large part due to a significant growth in exports to the United States (*see* Table 2). Lackluster EC growth has caused sub-Saharan African growth rates to not fully reflect the actual effect of the AGOA on sub-Saharan Africa’s economic growth. As EC growth rates begin to climb to their pre-2001 levels, a more accurate indication of the AGOA’s effect will be discernable. Furthermore, these figures do not fully capture the benefits of long-term investment,<sup>76</sup> expressed commitment to debt relief,<sup>77</sup> and technical assistance provided under the AGOA.

74. Calculated using USITC Interactive Tariff and Trade Data Web, available at <http://dataweb.usitc.gov/>.

75. See 2004 COMPREHENSIVE REPORT, *supra* note 55. In 2002, exports to the United States accounted for 20.9 percent of total sub-Saharan African exports. *Id.*

76. At year-end 2003, the U.S. direct investment position in sub-Saharan Africa stood at \$11.5 billion, a 46% percent increase over 2001. 2005 COMPREHENSIVE REPORT *supra* note 51, at 4; 2004 COMPREHENSIVE REPORT, *supra* note 55, at 16; *see also* USITC Pub. 3650, *supra* note 68, at 2-11 tbl.2-5.

77. The United States has agreed to provide 100 percent bilateral debt relief for qualifying countries under the Heavily Indebted Poor Countries (HIPC) Initiative. 2005 COMPREHENSIVE REPORT, *supra* note 51, at 20. To date, sixteen sub-Saharan countries have received interim debt relief, with another seven reaching their HIPC Completion Points, resulting in irrevocable debt relief. *Id.* Though HIPC is not a part of the AGOA initiative, U.S. participation is further reinforced by commitments made in AGOA. *Id.*

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The most recent critique of the AGOA involves the January 1, 2005, elimination of all qualitative import restrictions on textiles and apparel.<sup>78</sup> Critics imply that the dismantling of the quota system threatens to negate the preferential treatment received by AGOA beneficiaries in the area of apparel and, therefore, to undo the majority of economic growth garnered under the AGOA over the last five years.<sup>79</sup> Initial data appears to validate this argument. Since quotas on textiles and apparel have been removed, China, the largest apparel producer in the world, saw its percentage of total U.S. apparel imports rise from 15.6% in 2004 to 25% in the first nine months of 2005.<sup>80</sup> In total volume, Chinese apparel imports to the United States relative to 2004 figures have increased by 68.5%.<sup>81</sup> During the same period, AGOA beneficiary apparel exports to the United States have dropped by 6.1%.<sup>82</sup>

These figures, however, are misleading. The onslaught of Chinese apparel imports will abate for at least two reasons. First, the United States and China negotiated an agreement on November 8, 2005, that allows the United States to retain qualitative restrictions on textiles and apparel through 2008.<sup>83</sup> The agreement went into effect January 2006 and sets quotas on thirty-four textile and apparel products.<sup>84</sup> In general, apparel products are limited to ten percent growth in 2006, 12.5 percent in 2007, and fifteen percent in 2008—though permissible apparel growth rates vary by category.<sup>85</sup> Thus, at least over the next three years, AGOA beneficiaries will likely con-

78. See *supra* note 30.

79. See Frances Williams, *China and India gain from end of quotas*, FIN. TIMES, Oct. 25, 2005.

80. See Interactive Tariff and Trade Web, *supra* note 64. Figures were calculated using the accumulative customs value for HTS chapters 61-62.

81. *Id.* Figures were calculated using the accumulative customs value for HTS chapters 61-62.

82. *Id.* Figures were calculated using the accumulative customs value for HTS chapters 61-62.

83. Memorandum of Understanding Concerning Trade in Textile and Apparel Produce, U.S.-P.R.C., Nov. 8, 2005, available at [http://www.ustr.gov/assets/World\\_Regions/North\\_Asia/China/asset\\_upload\\_file91\\_8344.pdf](http://www.ustr.gov/assets/World_Regions/North_Asia/China/asset_upload_file91_8344.pdf).

84. *Id.* Apparel products include: baby socks, socks, cotton knit shirts, men's and boys' woven shirts, sweaters, cotton trousers, brassieres, underwear, swim-wear, wool suits, wool trousers, man-made knit shirts, man-made fiber trousers, and silk/vegetable fiber trousers. *Id.* Annex I.

85. *US, China Sign Textile Pact*, WASH. TRADE DAILY, Nov. 9, 2005, at 1.

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tinue to increase their share of U.S. apparel imports. The period will also give apparel producers in AGOA beneficiary countries the opportunity to improve competitiveness in anticipation of the removal of all quotas on Chinese apparel imports in 2009.

Secondly, China's recent currency revaluation and any future revaluation will have a downward effect on U.S. imports of Chinese apparel products. Under pressure from the United States, other foreign governments, and the International Monetary Fund (IMF), the Chinese government, on July 21, 2005, announced a 2.1 percent revaluation of its currency vis-à-vis the U.S. dollar and its adoption of a more flexible exchange rate system that pegs the renminbi to a basket of currencies, rather than to the U.S. dollar.<sup>86</sup> Though the renminbi still remains undervalued vis-à-vis the U.S. dollar, the small profit margins of the apparel industry ensure that even this minor increase in the relative strength of the renminbi will downwardly affect demand for Chinese textile and apparel imports in the United States.<sup>87</sup> Furthermore, despite the statements of the Chinese government to the contrary, future revaluations of the renminbi are likely.<sup>88</sup> Continued concerns among U.S. lawmakers about the trade imbalance between China and America and Congressional support for a bill that would impose 27.5 percent punitive tariffs on Chinese goods if China does not substantially increase the value of its currency indicate that China will be forced into future revaluations.<sup>89</sup> Any future revaluation will increase the cost of Chinese imports, allowing AGOA apparel imports to remain competitive in the U.S. market.

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86. Richard McGregor et al., *China revalues the renminbi*, FIN. TIMES (London), July 22, 2005, at 3.

87. Geoff Dyer, *Textile and consumer goods sector set to be worst affected, analysts warn*, FIN. TIMES (London), July 22, 2005, at 1.

88. Peter Goodman, *Don't Expect Yuan to Rise Much, China Tells World*, WASH. POST, July 27, 2005, at D1.

89. *Snow: China can move faster on currency*, REUTERS, Nov. 5, 2005 ("there is a good deal of momentum on legislation in Congress that would slap hefty tariffs on Chinese exports to the United States . . ."); Peter Goodman, *Don't Expect Yuan to Rise Much, China Tells World*, WASH. POST, July 27, 2005, at D1. The IMF has also suggested that China needs a more flexible currency policy. William McQuillen, *China Still Needs More Flexible Yuan Rate, IMF Says*, BLOOMBERG NEWS, Sept. 12, 2005.

Most importantly, despite the overwhelming influx of apparel imports from China and other countries in the first nine months of the year, 2005 AGOA apparel imports to the United States are likely to outpace 2003 imports by at least twenty-five percent.<sup>90</sup> Also, in a report published after the removal of quotas on textiles and apparel in January 2005, the U.S. Trade Representative determined that eleven sub-Saharan African countries retain a competitive advantage in apparel manufacturing.<sup>91</sup> These facts suggest that, despite presumed Chinese dominance of the apparel sector, the AGOA keeps AGOA beneficiary apparel production competitive and will continue to provide a means for export-oriented growth in sub-Saharan Africa.

In conclusion, while there are undoubtedly improvements that could greatly enhance the AGOA's potential to create economic growth in sub-Saharan Africa,<sup>92</sup> economic indicators show that the Act has had a significant role in sustaining rates of economic growth over the last five years. Therefore, a finding that the AGOA is WTO-inconsistent would threaten to dismantle one of sub-Saharan Africa's few real opportunities to create the export-led growth envisioned by Prebisch.

#### IV. THE APPELLATE BODY DECISION IN *EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES*

As noted above, the Appellate Body largely reversed the Panel's decision that had required benefit-granting countries to offer GSP benefits to all developing countries or none at all.

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90. See Interactive Tariff and Trade Web, *supra* note 64. Figures were calculated using the accumulative customs value for HTS chapters 61-62. In the first three quarters of 2003, AGOA beneficiaries imported \$866 million in apparel products to the United States. In the first three quarters of 2005, AGOA beneficiaries imported \$1.08 billion in apparel products to the United States.

91. USTR, African Growth and Opportunity Act Competitiveness Report, Annex A (July 2005), available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/asset\\_upload\\_file604\\_7857.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file604_7857.pdf). Those countries are: Benin, Ethiopia, Gambia, Kenya, Madagascar, Malawi, Namibia, Rwanda, Swaziland, Tanzania, and Zambia. *Id.*

92. CLINE, *supra* note 26, at 270.

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Seemingly satisfied with the Appellate Body's decision,<sup>93</sup> the trade community has ignored the potential ramifications of the Appellate Body's decision for special preference regimes such as the AGOA.<sup>94</sup> This Part lays out the Appellate Body's interpretation of the Enabling Clause, which calls into question the WTO consistency of the AGOA and other special preference regimes.

A. *The EC's Claim on Appeal to the Appellate Body*

One month after the Panel's decision in *EC—Tariff Preferences I*, the EC lodged an appeal arguing that the Panel erred in finding the Drug Arrangements<sup>95</sup> to be inconsistent with the Enabling Clause's scope and non-discrimination requirements.<sup>96</sup> India alleged that the Enabling Clause does not permit the EC to treat WTO Member beneficiaries differently under its GSP regime, as provided for under the Drug Arrangements.<sup>97</sup> However, India submitted that the dispute focused "not on the EC's initial selection of particular developing countries as beneficiaries under its GSP scheme, but on the EC's treatment of developing countries already identified as beneficiaries under that scheme."<sup>98</sup>

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93. Pruzin, *supra* note 11.

94. The trade community's failure to grasp the potential consequences of this decision is evidenced by the lack of discussion about it in academic and trade publications.

95. See *supra* notes 3-4 and accompanying text.

96. *EC—Tariff Preferences II*, *supra* note 10, ¶¶ 18-19. Procedurally, the EC argued that the Panel erroneously found the Enabling Clause is an "exception" to Article I:1 of the GATT, thereby assigning the burden of justifying the Drug Arrangements to the EC. *Id.* ¶¶ 9-10. Furthermore, the EC argued that the Panel erred in determining that Article I:1 of the GATT applies to measures covered by the Enabling Clause. The EC submitted that the Drug Arrangements, as part of the EC GSP scheme, are governed solely by the provisions of the Enabling Clause, to the exclusion of Article I:1. *Id.* ¶ 12. Finally, the EC alleged that India failed to make a claim with respect to the Enabling Clause and, therefore, the Appellate Body should refrain from assessing the Drug Arrangements under the Clause. These issues are not germane to the topic of this article and are not dealt with here. *Id.* ¶ 7 (EC notified the Dispute Settlement Body (DSU) of its intention to appeal on January 8, 2004).

97. *Id.* ¶ 45. India also argued that the Enabling Clause is an exception to Article I:1 and that it properly made a claim under the Clause. *Id.* ¶¶ 35, 41.

98. *Id.* ¶¶ 46, 129.

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After setting aside the EC's procedural claims, the Appellate Body turned to the question of whether the Drug Arrangements are justified under the Enabling Clause. The question presented was whether the Drug Arrangements constituted "non-discriminatory" preferential treatment under footnote 3 to paragraph 2(a) of the Enabling Clause.<sup>99</sup>

B. *Interpretation of "Non-Discriminatory" in Footnote 3 to Paragraph 2(a) of the Enabling Clause*

The Enabling Clause is a part of GATT 1994.<sup>100</sup> Paragraph 1 of the Clause authorizes WTO Member countries to provide "differential and more favourable treatment to developing countries, without according such treatment to other [WTO Members]."<sup>101</sup> Such differential treatment is permitted "notwithstanding" the MFN obligations of Article I:1 of the GATT. Paragraph 2(a) and footnote 3 clarify that preferential tariff treatment is permissible under paragraph 1 when such treatment is "in accordance with the Generalized System of Preferences,"<sup>102</sup> "[a]s described in the [1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries.'"<sup>103</sup>

The Appellate Body first determined that the qualification of the GSP as "generalized, non-reciprocal and non-discriminatory" imposes obligations on preference-granting countries, rather than simply providing a helpful "cross-reference to where the [GSP] is described."<sup>104</sup> These obligations must be fulfilled in order for preferential treatment to be permissible under paragraph 2(a).<sup>105</sup>

The Appellate Body next turned to the meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a). It

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99. A second relevant question is whether the words "developing countries" in paragraph 2(a) of the Enabling Clause refer to all developing countries or a sub-set thereof. This question, however, is resolved by the Appellate Body's analysis of the central question regarding the meaning of "non-discriminatory" in footnote 3. *Id.* ¶ 175.

100. *See* Enabling Clause, *supra* note 19.

101. Enabling Clause, *supra* note 19, ¶ 1 (footnote 1 omitted).

102. Enabling Clause, *supra* note 19, ¶ 2(a)

103. Enabling Clause, *supra* note 19, ¶ 2(a) n.3.

104. *EC—Tariff Preferences II*, *supra* note 10, ¶¶ 146, 148.

105. *Id.* ¶ 148.

notes that “non-discrimination” has, at its root, two meanings: (1) drawing distinctions per se; and (2) drawing distinctions on an impermissible basis.<sup>106</sup> While these divergent meanings are inconclusive with regard to whether the granting of different tariff preferences to different GSP beneficiaries is permissible, both definitions suggest that differentiating among “similarly-situated beneficiaries is discriminatory.”<sup>107</sup>

Reading “non-discriminatory” in context breeds a similarly ambiguous result. In addition to requiring that preferential treatment be “non-discriminatory,” footnote 3 provides that such treatment also be “generalized” in the sense that it must “apply more generally; [or] become extended in application.”<sup>108</sup> By using the term “generalized,” the Contracting Parties sought to eliminate existing special preferences that were granted only to certain designated countries.<sup>109</sup> However, this added context does not, as the Panel concluded, lead to an interpretation of “non-discriminatory” as requiring *identical* tariff preferences under GSP schemes to *all* developing countries.<sup>110</sup> Rather, the term “generalized” requires a GSP scheme to remain “generally applicable,” meaning available to developing countries generally.<sup>111</sup> The term is silent about whether a preference-granting country employing a generally applicable GSP scheme is permitted to differentiate amongst GSP beneficiaries.

As further context for determining the meaning of “non-discriminatory” in footnote 3, the Appellate Body examined paragraph 3(c) of the Enabling Clause which specifies that preferential treatment under the Enabling Clause “shall . . . be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”<sup>112</sup> The Appellate Body rejected the Panel’s reason-

106. *Id.* ¶ 153.

107. *Id.* ¶ 153. The Appellate Body reasoned that, through the particulars of their submissions, both India and the EC agreed with this determination and only disagreed as to the basis for determining whether beneficiaries are similarly-situated. *Id.*

108. Enabling Clause, *supra* note 19, ¶ 2(a) n.3.

109. *EC—Tariff Preferences II*, *supra* note 10, ¶ 155.

110. *Id.* ¶ 156.

111. *Id.*

112. Enabling Clause, *supra* note 19, ¶ 3(c). “Although paragraph 3(c) informs the interpretation of the term ‘non-discriminatory’ in footnote 3 to

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ing that because it lacked a reference to the needs of *individual* developing countries, the paragraph required identical preferential treatment to respond to the needs of *all* developing countries.<sup>113</sup> Noting the Dispute Settlement Understanding's<sup>114</sup> (DSU) prohibition against a Panel or Appellate Body reading obligations into the text of WTO agreements,<sup>115</sup> the Appellate Body concluded that the absence of an "explicit requirement in the text of paragraph 3(c) to respond to the needs of 'all' developing countries, or to the needs of 'each and every' developing country, suggests . . . that [the] provision imposes no such obligation."<sup>116</sup> Therefore, paragraph 3(c) permits preference-granting countries to "respond positively" to the "needs of developing countries" by treating developing countries within their GSP schemes differently.<sup>117</sup>

However, the Appellate Body quickly limited the permissiveness of paragraph 3(c) stating, "paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries."<sup>118</sup> First, preferential treatment must respond to the "development, financial and[/or] trade needs" of developing countries.<sup>119</sup> Assertions are insufficient to qualify a preferential treatment scheme as responding to one of these needs. The "existence of a 'development, financial [or] trade need' must be assessed according to an *objective* stan-

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paragraph 2(a) . . . paragraph 3(c) imposes requirements that are separate and distinct from those of paragraph 2(a)." *EC—Tariff Preferences II*, *supra* note 10, ¶ 179.

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113. *Id.* ¶ 159. The Panel thought a GSP-granting Member could respond to the needs of all developing countries by ensuring sufficient breath of product coverage and depth of tariff cuts in its GSP scheme.

114. The DSU rules and procedures govern dispute settlement at the WTO. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

115. *Id.* art. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

116. *EC—Tariff Preferences II*, *supra* note 10, ¶ 159.

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117. *Id.* ¶ 162. The Appellate Body also draws on the paragraph 7 of the Enabling Clause and the Preamble to the WTO Agreement to reach this conclusion; however, its analysis is conclusory, adding little to buttress its findings.

118. *Id.* ¶ 163 (emphasis in original).

119. *Id.*

dard.”<sup>120</sup> The Appellate Body noted that “[b]road-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.”<sup>121</sup>

Second, paragraph 3(c) mandates that preferential treatment “respond positively” to the needs of developing countries.<sup>122</sup> Stated differently, the measure “must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country.”<sup>123</sup> However, it is not enough to be well-intentioned. Not only must a measure taken under paragraph 2 aim to improve the situation of a beneficiary country, but also, “the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.”<sup>124</sup>

Finally, the Appellate Body dismissed the Panel’s contention that interpreting paragraph 2 in any manner other than mandating formally identical treatment for all developing countries renders paragraph 2(d) of the Enabling Clause redundant.<sup>125</sup> Paragraph 2(d) provides that differential treatment under paragraph 1 of the Enabling Clause is allowed when “[s]pecial treatment of the least developed among the developing countries [is granted] in the context of any general or specific measures in favour of developing countries.” In the Panel’s view, if paragraph 2(a) allowed differing treatment of developing country beneficiaries, including disparate treatment of least-developed countries vis-à-vis other developing countries, paragraph 2(d) would be repetitive.<sup>126</sup> The Appellate Body concluded, contrarily, that paragraph 2(d) saves developing countries from having to establish that preferential treatment of least-developed countries does not constitute “discrimination” for the purposes of paragraph 2(a) footnote 3.<sup>127</sup> Thus, by making clear that developed countries may accord preferential treatment to LDCs different from the prefer-

120. *Id.* (emphasis in original).

121. *Id.* (emphasis in original).

122. *Id.* ¶ 164.

123. *Id.* (emphasis in original).

124. *Id.*

125. *Id.* ¶¶ 171-172.

126. *EC—Tariff Preferences I*, *supra* note 3, ¶ 7.145.

127. *EC—Tariff Preferences II*, *supra* note 10, ¶ 172. According to the Appellate Body, paragraphs 6 and 8 of the Enabling Clause evidence the “draft-

ences granted other developing countries, paragraph 2(d) is not redundant where paragraph 2(a) does not require identical treatment of all developing countries.

In sum, the Appellate Body concluded that the term “non-discriminatory” in footnote 3 does not bar Members from granting different preferential tariff treatment to different GSP beneficiaries, provided such treatment meets the remaining conditions of the Enabling Clause.<sup>128</sup> However,

in granting differential tariff treatment, preference-granting countries are required, by virtue of the term “non-discriminatory,” to ensure that identical treatment is available to *all* similarly-situated GSP beneficiaries, that is, to all GSP-beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond.<sup>129</sup>

C. *The Appellate Body’s Analysis Regarding the Consistency of the Drug Arrangements with the Enabling Clause*

In determining whether the Drug Arrangements met the requirements of the Enabling Clause, the Appellate Body proceeded through a two-step analysis, first identifying the need addressed by the Arrangements and, second, determining whether the preference is accessible to all GSP beneficiaries with that need.

After quickly identifying the need alleged to be addressed by the EC’s differential tariff treatment, namely the problem of illicit drug production and trafficking, the Appellate Body moved to the question of whether the Drug Arrangements granted tariff preferences to all GSP beneficiaries similarly saddled with drug trafficking and production problems.<sup>130</sup>

The Appellate Body began its analysis recognizing the “closed-list” nature of the Drug Arrangements. By the terms of the regulation creating the EC’s GSP scheme (“the Regulation”), the Drug Arrangements are limited to twelve desig-

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ers [wish] to emphasize that least-developed countries form an identifiable sub-category of developing countries under paragraph 2(a).” *Id.*

128. *Id.* ¶ 173.

129. *Id.*

130. *Id.* ¶ 180.

nated developing countries.<sup>131</sup> Furthermore, the Drug Arrangements fail to provide any objective criteria that, if met, would allow for the addition of other similarly situated developing countries to the list of beneficiaries.<sup>132</sup> That the Regulation may hypothetically be amended to include similarly situated developing countries is of no consequence. Such a burden “cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.”<sup>133</sup>

Similarly, the Drug Arrangements provide no criteria for removal from the Drug Arrangements of countries no longer affected by the problems of drug trafficking and production.<sup>134</sup> In fact, the Regulation explicitly states that the continuation of preferential treatment under the Drug Arrangements will not be prejudiced by evaluations, required by the Regulation, indicating that the Drug Arrangements are not having their desired effect or that a beneficiary no longer suffers from the drug production or trafficking problem.<sup>135</sup> Furthermore, the fact that the Regulation provides for temporary withdrawal of benefits under the GSP (including the Drug Arrangements) for “shortcomings in customs controls on export or transit of drugs . . . or failure to comply with international conventions on money laundering” is insufficient. The Appellate Body noted that the withdrawal provisions apply to the Regulation generally and that the conditions for withdrawal are not connected to the question of whether the beneficiary is a “seriously drug-affected country.”<sup>136</sup> The Appellate Body seems to suggest that, in order to meet the dictates of paragraph 2(a) of the Enabling Clause, removal provisions for a

131. *Id.* ¶ 181; *see also* Council Regulation 2501/2001, *supra* note 4, art. 10, 25, at 5, 8; *supra* note 4 (list of twelve beneficiary countries).

132. *EC—Tariff Preferences II*, *supra* note 10, ¶ 183.

133. *Id.* ¶ 187. The scheme is also presumably objectionable because the lack of objective criteria can prevent similarly situated countries from identifying themselves as potential Drug Arrangement beneficiaries.

134. *Id.*

135. *Id.* ¶ 183; *see also* Council Regulation 2501/2001, *supra* note 4, art. 25, at 8 (stating that the results of evaluations regarding the effect of the Drug Arrangements and the efforts of beneficiary countries’ efforts in combating drug production and trafficking “will be without prejudice to the continuation of the [Drug Arrangements] until 2004, and their possible extension thereafter”).

136. *EC—Tariff Preferences II*, *supra* note 10, ¶ 184.

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preference arrangement must be specific to the arrangement and must directly evaluate a country's status with regard to the particular need being addressed by the preferential treatment.

As the Regulation employs a closed-list of twelve beneficiaries, only modifiable by amendment, and contains no criteria or standards that developing countries must meet to qualify for the Drug Arrangements, the Appellate Body concluded that the Regulation is not justified under paragraph 2(a) of the Enabling Clause. Thus, a WTO Member employing a closed-list trade preference regime that is modifiable only by amendment to the enacting legislation violates its obligation to provide MFN treatment to non-beneficiary WTO Members.<sup>137</sup>

V. WAYS TO OFFER MORE FAVORABLE TARIFF TREATMENT TO  
A SUB-SET OF GSP BENEFICIARIES AFTER *EC—TARIFF  
PREFERENCES II*

Following *EC—Tariff Preferences II*, there are three principal, WTO-consistent ways of offering preferential tariff treatment to a subset of a preference-granting country's GSP beneficiaries. First, as discussed above, a preference-granting Member may employ the Enabling Clause to grant additional preferential treatment under its GSP regime provided such treatment is offered to all similarly situated beneficiaries, as determined by objective criteria. Alternatively, a preference-granting country may obtain a WTO waiver, allowing it to grant any preferential treatment that the waiver permits. Finally, under the provisions providing for the creation of a customs union or free-trade area (FTA), a Member may temporarily grant preferential treatment with the aim of creating a regional trade agreement (RTA). The second and third options are discussed below.

A. *WTO Waivers and Consensus Decisionmaking*

Pursuant to Article IX:3 of the Marrakech Agreement Establishing the WTO, the WTO Ministerial Conference may, in "exceptional circumstances," waive a Member's obligation

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137. The Drug Arrangements would have been permissible had the EC received a waiver pursuant Article IX:3 of the GATT. At the time, the EC had not yet received such a waiver. *Id.* ¶ 186.

under the WTO Agreements. Waivers of Article I:1 obligations are initially submitted to the Council for Trade in Goods for consideration.<sup>138</sup> Subsequently, the Ministerial Conference considers the request.<sup>139</sup> If consensus is not reached in ninety days, the decision to grant the waiver is determined by a three-fourths vote of the Members.<sup>140</sup> In practice, decisions at the WTO, including decisions of the Ministerial Conference, are made by consensus.<sup>141</sup> Consensus is reached when “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”<sup>142</sup> The United States and the EC have diligently ensured that decisionmaking at the WTO is conducted by consensus, as this practice has allowed them to dominate the WTO decisionmaking process.<sup>143</sup>

Preferential tariff schemes have commonly received waivers under the WTO Agreement or its GATT predecessor.<sup>144</sup> However, U.S. and EC insistence on consensus decisionmaking offers developing countries the opportunity to extract concessions from preference-granting countries in exchange for their support of a scheme’s waiver. For example, in order to

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138. Agreement Establishing the World Trade Organization, art. IX:3(b) [hereinafter WTO Agreement]. In practice, the requirement of “exceptional circumstances” has not prevented preference regimes from receiving WTO waivers. See, e.g., World Trade Organization, *European Communities—The ACP-EC Partnership Agreement*, WT/MIN(01)/15 (Nov. 14, 2001) (presenting no “exceptional circumstance” to justify the waiver, though noting that the Agreement is “aimed at improving the standard of living and economic development of ACP States”).

139. WTO Agreement, *supra* note 138, art. IX:3(a). R

140. *Id.*

141. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 345 (2002).

142. WTO Agreement, *supra* note 138, art. IX:1 n.1. R

143. See generally, Steinberg, *supra* note 141. R

144. See, e.g., *United States Caribbean Basin Economic Recovery Act Waiver* (BISD 31S/20) (Feb. 15, 1985) (renewed Nov. 15, 1995, WT/L/104); *United States Andean Trade Preference Act Waiver* (L/6991) (May 19, 1992) (renewed October 14, 1996, WT/L/184); *European Communities Fourth ACP-EEC Convention of Lomé Waiver* (BISD 41S/26) (Dec. 9, 1994) (renewed October 14, 1996, WT/L/186); *European Communities—The ACP-EC Partnership Agreement Waiver* (WT/L/436) (Nov. 14, 2001). Prior to the creation of the WTO, waivers of GATT obligation were granted pursuant Article XXV:5 of the GATT.

finally put the Banana Dispute<sup>145</sup> to rest, the EC sought to secure a waiver for the Cotonou Agreement, which provided beneficiaries with preferential tariff treatment for bananas. Ecuador, the largest producer of bananas in the world, feared the Agreement could price its producers out of the EC market.<sup>146</sup> By threatening to oppose the waiver,<sup>147</sup> Ecuador was able to extract concessions from the EC. Under a compromise agreement, Ecuador and other Latin American countries exchanged their support of a waiver for the right to initiate arbitral review of the Agreement.<sup>148</sup> If an arbitrator found that the EC's revised tariffs "diminish[ed] total market access" of Latin American bananas, the waiver could be suspended.<sup>149</sup> Thus, despite the prospects of a likely vote in favor of the Cotonou waiver,<sup>150</sup> the EC agreed to provisions that could undo the trade preference regime rather than risk creating a precedent for majority voting at the WTO and thereby threaten the continued use of consensus-based decisionmaking.

B. *Interim Agreements Leading Towards the Creation of a Free Trade Area*

Article XXIV:5 of the GATT creates an exception to all WTO obligations, including the MFN obligation pursuant to Article I:1, for FTAs and interim agreements leading to the

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145. For a history of the dispute, see Mauricio Salas & John H. Jackson, *Procedural Overview of the WTO EC—Banana Dispute*, 145 J. INT'L ECON. LAW 145 (2000).

146. James McCall Smith, *Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 257, 279 (John S. Odell ed., 2006).

147. Ecuador's opposition also threatened to stall the launch of the Doha Development Round negotiations. The ACP states, beneficiaries under the Cotonou Agreement, threatened to prevent the initiation of new trade negotiations, absent a waiver. *Id.* at 280-81.

148. *Id.* at 282.

149. *Id.*

150. Prior to the compromise with Ecuador, the coalition opposed to the waiver included only Ecuador, Guatemala, Honduras, Nicaragua, and Panama. *Id.* at 280. Furthermore, 54 of the 143 WTO members at the time were Cotonou beneficiaries or members of the EC. See UNCTAD *List of Beneficiaries*, *supra* note 23; see also WTO.org, List of WTO Members, [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e/htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e/htm) (last visited Apr. 8, 2006). Given the limited resistance and the overwhelming support of the waiver, capturing the additional fifty-four votes necessary for the waiver's passage seemed likely.

formation of an FTA.<sup>151</sup> The article provides that “the provisions of [GATT 1994] shall not prevent, as between the territories of contracting parties, the formation of a . . . free-trade area or the adoption of an interim agreement necessary for the formation of a . . . free-trade area.”<sup>152</sup> Article XXIV:5(b) requires that the customs duties applied by the constituent parties to an FTA or an FTA interim agreement must not “‘on the whole be higher . . . than the general incidence’ of the duties that were applied by each of the constituent members before the formation of the [FTA]” or adoption of an interim agreement.<sup>153</sup>

In the case of an interim agreement, paragraph (c) requires that “any interim agreement [leading to the formation of an FTA] shall include a plan and schedule for the formation of such a . . . free-trade area within a reasonable length of time.”<sup>154</sup> According to the Understanding on the Interpretation of Article XXIV, a “‘reasonable length of time’ . . . should exceed ten years only in exceptional cases.”<sup>155</sup> Members entering into an interim agreement are required to notify WTO

151. Article XXIV:5 also provides for the creation of customs unions. GATT, *supra* note 2, art. XXIV:5. The analysis here is limited to FTAs, as the creation of a customs union between the United States and AGOA beneficiaries is improbable.

152. *Id.*

153. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 53, WT/DS34/AB/R (Nov. 19, 1999) [hereinafter *Turkey Textiles*]. Though the measure at issue in *Turkey Textiles* created a customs union, the findings of the Appellate Body are applicable here. First, the Appellate Body based its findings in large part on its interpretation of the chapeau of article XXIV:5. *Id.* The chapeau applies both to XXIV:5(a), the provisions governing customs unions and their interim agreements, and XXIV:5(b), the provisions governing the creation of a free trade area and any interim agreement leading to the creation of an FTA. *Id.* Furthermore, the language interpreted by the Appellate Body in the quote above is found both in 5(a) and 5(b). See GATT, *supra* note 2, art. XXIV. The Appellate Body in *Turkey Textiles* also explicates requirements regarding “other regulations of commerce,” other than duties. *Turkey Textiles*, ¶ 54. The analysis here omits the Appellate Body’s findings as the AGOA is a tariff preference regime.

154. GATT, *supra* note 2, art. XXIV:5(c).

155. Understanding on the Interpretation of Article XXIV of the GATT 1994, ¶ 3, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1a, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1161 (1994) [hereinafter Understanding on the Interpretation of Article XXIV].

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Members.<sup>156</sup> Subsequently, Members and the Committee on Regional Trade Agreements examine the interim agreement and make recommendations.<sup>157</sup> Alleged violations of Article XXIV are resolved in dispute settlement proceedings.<sup>158</sup>

No authoritative body has determined exactly what constitutes an “interim agreement” or a “plan and schedule” under article XXIV, despite the fact that working parties have long debated these issues. The working party reports demonstrate a lack of consensus regarding these issues.<sup>159</sup> At a minimum, however, it seems to be agreed that an interim agreement must include a plan “contain[ing] specific concrete provisions for attaining the objective of the tariff and quota dismantlement in a first stage, and the provisions necessary for continu-

156. GATT, *supra* note 2, art. XXIV:7(a).

157. GATT, *supra* note 2, art. XXIV:7(b); Understanding on the Interpretation of Article XXIV, *supra* note 155, ¶ 7. According to paragraph 7, “[a]ll notifications made under paragraph 7(a) of Article XXIV [of the GATT] shall be examined by a working party in light of the relevant provisions of GATT 1994 and the Understanding on the Interpretation of Article XXIV. The working party shall submit a report to the Council for Trade in Goods on its findings . . . .” *Id.* Prior to the WTO Agreement, examinations were conducted by individually constituted working parties. However, on February 6, 1996, the General Council established the Committee on Regional Trade Agreements (CRTA) with the mandate to examine regional trade agreements referred to it by the Council for Trade in Goods. WTO, Guide to GATT Law and Practice, Analytical Index (1995) [hereinafter Analytical Index]. Since 1995, no examination report has been finalized for lack of consensus among CRTA members. WTO.org, Regional Trade Agreements—The WTO Committee (CRTA), [http://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regcom_e.htm) (last visited Mar. 27, 2006); *see also* Report of the Committee on Regional Trade Agreements to the General Council, WT/REG/13 (Dec. 5, 2003).

158. Understanding on the Interpretation of Article XXIV, *supra* note 155, ¶ 12.

159. Analytical Index, *supra* note 157, vol. 2, 807-08 (1995). For example, the Working Party on “Association of Turkey with the European Economic Community” noted the position of Turkey and the EEC that the very term “‘interim agreement’ indicates rather clearly that the ‘plan and schedule’ need not necessarily be detailed and complete.” L/2265, 13S/59, 62, ¶ 9 (adopted Mar. 25, 1965). Alternatively, the Report of the Working Party on “European Community—Agreements of Association with Tunisia and Morocco” stated that “without a precise and complete plan and schedule, it would be impossible for the CONTRACTING PARTIES to make findings with regard to whether the agreements were likely to result in free-trade areas within a reasonable period and, if necessary, to make recommendations.” L/3379, 18S/149, 157, ¶ 27 (adopted Sept. 29, 1970).

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ing such dismantlement in accordance with the stated will of the parties to achieve a free-trade area within the meaning of Article XXIV.”<sup>160</sup>

Commentators have expressed concern that ambiguity regarding the requirements of article XXIV:5 with regard to interim agreements allows Members to create select preference regimes and claim that the arrangements fall within the exception for interim agreements, though the Members have no real intention of forging an RTA.<sup>161</sup> Though examination of notified interim agreements by Members and the Committee on Regional Trade Agreements, as required by article XXIV, would seem to obviate any concern, very few interim agreements in GATT/WTO history have ever been notified at the interim stage.<sup>162</sup> Furthermore, despite the notification of hundreds of RTAs—some of which offer loose preferences as interim agreements and set no date for completion of the RTA—this author has found no formal record of any GATT disapproval of any RTA.<sup>163</sup> This suggests that, even if Members reported faux interim agreements, neither the Committee on Regional Trade Agreements nor the Members themselves would object.

VI. THE AGOA IS PROBABLY INCONSISTENT WITH THE WTO  
AND THEREFORE A VIOLATION OF THE U.S.  
MFN OBLIGATION

On its face, the AGOA is a violation of the MFN provisions of article I:1. The scheme does not extend its preferential treatment to all WTO Members, rather it is limited to designated countries of sub-Saharan Africa. Thus, if the AGOA is

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160. Report of the Working Party on Agreement between the EEC and Lebanon, L/4131, 22S/43, 46 ¶ 12 (adopted Feb. 3, 1975). At the Fourth Ministerial Conference in Doha, Ministers agreed to launch negotiations aimed at clarifying and improving the discipline and procedures under the existing WTO provisions applying to RTAs. See Negotiating Group on Rules, *Background Note by the Secretariat: Compendium of Issues Related to Regional Trade Agreements*, TN/RL/W/8/Rev.1 (Aug. 1, 2001) [hereinafter *Compendium of Issues Related to RTAs*].

161. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 166 (1997) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

162. *Compendium of Issues Related to RTAs*, *supra* note 160.

163. See Analytical Index, *supra* note 157, at 818; see also JACKSON, *WORLD TRADING SYSTEM*, *supra* note 161, at 166.

challenged as inconsistent with the WTO, the United States must defend the scheme on one of the grounds enumerated above.<sup>164</sup>

A. *The AGOA Probably Is Not Justifiable Under the Enabling Clause*

Under the interpretation of the Enabling Clause announced in *EC—Tariff Preferences II*, the United States is unlikely to successfully argue that the AGOA is permissible under the Enabling Clause. Though the scheme arguably addresses a need particular to sub-Saharan Africa, the list of AGOA beneficiaries is closed, with no objective criteria for adding or removing beneficiaries. The closed-list nature of the regime makes it clearly inconsistent with the Appellate Body's interpretation of the Enabling Clause in *EC—Tariff Preferences II*.

The text of AGOA suggests that its purpose is to “encourage both higher levels of trade and direct investment in support of the positive economic and political developments under way throughout the region.”<sup>165</sup> Though the AGOA clearly aims to “respond positively” to a recognized “development, financial [or] trade” need of sub-Saharan Africa,<sup>166</sup> the need is clearly not peculiar to the region. Even assuming this “need” is unique to LDCs, the AGOA would still not be consistent with the Enabling Clause's requirement that a preference regime offer identical treatment to all similarly situated beneficiaries of a country's GSP regime.<sup>167</sup> The Act excludes from its list of beneficiaries three LDCs that are U.S. GSP beneficiaries.<sup>168</sup> Furthermore, the AGOA preferences are extended

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164. A Member may bring a claim under the WTO Agreements where another party has violated its WTO obligations and as a result, a benefit to the complaining party is being nullified or impaired. GATT, *supra* note 2, art. XXIII.

165. 19 U.S.C. § 3701(9) (2000).

166. In fact, the Preamble to the Marrakesh Agreement Establishing the WTO recognizes, “there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Marrakesh Agreement Establishing World Trade Organization, Preamble, Apr. 15, 1994, 33 I.L.M. 15 (1994).

167. *See supra* Part II.A.

168. These countries include Bangladesh, Haiti, and Nepal. Additionally, the Solomon Islands are a U.S. GSP beneficiary and a WTO recognized LDC, however, the United States does not consider the Solomon Islands an

to beneficiaries that have not been granted LDC status by the United States or by the WTO.<sup>169</sup> Therefore, alleging that economic growth is the “need” the AGOA addresses will provide the United States with little room to argue that the Act is consistent with the requirements of the Enabling Clause and therefore consistent with its WTO obligations.

Alternatively, the AGOA can be interpreted as addressing the need for reducing HIV/AIDS in sub-Saharan Africa. The text of the AGOA supports this reading by stating that one of the Act’s aims is to reduce the incidence of HIV/AIDS in the region.<sup>170</sup> Thus, at a glance, the AGOA appears to meet the requirements of paragraph 3(c) of the Enabling Clause by addressing a need unique to sub-Saharan Africa.

Sub-Saharan Africa currently accounts for sixty-five percent of the roughly thirty-five million cases of HIV/AIDS worldwide and seventy-five percent of the three million global HIV/AIDS deaths in 2003, though the region accounts for just over ten percent of the world’s population.<sup>171</sup> Notwithstanding HIV/AIDS prevalence in other countries and regions, the severity of the sub-Saharan African experience arguably creates a “need” unique to the region that the United States is addressing through paragraph 3(c) of the Enabling Clause. Furthermore, a plausible argument exists that preferential treatment under the AGOA should be extended to all sub-Saharan African countries, even those with low HIV/AIDS prevalence rates, as the concentration of high-prevalence countries exclusively in sub-Saharan Africa,<sup>172</sup> coupled with

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LDC. See UNCTAD, HANDBOOK OF STATISTICS app. 1 (2005); see also WTO.org, Understanding the WTO: The Organization, Least-developed Countries, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Apr. 14, 2006).

169. These states include Cameroon, Congo (Brazzaville), Cote d’Ivoire, Eritrea, Gabon, Ghana, Kenya, Mauritius, Namibia, Nigeria, Senegal, Seychelles, South Africa, Swaziland, and Zimbabwe. UNCTAD, HANDBOOK OF STATISTICS app. 1 (2005).

170. 19 U.S.C. §§ 3701(9), 3739(b) (2000).

171. Joint United Nations Programme on HIV/AIDS [UNAIDS], *2004 Report on the Global AIDS Epidemic: 4th Global Report*, 10, 30, UNAIDS/04.16E (June 2004).

172. The fourteen countries in the world that have adult prevalence rates of ten percent or higher are all located in sub-Saharan Africa (Botswana, Cameroon, Central African Republic, Djibouti, Guinea-Bissau, Kenya, Lesotho, Malawi, Namibia, Mozambique, South Africa, Swaziland, Zambia,

the interconnectedness of the region through immigration flows, exposes all AGOA beneficiaries to a unique HIV/AIDS risk. However, the United States would still have to demonstrate that the HIV/AIDS epidemic in sub-Saharan Africa is “by its nature” a need that can be “effectively addressed through tariff preferences.”<sup>173</sup> Though the Act concludes that “[s]ustained economic development is critical to creating the public and private sector resources in sub-Saharan Africa necessary to fight the HIV/AIDS epidemic,” a WTO Panel is likely to require some evidence that HIV/AIDS is a problem that can be addressed through tariff preferences.<sup>174</sup>

In any case, the AGOA’s closed-list form and lack of objective criteria for determining beneficiary eligibility are likely to trump the argument’s validity. In its analysis of the EC’s Drug Arrangements in *EC—Tariff Preferences II*, the Appellate Body made no attempt to determine whether by some objective criteria the Drug Arrangements’ closed list of beneficiaries already included all GSP-eligible drug-affected countries and, therefore, complied with the Enabling Clause.<sup>175</sup> Rather, the Appellate Body made clear that a special preference regime must employ objective criteria related to the “need” being addressed in order to allow for the addition and removal of countries to and from the list of beneficiaries based on their changing situation.<sup>176</sup> Such criteria are necessary to ensure preferential treatment is available to all current and future similarly-situated GSP beneficiaries. It is not enough that at the time of inception a closed-list preference regime includes all GSP beneficiaries facing the particular problem being addressed by the preference regime.

On this count the AGOA fails. By its terms, the AGOA is limited to forty-eight eligible sub-Saharan African countries.<sup>177</sup> Though these forty-eight countries can oscillate between eligibility and ineligibility based on specified conditions, there is no explicit mechanism for granting AGOA treatment to any

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and Zimbabwe). See UNAIDS/WHO AIDS Epidemic Update, Dec. 2005, available at [http://www.unaids.org/epi/2005/doc/EPIupdate2005\\_html\\_en/epi05\\_05\\_en.htm](http://www.unaids.org/epi/2005/doc/EPIupdate2005_html_en/epi05_05_en.htm).

173. *EC—Tariff Preferences II*, *supra* note 10, ¶ 164; see also *supra* Part II.A.

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174. 19 U.S.C. § 3739(a)(7) (2000).

175. See generally *EC—Tariff Preferences II*, *supra* note 10.

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176. See *supra* Part II.B.

177. 19 U.S.C. §§ 3703, 3706 (2000).

country other than the original forty-eight explicitly mentioned by the Act.<sup>178</sup> Furthermore, the eligibility criteria, though arguably related to economic growth, fail to even mention HIV/AIDS, the only plausible “need” that the United States could allege.<sup>179</sup> Presumably, the United States can amend the AGOA to add any GSP beneficiary that achieves a high HIV/AIDS prevalence rate. However, the Appellate Body, in *EC—Tariff Preferences II*, found this alternative insufficient, as it “cannot ensure that the preferences under [a given regime] are available to all GSP beneficiaries suffering from [the problem the regime aims to solve].”<sup>180</sup> Thus, absent generally applicable eligibility criteria permitting similarly situated U.S. GSP beneficiaries to participate in the AGOA, a WTO Panel is likely to find that the AGOA is not justified under the Enabling Clause.

B. *It is Unclear Whether the United States Can Obtain a Consensus Decision for a WTO Waiver for the AGOA*

Currently, the AGOA does not have a WTO waiver.<sup>181</sup> Though the United States could probably ultimately retain a waiver, doing so through the U.S.-preferred method of consensus-based decisionmaking is unlikely.

In 2002, at a Special Session of the WTO Committee on Trade and Development, Paraguay forwarded a proposal to bar the use of WTO waivers for the purpose of extending preferential treatment to any subset of the world’s developing countries.<sup>182</sup> The proposal was supported by Thailand, the Philippines, India, and Argentina.<sup>183</sup> Paraguay also vowed to oppose any effort to renew the U.S. waiver for the Andean Trade Preference Act (ATPA).<sup>184</sup> The ATPA waiver expired in

178. See generally 19 U.S.C. §§ 3701-3741 (2000).

179. See 19 U.S.C. §§ 3703, 3706 (2000).

180. *EC—Tariff Preferences II*, *supra* note 10, ¶ 187; see also *supra* Part II.B.

181. *EC—Tariff Preferences I*, *supra* note 3, Annex E; see also Rugaber, *supra* note 7.

182. *Paraguay Threatens WTO Approval of ATPA, Alleges Discrimination*, INSIDE U.S. TRADE, June 21, 2002.

183. *Id.*

184. *Id.*

December of 2001 and has yet to be renewed.<sup>185</sup> Paraguay's actions and India's challenge of the EC's Drug Arrangements demonstrate a new resistance among some developing countries to the proliferation of special preference regimes.

Any attempt by the United States to obtain a waiver for the AGOA could be met with significant resistance from, at least, a small number of countries. It remains unclear how much the United States would be willing to concede to holdout countries in order to get a waiver passed by consensus. In any case, the United States is not likely to forgo a consensus decision and bring the waiver to a vote. Even if passage is assured, the United States is unlikely to risk undermining the current tradition of consensus decisionmaking in order to maintain a preference regime with a region that accounts for less than one percent of total U.S. merchandise exports.<sup>186</sup>

C. *A Panel is Unlikely to Find that the AGOA Constitutes an Interim Agreement Leading Towards the Formation of an FTA*

If presented with a WTO challenge, the United States might argue that the AGOA constitutes an interim agreement under Article XXIV.<sup>187</sup> On its face, this argument has a measure of credibility, as the United States is currently negotiating with the five members of the Southern African Customs Union (SACU) to create an FTA.<sup>188</sup> Furthermore, the preferential treatment offered AGOA beneficiaries in no way raises the general incidence of duties applied by the United States or AGOA beneficiaries, as required by Article XXIV:5(b).<sup>189</sup>

185. *EC-Tariff Preferences I*, *supra* note 3, Annex E; *see also EU Files Appeal Against WTO Ruling on Preferences for Nations Combating Drugs*, WTO REPORTER, Jan. 12, 2004.

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186. 2004 COMPREHENSIVE REPORT, *supra* note 55, at 13.

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187. *See supra* Part III.B.

188. 2004 COMPREHENSIVE REPORT, *supra* note 55, at 61. The United States has never notified the WTO about an interim agreement between it and any AGOA beneficiary. *See* Committee on Regional Trade Agreements, *Basic Information on Regional Trade Agreements*, WT/REG/W/44 (Feb. 7, 2002). However, notification of interim agreements is rare. *See supra* note 162. Thus, the absence of notification would seemingly not detract from such an argument by the United States.

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189. *See supra* Part III.B.

However, the text of the legislation exposes the ridiculousness of this argument. Article XXIV:5(b) characterizes an interim agreement as one “leading to the formation of a free-trade area.” The AGOA’s enabling legislation provides that “free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa.”<sup>190</sup> Thus, the AGOA lacks even the “stated will of the parties to achieve a free-trade area.”<sup>191</sup> In fact, most AGOA beneficiaries are currently uninterested in negotiating an FTA with the United States.<sup>192</sup> Furthermore, the AGOA contains no “concrete provisions” or schedules for “attaining the objective of the tariff and quota dismantlement in a first stage,” let alone the provisions for “continuing such dismantlement.”<sup>193</sup> Even under the most forgiving hermeneutic standard, the United States will not be able to convince a WTO tribunal that the AGOA is “leading to the formation of a free-trade area.”

## VII. CONCLUSION

The AGOA is an increasingly important vehicle for economic growth in sub-Saharan Africa. Furthermore, the recent extension of the scheme until 2015 and the possible addition of tariff preferences in apparel and agriculture promise to enhance the scheme’s already substantive results.<sup>194</sup>

In *EC—Tariff Preferences II*, the Appellate Body made clear that the AGOA’s “closed-list” form is incompatible with U.S. obligations under the WTO. Though a challenge to the re-

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190. 19 U.S.C. § 3723 (2000).

191. *See supra* Part III.B.

192. USTR, COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT 112 (2001) (“Sub-Saharan African countries have generally indicated that they need more time to raise their profoundly low levels of economic development, strengthen weak industries, and develop trade capacity and negotiating expertise in order to effectively negotiate a free trade agreement with the U.S.”).

193. *See* 19 U.S.C. § 3723 (2000). The AGOA did require the President to create a plan for the “purpose of negotiating and entering into one or more trade agreements with interested beneficiary sub-Saharan African countries.” *Id.* The plan submitted by the President is a one page summary of the state of the United States/sub-Saharan African trade, the importance of FTAs, and the disinterest of AGOA beneficiaries in entering into a FTA with the United States. *See generally id.* at 109.

194. *WTO Decision Puts AGOA at Risk*, *supra* note 8.



gime at the WTO is not inevitable, three factors increase the likelihood of a claim. First, India's challenge to the Drug Arrangements in *EC—Tariff Preferences* demonstrates the willingness of a small emerging group of developing countries opposed to special preference regimes to bring their grievances before a WTO tribunal. Second, the AGOA's preferential treatment in the sensitive area of textiles and apparel provides an incentive for developing countries with significant textile sectors to challenge the scheme's WTO compatibility. As the volume of AGOA textile imports into the United States grows over the next ten years, textile producers in non-AGOA countries stand to see their market share diminished significantly. Finally, benefits accrued under the normal GSP preferences are minimal. Thus, the prospect of removal from the U.S. GSP rolls as a result of challenging the AGOA creates a de minimis deterrent effect.<sup>195</sup>

Moreover, the political costs associated with attempting to dismantle a trade preference regime aiming to benefit the poorest region in the world are not necessarily prohibitive. Middle-income countries like India and Paraguay could coalition with Bangladesh or Nepal—LDC textile producing countries with potential claims against the AGOA. The United States similarly attempted to employ Ecuador as a legitimizing factor for its claim against the EC's preferential treatment of ACP bananas.<sup>196</sup> Challengers could further defray the political costs by pointing out that the majority of the textile exports from AGOA beneficiaries to the United States come not from LDCs but rather from Mauritius and South Africa.<sup>197</sup>

If a challenge were to arise, the continued existence of the AGOA would be seriously threatened. The United States has no viable defense of the scheme and will be unlikely to build the consensus necessary for a waiver. Thus, assuming a WTO challenge, the future of the AGOA rests on the U.S. willingness to make concessions to those Members opposed to an AGOA waiver in order to secure a waiver by consensus. If the

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195. Interestingly, India brought its claim against the EC in *EC—Tariff Preferences*, despite the fact that its imports received preferential treatment under the EC GSP more often than the imports of any other developing country. CLINE, *supra* note 26, at 71 (10.3 percent of India's imports to the EC benefited from the EC GSP program).

196. SMITH, *supra* note 146, at 263.

197. USITC Pub. 3650, *supra* note 68, at 5-32.

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costs of consensus are too high, the United States will be forced to dismantle the regime.

*EC—Tariff Preferences II*, touted as a win for developed country preference regimes and their beneficiaries, could undo U.S. efforts to grant real market access to the most impoverished region of the world. If the AGOA were undone, sub-Saharan Africa would be robbed of a true opportunity to achieve the export-led growth and industrialization that Raul Prebisch advocated for and that the GSP failed to deliver.