

Consensus Recommendations for U.S. Preference Program Improvements

This consensus proposal for U.S. preference program improvements is supported by a broad range of stakeholders who use preference programs or work closely with those who do. The group includes non-governmental organizations working to reduce poverty in developing countries, U.S. companies sourcing goods from developing countries for sale in the United States, and individuals and research organizations focused on trade and development policy.

We agree that the goals of the various existing U.S. trade preference programs could be better achieved if they were components of a single, comprehensive trade preference program that increases opportunities for *all* developing countries, and in particular, LDCs to benefit as much as possible from global trade while, at the same time, creating certainty for exporters, importers, investors and workers. We believe this proposal addresses the concerns different stakeholders have with the ways in which current U.S. preference programs operate and the constraints on their success in promoting development through trade.

This brief paper does not seek to limit reform to the issues contained herein. Many of the organizations that support these recommendations also support more detailed reforms in particular areas, and we continue to discuss and develop consensus on these issues that should also be considered in comprehensive trade preference reform.

GENERAL PRINCIPLES and BENEFITS

Issue

The primary goal of a U.S. preference program should be to promote sustainable economic development in developing countries through expanded job-creating trade with the United States. To achieve this goal, a successful preference program must meet the needs of two constituencies: those who grow, make, and export goods in the beneficiary developing country (BDC), and their customers in the United States. These constituencies require a preference program that is:

- Certain, reliable, predictable and long-term;
- Simple to use;
- Promotes sustainable development and stimulates value-added production opportunities in the beneficiary countries, covering all products that beneficiary countries are capable of producing,
- Sensitive to beneficiaries' differing or unique development needs; and
- Wherever possible, linked to targeted policies and programs to build capacity to participate in markets and take full advantage of preferential market access.

Currently, U.S. preference programs fall short of these requirements. The family of U.S. preference programs, which includes as many as six separate programs,¹ is characterized by

¹ The six programs are the Generalized System of Preferences (GSP), the African Growth and Opportunity Act (AGOA), the Caribbean Basin Economic Recovery Act (CBERA, including the Caribbean

short duration periods and a multiplicity of rules of origin, eligibility requirements, and product “graduation” procedures. Further, these programs do not cover all products of key interest to BDCs,² and they may be sensitive to the economic challenges of some beneficiaries while not meeting the needs of others.

Recommendation

We recommend that the United States maintain a single preference program that extends duty-free treatment for imports of eligible articles from BDCs, and that provides permanent, 100 percent duty-free and quota-free (DFQF) benefits to imports from eligible lesser-developed countries.

ELIGIBLE BENEFICIARY DEVELOPING COUNTRIES

Issue

U.S. preference programs have differing eligibility criteria, some of which are more restrictive than others and many of which are similar but differently worded. These differences create confusion and uncertainty for producers in BDCs and their customers in the United States about whether a BDC will qualify for benefits. In short, the eligibility criteria for U.S. preference programs need to be updated and harmonized.

Recommendation

The new single preference program should have one set of clear, commercially meaningful and achievable set of eligibility criteria. The goal is to have as many beneficiary developing countries achieve and retain eligibility as possible, and, ideally the eligibility criteria should work to promote progress in different areas rather than blocking access to the U.S. market. The purpose of the eligibility criteria is to provide incentives for BDCs to adopt policies and practices that will have the greatest positive impact on their sustainable development. Whenever possible, progress towards meeting eligibility criteria shall be encouraged and supported, including through targeted capacity building assistance. The new process requirements described below will help ensure that the eligibility criteria are used to the fullest extent possible, and priority will be placed on maintaining benefits if countries work to make progress in meeting the eligibility criteria within a reasonable period of time

We recommend two types of eligibility criteria, which are detailed in Attachment A. The first is a group of statistical and other objective criteria relating to levels of development and trade competitiveness. It includes a definition of developing countries contained in the U.S. Generalized System of Preferences program and a new definition of a “lesser developed

Basin Trade Partnership Act, CBTPA, and the Caribbean Basin Initiative, CBI), the Andean Trade Preferences Act/Andean Trade Preferences and Drug Eradication Act (ATPA/ATPDEA), the Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act, and West Bank/Gaza Strip Qualifying Industrial Zones preferences (QIZs).

² From the development perspective of BDCs, the product exclusions mean that the perverse situation exists that, for example, the United States provides Bangladesh and Cambodia \$161 million in foreign aid in FY 2008 with one hand, and then takes it and more back with the other hand by collecting nearly six times as much (\$981 million in 2007) in duties on imports from those impoverished countries.

country” (LDC) that is designed to be objective, measurable and sensitive to the special needs of BDCs in Sub-Saharan Africa.

The second group of criteria requires a Presidential assessment of a developing country’s trade, business, labor and other practices. It covers the major criteria currently included in other existing U.S. preference programs, including conditions relating to civil rights/ democracy, corruption, market access, intellectual property rights, investment, labor/human rights, and national security/terrorism/narcotics.

RULE OF ORIGIN

Issue

Generally, U.S. preference programs contain a 35 percent value added rule of origin for non-apparel goods that BDC producers must meet in order to qualify for benefits. For apparel products, the various U.S. preference programs include a number of differing rules of origin. Past legislative efforts to encourage commercial sourcing decisions have frequently had unintended negative consequences and have often ultimately resulted in different and complex rules that have created confusion and uncertainty for U.S. customers and an enormously burdensome paperwork requirement for BDC exporters. Compliance and enforcement problems are inevitable under the current system. Often, the hurdles involved in meeting these complicated rules cost exporters and importers more than the tariff savings afforded by the preference program. In addition, the opportunities to meet the rules of origin by using inputs from other BDCs are limited, and cumulation is not possible at all with respect to U.S. free trade agreement (FTA) partners, undermining economic opportunities.

Recommendation

We recommend that the preference program contain a single simple rule of origin for all products, with a clear opportunity to cumulate inputs from other BDC and FTA countries. The rule should be substantial transformation plus at least 35 percent of the appraised value of the article, with the sum of the cost or value of the materials produced in the BDC or any one or more such BDCs, the United States, [or a U.S. FTA partner] plus the direct costs of processing operations performed in the BDC or other BDCs/[FTA partners] counting towards that 35 percent.³

We recommend that the preference program continue to require that eligible products be imported directly from an eligible BDC and be wholly the growth, product, or manufacture of a beneficiary developing country, or be a new or different article of commerce which has been grown, produced, or manufactured in one or more beneficiary developing countries or U.S. free trade agreement countries.

Trade preference reform should be undertaken in such a way to ensure that the poorest beneficiary countries, particularly LDCs, are not disadvantaged through extension of preferences to new regions and countries. We are developing separate specific recommendations for a comprehensive trade and development strategy for Sub-Saharan Africa

³ This means, for apparel, that if fabric from any source is cut and sewn in a BDC, the full value of the fabric counts toward the 35 percent requirement. The rule of origin would be similar to that in HR 4101.

that we intend to issue in a related paper.

COUNTRY/PRODUCT “GRADUATION”

Issue

Under all existing U.S. preference programs, a BDC may lose benefits (permanently or temporarily) if the President determines that it no longer meets one or more of the eligibility criteria. The process leading to such a determination can be inconsistent and unpredictable, stretching over many years, or informed more by political than objective rationales. In all cases, the process has lacked transparency.

Individual products can lose benefits (permanently or temporarily) only under the GSP program when trade in those products exceeds “competitive need limits” (CNLs) or as the result of action on a petition from a U.S. producer. The CNLs are artificial measures of “competitiveness,” and the annual review process is confusing to both exporters and importers. Deadlines for the implementation of the loss of benefits are unreasonable, and the reasons for determinations are often obscure.

Recommendation

Bearing in mind that the goal is to retain preference benefits for the greatest number of products imported from the greatest number of eligible developing countries based on objective criteria, we recommend that the current country and product “graduation” procedures, particularly those under the GSP program, be significantly changed. In particular, we recommend that clear and reasonable deadlines for action be maintained, and that the President publish, publicly, the reasons for decisions. We recommend that the President work with BDCs, using capacity building if necessary, to assist BDCs in meeting the eligibility criteria or in overcoming any deficiencies in continuing to meet eligibility criteria.

We also recommend that the preference program contain no *a priori* product exclusions, but that, for non-LDC beneficiaries, extension of preference benefits for products currently excluded from GSP be evaluated on a case-by-case basis during a pre-implementation “transition period” described in Attachment B. During this transition period and annually afterward, we recommend a clear and objective process for removing products from eligibility when imported from non-LDCs. We further recommend a policy approach that enables countries that exceed certain development thresholds (such as income levels) to enter into more mature trading relationships, rather than lose trade benefits. The details of our recommendations are provided in Attachment C.

CAPACITY BUILDING

Issue

The United States extends billions of dollars (\$2.3 billion in FY2008) in trade capacity building assistance (TCBA) to developing countries. Unfortunately, this spending is not as successful as it should be in generating sustainable development and increasing value-added production opportunities in many developing countries. The reasons are several. Over 15 U.S. government agencies report devoting some funds to TCBA, with little effective coordination among them or with other donor governments, international institutions, businesses and non-governmental organizations engaged in TCBA efforts. In addition, TCBA is not systematically used to help BDCs take full advantage of U.S. preference programs. There is no formal,

comprehensive assessment of what individual BDCs need to enable them to fully participate in markets and make full and effective use of U.S. preference programs, including meeting eligibility requirements and other requirements, e.g. sanitary and phytosanitary standards.

Recommendation

We recommend that the President designate a new senior official for sustainable/market-led development within the Executive Office of the President who, among other responsibilities, will oversee implementation by the TPSC of the improved preference program and ensure that TCBA efforts spread throughout the government are coordinated and targeted at initiatives that will help BDCs meet the eligibility criteria of the preference program and fully participate in markets, including taking full advantage of the preferences available, with a particular focus on connecting women, smallholder farmers and other small business to market.

We recommend that the President undertake a development review with input from every agency with TCBA programs in place, coordinated by the senior official for sustainable/market-led development, and including input from multilateral lending banks, foundations, NGOs, beneficiary country governments, U.S. consumers (U.S. importers), local businesses and workers and their organizations, and other private sector organizations regarding the effectiveness of current TCBA initiatives and suggesting ways to improve them to target specific products and sectors with the greatest long-term promise for development, including ways to encourage and support building local and regional markets and capacity, especially in Sub-Saharan Africa. The review must include recommendations for adjusting TCBA so that it is effective in enabling beneficiary countries, especially those in Sub-Saharan Africa and other least developed countries, to make full use of the preference program. The President must report to Congress on progress made.

Annually thereafter, we recommend that the President seek input from governments of preference beneficiaries and affected communities, including local business groups, NGOs, worker organizations and others to assess what is working and what is not, and develop capacity building initiatives that are most appropriate for ensuring that beneficiaries are able to use the preference program. The review shall include recommendations for fully utilizing preferences. Again, the President must report to Congress on progress made.

Additional recommendations on (1) specific areas of focus for trade capacity building programs and (2) an integrated “whole of government” approach to support building local and regional capacity in Sub-Saharan Africa will be released separately.

TERM

Issue

To encourage sustainable development and investment, preferences need to be in effect for as long a period of time possible. With the exception of CBI and the QIZs, U.S. preference programs only remain in effect for short periods of time, discouraging U.S. investors and customers from relying on them for stable production or sourcing programs. While a permanent preference program would be the ideal solution, we recognize the concern on the part of some that this could lead some BDCs to be less than enthusiastic supporters of moving the WTO’s Doha Development Round or other trade liberalization efforts to a successful conclusion.

Recommendation

Our consensus recommendation is that the term of the preference program be permanent upon enactment for LDCs and extend for five years to all other BDCs, with automatic renewal for another five years if the President certifies to Congress that BDCs are contributing positively (from the multilateral perspective) to a successful outcome of WTO Doha Development Round trade negotiations. (We note here the distinction between a permanent preference program and the permanency of preference benefits. The latter continue only as long as the BDC meets the programs eligibility criteria.) If the President determines that only a small number of countries are not contributing positively to the successful outcome of the WTO Doha Round, the program would expire only for those countries. Upon implementation of a Doha agreement, preferences for non-LDC BDCs would be automatically extended for 10 years.

We further recommend that existing U.S. preference programs continue until their scheduled expiration dates. Renewal of those preference programs, including African Growth and Opportunity Act, should be considered if beneficiaries believe continuation would be beneficial and seek renewal.

Submitted by
(as of 12/1/09)

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U.S.-Bangladesh Advisory Council

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Attachment A
Beneficiary Eligibility Criteria

1. Threshold Criteria

Level of development: Beneficiary Developing Countries (BDCs) must have per capita income in U.S. dollars of no more than the World Bank's level defining a "high income" country over three consecutive years.

Lesser-developed countries (LDCs) are defined as those countries meeting one of the following two criteria:

- Determination by the United Nations that a country is a least developed country;
- Determination by the President that a BDC is a least developed country for the purposes of the African Growth and Opportunity Act.

No members of the European Union are eligible for any benefits.

No BDC can account for more than 5 percent of total U.S. merchandise imports.

BDCs cannot be a member of a commodity cartel that withholds supplies from trade that thus raises the price of the commodity to an unreasonable level and causes serious disruption to the world economy.

2. Evaluative Criteria

Civil rights/"democracy". The BDC should have established or be making continual progress toward establishing the rule of law, political pluralism and the right to due process, a fair trial and equal protection under the law.

Corruption. The BDC should have in place a system, or be taking steps to have in place a system, to fight bribery and corruption.

Market access. The BDC should provide the United States access to its resources, goods and services markets and be encouraging increased goods and services trade and investment inflows, particularly from the United States and countries in the region; the BDC should not provide preferential treatment to other developed countries that it does not also provide the United States if it causes a "significant adverse effect" on the United States.

Intellectual Property Rights (IPR). The BDC should adequately and effectively protect and enforce IPR.

Investment. The BDC should reduce trade-distorting investment practices and policies and provide adequate compensation for nationalized, expropriated or otherwise seized U.S. property, including patents, copyrights and trademarks.

Labor/human rights. As an initial determination, a BDC should afford or be making continuous progress toward adopting and effectively enforcing laws consistent with the core labor rights listed in the 1998 ILO Declaration on Fundamental Rights at Work and of laws that govern acceptable conditions at work, and should have or be making continuous progress toward creating fair, equitable and transparent tribunals for this purpose. The BDC should not engage in activities that constitute gross violations of internationally recognized human rights.

National security/terrorism. The BDC should not engage in activities that undermine US national security, or aid or otherwise support international terrorism, or support or otherwise perpetuate the supply of illegal narcotics into international markets.

Attachment B

Process for Start-Up Transition Period for Country Product Eligibility

A short (one-two year) transition period is required to allow a smooth transition from existing preference programs to the new preference program. All expiring preference programs must therefore be extended to remain in effect for this transition period and apply to imports from their respective BDCs.

During the transition period,

- The President shall issue regulations for the new preference program.
- The President will determine which BDCs meet the eligibility criteria for preferences, and which BDCs require capacity building assistance to be in a position to meet the eligibility criteria by the end of the transition period.
- Product eligibility for preferences when imported from non-LDC BDCs shall be determined by a “negative list” evaluation conducted by U.S. International Trade Commission at the 8-digit HTS product level of detail, with advice to the President to suspend duty-free treatment for products imported from BDCs other than LDCs. The ITC will focus on the list of all HTS items currently excluded from GSP (either statutorily or because they have exceeded competitive need limits).

After both determinations are made, duty-free benefits under the new preference program go into effect.

Attachment C
Country/Product Change Process

1. Country Changes (applies to *all* BDCs, including LDCs):

The President shall make determinations of each BDC's continued eligibility for preferences through an automatic annual review. Within a reasonable period after the program's effective date, this review will place particular focus on whether countries have both implemented and are enforcing conditions contained in the eligibility criteria. Wherever possible, capacity building resources will be utilized to assist BDCs in meeting the eligibility criteria. In addition, the President shall accept petitions on an annual basis to initiate case-by-case reviews of an individual BDC's compliance with eligibility criteria, and the decision to initiate or not initiate a review will be published within 30 days with explanations for the reasons for the decision. An out-of-cycle review would be possible in the event of an egregious violation of eligibility criteria that arises after the regular review cycle has begun. Input from all interested stakeholders will be solicited, public hearings held. In deciding whether to suspend or revoke beneficiary status in whole or in part, the President will consider whether the BDC's ability to meet the eligibility criteria could be assisted with greater or more specific capacity building assistance. The President will publish his/her decision in the Federal Register, with a detailed explanation of the reasons behind the decision, within one year of the decision to accept the petition for review. The President may decide to postpone suspension or terminate benefits in whole or in part if he/she believes additional capacity building assistance will be effective in assisting the BDC in meeting the eligibility criteria within a reasonable period of time. Further, if a country is approaching the per capita income threshold eligibility criteria limit, the President may decide to continue to extend benefits to the BDC if the BDC agrees to undertake/implement (on an MFN basis) new trade liberalization policies or trade preferences for LDCs. If instead the recommendation is to proceed with the suspension or termination of benefits, in whole or in part, that change in duty-free status will not become effective before 12 months from publication in the Federal Register.

Countries that have benefits suspended or revoked in whole or in part can ask to have them restored if they can show they have subsequently made the changes necessary to meet the eligibility criteria. The process for reinstatement of benefits shall be initiated by petition on an annual basis, provide for input from all interested stakeholders, allow for a public hearing, and result in a decision that is published within one year in the Federal Register and includes details of the reasons for the decision.

2. Product Changes (applies to BDCS that are *not* LDCS):

Annually, the President shall accept petitions to suspend or terminate the extension of preferences for a specific product (at the 8-digit HTS level) from a specific BDC. The petition must provide information that shows that imports of the product from the BDC are having a significant adverse impact on producers/workers in the United States of a like or directly competitive product. The decision to begin or not begin a review of the petition will be published within 30 days in the Federal Register with reasons for the decision. Input from interested stakeholders will be accepted, in writing and at a public hearing. In addition to the impact on U.S. producers/workers of the continuation of preferences for a specified product, the President will also consider the likely impacts of suspension or termination of preferences, in whole or in part, on the BDC, other BDCs, LDCs, or non-beneficiary countries; and on U.S. consumers. Any agency reports prepared to advise the President will be detailed and public. The President shall publish his/her decisions, with the detailed reasons for the decisions, in the Federal

Register within 12 months of acceptance of the petition for review, with an effective date of loss of preferences 12 months from the date of publication in the Federal Register.

The President may restore duty-free treatment to products that have lost that treatment if interested stakeholders can show that restoration will no longer adversely affect U.S. producers or workers and will benefit the BDC's overall economic development and the U.S. national economic interest. The process for reinstatement of benefits shall be initiated by petition on an annual basis, provide for input from all interested stakeholders, allow for a public hearing, and result in a decision that is published within one year of the beginning of the investigation in the Federal Register and includes details of the reasons for the decision.