Vietnam's Eligibility to Receive Trade Benefits under the U.S. Generalized System of Preferences

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I. Introduction

In May 2008, Vietnam officially requested to receive trade benefits under the U.S. Generalized System of Preferences (GSP) program as a beneficiary developing country (BDC). Ultimately, providing Vietnam with GSP benefits would likely benefit both the U.S. and Vietnamese economies. However, Vietnam’s compliance with the U.S. GSP eligibility criteria is problematic. In particular, Vietnam’s protections for both intellectual property rights and worker rights are inadequate. Until Vietnam makes significant progress on these issues, it is unlikely that it will receive U.S. GSP benefits.

The first section of this paper gives a brief background on the development and the legal basis of GSP programs within the World Trade Organization (WTO). The next section provides a summary of the U.S. GSP program and an overview of its country and its product eligibility requirements. The final section, initially providing a background on Vietnam’s trade and economy, analyzes Vietnam’s prospects for eligibility under the U.S. GSP program.

II. Generalized System of Preferences Background

Developing countries’ interests in the GATT/WTO system have evolved over the years. For a long time, developing countries sought an exception to the Most Favored Nation (MFN) principle so that they could receive preferential treatment. It was not until the Enabling Clause was adopted in 1979 that developing countries were allowed significant differential and more favorable treatment under the GATT/WTO system. The

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Enabling Clause provides the legal basis for national GSP programs under which
developing countries are provided trade preferences.

**A. Developing Countries and the WTO**

There has long been a tension between developed and developing countries’
interests in the GATT/WTO system. Developing countries have traditionally been
unsatisfied with the GATT/WTO system and have felt that they have had only limited
leverage and influence in decision-making. In particular, developing countries have been
frustrated because the GATT/WTO rules have failed to address some of their major
interests concerning agriculture, textiles, and clothing. As a result, many developing
countries were reluctant to join the GATT/WTO system up until the 1980s. They limited
imports by imposing high tariffs and quotas, and were generally opposed to liberalizing
their trade policies.

In the 1980s, after having observed the success of open trade policies in other
countries, more developing countries changed their outlook, started to liberalize their
trade policies, and joined the WTO system. Consequently, the multilateral structure of the
WTO has enabled them to leverage their numbers in advancing their interests in trade
negotiations.

**B. The Most Favored Nation Principle**

The Most Favored Nation (MFN) principle is one of the cornerstones of
GATT/WTO trade law. It is enshrined in Article I:1 of GATT and obligates members to
treat like products of all other member countries no worse than they treat the imports of
their most favored trading partner.\textsuperscript{2} This fundamental principle prohibits members of GATT/WTO from taxing imports of the same item from different countries at different rates. Consequently, it also prohibits preferential treatment for developing countries.

Nevertheless, developing countries have sought special treatment that would improve their access to and competitiveness in developed countries’ markets, as well as promote their economic development through trade. They have persisted in arguing that equal treatment of unequal partners is unfair, and that the MFN principle unreasonably prevents richer countries from reducing tariffs for developing countries.

Eventually, several GATT articles were designed to provide developing countries with particular trade privileges. However, the first of these articles have turned out to be fairly ineffective: Article XVIII has only rarely been invoked, and Articles XXXVI, XXXVII, and XXXVIII (added to GATT as Part VI) seem to operate more as mere recommendations than as legally binding provisions.

\textbf{C. The Enabling Clause}

Effectively, it was not until the Enabling Clause was adopted as part of the Tokyo round in 1979 that developing countries were granted significant differential and more favorable treatment under GATT. Paragraph 1 of the Enabling Clause explicitly provides an exception to the MFN principle, asserting that:

\begin{quote}
Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.\textsuperscript{3}
\end{quote}

\begin{footnotes}

\footnotetext{3} Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter Enabling Clause], http://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm
\end{footnotes}
Ultimately, the Enabling Clause allows GATT/WTO members to provide developing countries with trading preferences that would otherwise violate the MFN principle. The Enabling Clause provides the legal basis for creating formal GSP programs, which establish rules on exactly how these trade preferences will be provided. Paragraph 2(a) and footnote 3 of the Enabling Clause provide that a GSP program may only give preferential treatment in accordance with the Preamble to the 1971 Waiver Decision. Consequently, preferential treatment under the Enabling Clause must be “generalized, non-reciprocal and non discriminatory [and] beneficial to the developing countries.”

Over the years, more than twenty-five countries have established their own GSP programs, each program consisting of different beneficiaries, products, and types of preferences granted. Currently there are thirteen distinct GSP programs provided by Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russia, Switzerland, Turkey, and the United States, respectively.

III. Introduction to the U.S. GSP

Simply providing aid to developing countries can be problematic: aid may be wasted without good governance, it may exacerbate problems of inflation, and it may create an unsustainable debt burden for the recipient country. Thus, economists and politicians have increasingly advocated development through trade rather than aid. In line with this approach, the U.S. has made use of its GSP program in order to encourage

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1 Enabling Clause, para 2(a).
growth in developing countries through trade. At the same time, the GSP program
benefits the U.S. economy because it lowers costs for American industry and consumers.⁸

The United States first implemented its GSP program in 1976, and has been periodically renewing its program since then.⁹ The program provides preferential, duty-free treatment for 3,448 products from 131 beneficiary developing countries (BDCs). Furthermore, 44 countries have been designated as least developed beneficiary developing countries (LDBDCs), and are given duty-free treatment for an additional 1,434 products.¹⁰

**A. Country Eligibility**

The President ultimately decides which countries are eligible for GSP treatment.¹¹ Title V of the 1974 Trade Act (“the GSP statute”) provides the guidelines for eligibility under the U.S. GSP program. The GSP statute outlines various factors to be considered before granting a country BDC status, including several economic factors¹² and certain mandatory and discretionary eligibility criteria.¹³

First, in modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account several economic factors, including the anticipated effects on the economic development of the country, the country’s GSP

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¹³ 19 U.S.C. § 2462(b) and (c).
treatment from other developed countries, the likely impact on U.S. producers, and the country’s competitiveness with respect to eligible products.\(^\text{14}\)

Second, the mandatory criteria exclude from eligibility: communist countries, certain export cartel members, countries that expropriate U.S. property, countries that fail to recognize arbitral awards in favor of U.S. citizens, countries that aid and abet international terrorism, and countries that don’t afford internationally recognized worker rights and have not eliminated the worst forms of child labor.\(^\text{15}\)

Finally, the President may also consider discretionary criteria, such as the desire of the country to be a GSP beneficiary, the level of economic development of the country, the country’s GSP treatment from other developed countries, and the country’s assurances of equitable and reasonable access to its markets, protection of intellectual property rights, actions taken to reduce trade distorting investment practices and barriers to trade in services, and steps taken to protect worker rights.\(^\text{16}\)

**B. Eligible Products**

Total imports entering the U.S. under the U.S. GSP program in 2008 were valued at approximately $29.8 billion. The top U.S. GSP imports in 2008, by trade value, were crude petroleum oils and oils from bituminous minerals (which are only eligible for duty-free import from LDBDCs), biodiesel, certain ferrochromium, silver jewelry valued over $18 per dozen, gold necklaces and neck chains, new radial tires for vehicle cars,


\(^{15}\) 19 U.S.C. § 2462(b)(2).

\(^{16}\) 19 U.S.C. § 2462(c).
aluminum alloys, gold and platinum jewelry (not including necklaces and neck chains), and methanol.\textsuperscript{17} 

There are a number of safeguards in the U.S. GSP system that protect U.S. producers’ interests. To begin with, certain products are deemed “sensitive” and are excluded from GSP eligibility, including certain textiles, watches, electronics, steel articles, footwear, handbags, luggage, glass products, and agricultural products.\textsuperscript{18} In addition, the GSP statute establishes “competitive needs limitations” (CNLs) that automatically suspend GSP eligibility if imports of a particular product from a country reach certain thresholds.\textsuperscript{19} Finally, a BDC country may be “graduated” and removed from GSP eligibility if it has become sufficiently developed or competitive.\textsuperscript{20}

\textbf{IV. Vietnam’s Eligibility Under The U.S. GSP}

Although Vietnam and the U.S. have had a difficult past, times have changed. More than thirty years after the end of the Vietnam War and more than fifteen years since the fall of the Soviet Union and the end of the Cold War, the relationship between the two countries has improved immensely. In this section, first follows a brief review of Vietnam’s economic and political background, and then an in-depth analysis of Vietnam’s eligibility under the U.S. GSP program.

\begin{itemize}
  \item \textsuperscript{18} 19 U.S.C. § 2463(b) (2006).
  \item \textsuperscript{19} 19 U.S.C. § 2463(c).
  \item \textsuperscript{20} 19 U.S.C. § 2462(e).
\end{itemize}
A. Background on Vietnam

1. Evolution of Vietnamese Politics, Trade Policy, and Economy

The Vietnam War raged on for many years between North Vietnam, supported by its communist allies, and South Vietnam, supported by the United States and other allies. When Saigon fell on April 30, 1975, to the communist forces of North Vietnam, the war ended, and Vietnam was reunified as a communist state.

Once the United States withdrew from Vietnam, it imposed a trade embargo on Vietnam under the Trading with the Enemy Act of 1917 (TWEA),\(^\text{21}\) and cut off all trade.\(^\text{22}\) Vietnam was isolated from the U.S. and its allies and became dependent upon the Soviet Union and its communist allies for trade.\(^\text{23}\) Vietnam also received billions of dollars a year in economic and military aid from the Soviet Union.\(^\text{24}\)

In the early 1980s, the Vietnamese government collectivized land ownership and repressed private business. Vietnam had been devastated by the many years of war, and these new policies only exacerbated its economic problems. Industries that had been stable began to fail, and the population was pushed to the brink of famine.\(^\text{25}\) As the Soviet Union’s economy also began to struggle, it cut its aid to Vietnam.\(^\text{26}\)

In the midst of this crisis and increasing isolation, the Vietnamese government ushered in a set of dramatic reforms in the mid-1980s, called “Doi Moi” (renewal). The Doi Moi reforms were similar to the reforms that had been introduced by Deng Xiaoping.

\[^{21}\text{50 U.S.C. app. §§ 1-44 (1994).}\]
\[^{22}\text{A Would-Be Tiger: Assessing Vietnam’s Prospects for Gaining Most Favored Nation Status from the United States, 38 Wm. & Mary L. Rev. 1583, 1588 (May 1997).}\]
\[^{23}\text{William J. Duiker, Vietnam: Revolution in Transition 211 (2d ed. 1995).}\]
\[^{24}\text{U.S. Department of State, Background Note: Vietnam, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).}\]
\[^{26}\text{A Would-Be Tiger: Assessing Vietnam’s Prospects for Gaining Most Favored Nation Status from the United States, 38 Wm. & Mary L. Rev. 1583, 1588 (May 1997).}\]
in China just a few years earlier.\textsuperscript{27} After China opened its economy in 1978 and began focusing on export production, it experienced dramatic growth.\textsuperscript{28} Similarly, under the Doi Moi reforms, the Vietnamese government abandoned central state planning, permitted free-market enterprises, gave farmers greater control over what they produced, opened up the country to foreign investment, and began actively promoting export-led growth.\textsuperscript{29}

The Soviet Union collapsed in 1991, and Vietnam continued to take steps to open up its markets and expand its economic cooperation with the rest of the international community. Vietnam joined the International Monetary Fund (IMF), the World Bank, and the Asian Development Bank in the 1990s; it joined the Association of Southeast Asian Nations (ASEAN) in 1995, and the Asia-Pacific Economic Cooperation forum (APEC) in 1998.\textsuperscript{30}

Relations between the U.S. and Vietnam also improved. The U.S. finally lifted its trade embargo on Vietnam in 1994; Vietnam then entered into a Bilateral Trade Agreement (BTA) with the United States in 2001, and was granted Normal Trade Relations (NTR) status by Congress in 2006. Reforms that Vietnam made in compliance with the U.S. BTA—reforms on trade in goods and services, better enforcement of intellectual property rights, greater protections for investments, and increased transparency—helped Vietnam to subsequently join the WTO in 2007. In compliance with WTO requirements, Vietnam has revised most of its trade and investment laws, has opened up big sectors of its economy to foreign investors and exporters, and has become

\textsuperscript{30} U.S. Department of State, \textit{Background Note: Vietnam}, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).
even more integrated into the global economy. Furthermore, the U.S and Vietnam also concluded a Trade and Investment Framework Agreement (TIFA) in 2007.\textsuperscript{31}

2. Vietnam’s Current Trade and Economy

These reforms in Vietnam have increased exports dramatically and have helped to spur remarkable growth. In fact, exports accounted for a massive 72\% of the Vietnamese gross domestic product in 2008. Because of this boom in exports, Vietnam’s annual gross domestic product has been growing by an impressive 6\% to 8\% every year since 1990.\textsuperscript{32}

Vietnam’s major exports include garments and textiles, crude oil, footwear, fishery and seafood products, rice (Vietnam is now the world’s second largest exporter of rice), wood products, coffee, rubber, and handicrafts.\textsuperscript{33} Once Intel opens its new one billion dollar factory, Vietnam will also begin exporting microchips.\textsuperscript{34}

Vietnam’s principal imports include machinery, oil and gas, iron and steel, garment materials, and plastics.\textsuperscript{35} Many of these primary inputs are needed for the production of Vietnam’s exports. The sum of Vietnam’s imports and exports is 160\% of its GDP, making Vietnam’s economy one of the most open in the world.\textsuperscript{36} It should be noted, however, that despite Vietnam’s historic level of exports in 2008 of $62.9 billion, it ran a trade deficit of $17.5 billion.\textsuperscript{37}

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.

\textsuperscript{35} U.S. Department of State, Background Note: Vietnam, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).
\textsuperscript{37} U.S. Department of State, Background Note: Vietnam, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).
After implementing these reforms, trade between Vietnam and the U.S. has also burgeoned, and Vietnam has become a reliable and valuable trading partner to the U.S.\textsuperscript{38} In fact, Vietnam’s exports to the U.S. increased 900\% from 2001 to 2007.\textsuperscript{39} Vietnamese exports to the U.S. have been steadily increasing and came to a total of $12.9 billion in 2008.\textsuperscript{40} The U.S. is now Vietnam’s third biggest trading partner, and has become Vietnam’s biggest export market.\textsuperscript{41} Vietnam’s top exports to the U.S. currently include clothing and textiles, furniture, footwear, and crude oil.\textsuperscript{42}

Despite Vietnam’s reforms and impressive growth, it remains a very poor country. Vietnam is made up of about 86 million people with a gross domestic product of only $84.98 billion in 2008.\textsuperscript{43} According to the most recent World Bank report, the gross national income (GNI) per capita for Vietnam was only $790 in 2007. As a reference, the U.S. GNI per capita in 2007 was estimated to be $46,040.\textsuperscript{44}

The U.S. has extended BDC status under its GSP to 132 countries.\textsuperscript{45} However, many of these countries are more developed and have a higher GNI per capita than Vietnam. For example, Croatia, Turkey, and Thailand have all been granted BDC status, although each of these three countries has a much higher GNI per capita. In 2007, Croatia’s GNI per capita was estimated to be $10,460, Turkey’s $8,020, and Thailand’s

\begin{itemize}
\item\textsuperscript{38} Id.
\item\textsuperscript{40} U.S. Department of State, \textit{Background Note: Vietnam}, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).
\item\textsuperscript{43} U.S. Department of State, \textit{Background Note: Vietnam}, http://www.state.gov/r/pa/ei/bgn/4130.htm (March 2009).
\item\textsuperscript{45} USTR, \textit{General System of Preferences}, http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html (last accessed May 3, 2009).
\end{itemize}
$3,400.\textsuperscript{46} In fact, even thirteen countries\textsuperscript{47} designated as “least developed” BDCs (LDBDCs) under the U.S. GSP program had a higher estimated GNI per capita in 2007 than Vietnam.\textsuperscript{48}

Moreover, the GSP statute states that a country should be “graduated” and removed from GSP eligibility once it becomes a “high income” country (a GNI per capita level defined by the World Bank\textsuperscript{49}). This graduation level is currently $11,456,\textsuperscript{50} which is over fourteen times Vietnam’s GNI per capita.

Millions of Vietnamese families have very low living standards. In 2007, an estimated 14.8% of the population still struggled below the poverty line.\textsuperscript{51} In fact, 25% of children under the age of five suffer from malnutrition.\textsuperscript{52} Furthermore, the recent financial crisis and reduction in American consumption threaten to cut much of Vietnam’s export-led economic growth. This slowdown will likely increase unemployment and corporate bankruptcies, decrease foreign investment, and exacerbate poverty in Vietnam.\textsuperscript{53}

\textbf{B. Analysis of Vietnam’s GSP Eligibility}

\textsuperscript{47} Angola, Bhutan, Cape Verde, Djibouti, Equatorial Guinea, Kiribati, Lesotho, Mauritania, Samoa, Sao Tome and Principe, Vanuatu, Republic of Yemen, and Zambia
\textsuperscript{49} 19 U.S.C. § 2462(e).
The President ultimately decides which countries are eligible for GSP treatment.\textsuperscript{54} Title V of the 1974 Trade Act (“the GSP statute”) provides the guidelines for eligibility under the U.S. GSP program. The GSP statute outlines various factors to be considered before granting a country BDC status, including (1) several economic factors\textsuperscript{55} and (2) certain eligibility criteria.\textsuperscript{56}

1. Economic Factors

In modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account: (a) the anticipated effects on the economic development of the country; (b) the country’s GSP treatment from other developed countries; (c) the likely impact on U.S. producers; and (d) the country’s competitiveness with respect to eligible products.\textsuperscript{57}

a. Effect on Economic Development of the Country

First, we consider the effect that BDC status would have on furthering the economic development of the beneficiary country through the expansion of its exports. Much of Vietnam’s recent export-led growth has been dependent upon the competitiveness of Vietnamese goods in U.S. markets. In fact, the U.S. has become Vietnam’s biggest export market.\textsuperscript{58}

If Vietnam received U.S. GSP benefits, a number of Vietnamese products would be eligible for duty-free entry and would sell at even more competitive prices in U.S. markets. Eligible Vietnamese products would finally compete on a level playing field

\textsuperscript{54} 19 U.S.C. § 2462(a)(1).
\textsuperscript{55} 19 U.S.C. § 2461.
\textsuperscript{56} 19 § U.S.C. § 2462(b) and (c).
\textsuperscript{57} 19 U.S.C. § 2461.
with the duty-free products from all the other countries that currently receive GSP benefits. Plus, eligible Vietnamese products would gain an advantage over products from countries outside the U.S. GSP system, like China. Ultimately, GSP benefits would provide an added boost to Vietnam’s exports that would help to encourage further economic development and alleviate poverty.

There are over 3,400 tariff lines in the U.S. tariff schedule under which Vietnamese products would be eligible for GSP benefits.\(^{59}\) Vietnamese ceramic and porcelain homewares, import non-sensitive electronics (such as space heaters, loudspeakers, and audio frequency products), precious metal and imitation jewelry, sporting equipment, wooden tableware, and office supplies would all receive beneficial GSP treatment.\(^{60}\) In addition, some of Vietnam’s fastest growing, top exports to the U.S. (such as soaps, plastics and articles of plastic, machinery, and electrical machinery) would be eligible for duty-free GSP treatment, and may experience even greater growth if Vietnam were to acquire BDC status. Vietnam’s machinery and electrical machinery industries may also flourish under the U.S. GSP system, since the Vietnamese government has already been active in promoting these industries.\(^{61}\)

Moreover, Vietnam’s economy is currently vulnerable to economic shocks because its exports are concentrated in a relatively few number of industries and products.\(^{62}\) GSP treatment would encourage Vietnamese industry to shift into producing goods that are eligible for preferential treatment. This would help to expand and diversify


\(^{62}\) U.S. Census Bureau, \textit{U.S. Imports from Vietnam from 2004 to 2008 By 5-digit End-Use Code},
Vietnam’s exports, which would make the Vietnamese economy more resilient to economic shocks and ultimately promote development.

**b. GSP Treatment From Other Developed Countries**

Next, we consider whether other major developed countries are extending GSP benefits to the country seeking U.S. GSP status. Because of Vietnam’s low level of economic development, it receives GSP benefits from a number of other major developed countries. In fact, the European Union, Canada, Japan, New Zealand, Norway, Switzerland, Australia, and even Turkey and Russia have all extended GSP benefits to Vietnam.\(^63\) The U.S. stands alone as the only major developed country with a GSP program that has not extended these benefits to Vietnam.\(^64\)

**c. Impact on U.S. Producers**

We also consider the anticipated impact of such action on U.S. producers of like or directly competitive products. It is unlikely that designating Vietnam as a BDC under the U.S. GSP would have much of a detrimental effect on U.S. producers.

U.S. imports from Vietnam came to a total of $12.9 billion in 2008.\(^65\) However, this is only a tiny fraction of entire U.S. imports, which came to a total of $2.19 trillion in 2008. Moreover, U.S imports from Vietnam are dwarfed by the U.S. GDP, which was estimated to be about $14.3 trillion in 2008.\(^66\) Thus, all U.S. imports from Vietnam count for less than 0.6% of total U.S imports, and all U.S. imports from Vietnam are less than 0.1% of the total U.S. GDP.

Furthermore, certain products are deemed “sensitive” and are excluded from GSP eligibility, including most textiles, watches, electronics, steel articles, footwear, handbags, luggage, flat goods, work gloves, glass products, and agricultural products.\(^67\) In fact, the top U.S. imports from Vietnam (garments and textiles, furniture, footwear, and crude oil)\(^68\) will not gain much advantage through the U.S. GSP system because they fall under these “sensitive” product categories as delineated in the GSP statute.\(^69\) Moreover, crude petroleum is only eligible for duty-free import from LDBDC countries.\(^70\) Thus, the GSP system safeguards U.S. producers from the most popular Vietnamese imports.

Ultimately, extending BDC status to Vietnam should benefit the U.S. economy. Vietnamese imports that are eligible for GSP treatment would enter the U.S. markets duty-free, allowing them to compete with like duty-free products from other BDCs. This increase in competition within U.S. markets should shift production towards those BDC countries with a comparative advantage, driving prices down to the benefit of U.S. consumers and businesses.

Duty-free imports under the U.S. GSP program currently help U.S. consumers save millions of dollars annually on a broad range of products. Indeed, many U.S. businesses are able to benefit greatly from the GSP program by obtaining cheaper raw materials, components, and machinery. Savings on imports from GSP countries could be especially helpful for U.S. businesses that have been hit by this latest recession.

\(^{67}\) 19 U.S.C. § 2463(b).
\(^{69}\) 19 U.S.C. § 2463(b).
d. Competitiveness With Respect to Eligible Products

Finally, we consider the extent of the country’s competitiveness with respect to eligible products. As noted above, the Vietnamese products that would be eligible for GSP treatment are not very competitive with U.S. products and are not currently imported into the U.S. in large numbers.\(^{71}\)

Besides, the GSP statute establishes “competitive needs limitations” (CNLs) that would restrict the eligibility of any Vietnamese products if they become overly competitive. CNLs automatically suspend GSP eligibility when imports of a product from a particular country reach a certain threshold ($135 million in 2008) or when 50% or more of total U.S. imports of a particular product come from a single country.\(^{72}\)

Moreover, if U.S. producers are negatively affected by particular GSP imports, they may petition the USTR to remove these products from GSP eligibility.\(^{73}\) For instance, in June 2008, certain gold jewelry from Turkey and gold necklaces from India were stripped of GSP eligibility because they had become overly competitive under the U.S. GSP system.\(^{74}\)

As a BDC, Vietnam would have a competitive advantage over countries outside the U.S. GSP program. In particular, granting GSP benefits to Vietnam may also make certain Vietnamese goods more competitive with certain Chinese products in U.S. markets. Ultimately, this could help to partially offset the rising trade deficit that the U.S. has with China.


\(^{72}\) 19 U.S.C. § 2463(c).

\(^{73}\) 15 C.F.R. 2007.0(b).

2. Eligibility Criteria

In order to encourage countries to strengthen protections for various rights, the U.S. only provides GSP benefits when certain standards for eligibility are met. The most problematic GSP eligibility criteria for Vietnam include (a) the prohibition on communism, (b) the required protections of intellectual property rights, and (c) the required protections of worker rights.

a. Prohibition on Communism

The mandatory eligibility criteria prohibit the President from designating any country as a GSP beneficiary if it engages in certain activities. The first prohibition in this section provides that:

1. A GSP beneficiary may not be a Communist country, unless such country receives Normal Trade Relations (NTR) treatment, is a WTO member and a member of the International Monetary Fund (IMF), and is not dominated by international communism;\(^{75}\)

To begin with, one might debate whether or not Vietnam is a “Communist country.” First of all, the Vietnamese government officially refers to itself as a “Socialist Republic” rather than as a “Communist country.” Furthermore, it has transitioned to a market economy, it permits private enterprise, and it protects private property rights. On the other hand, Vietnam remains a one-party state run by the Communist Party of Vietnam (VCP), and the government continues to exert a great amount of control over the economy.

Presuming that Vietnam is a “Communist country,” it should still be able to obtain GSP benefits because it meets the requirements of the exception laid out in the statute above. Vietnam was granted NTR status by Congress in 2006, it became a

\(^{75}\) 19 U.S.C. § 2462(b)(2).
member of the WTO in 2007, and it joined the IMF in the 1990s. Finally, the requirement that a country not be “dominated by international communism” seems anachronistic, considering that the Soviet Union collapsed and the Cold War ended over fifteen years ago. Nevertheless, Vietnam has made effective reforms to open up its markets and has integrated into the rest of the global economy. Ultimately, even if Vietnam is communist, this should no longer prevent it from acquiring BDC status under the U.S. GSP.

b. Required Protections of Intellectual Property Rights

Next, we consider the extent to which the country provides “adequate and effective” protection of intellectual property rights. The Senate Finance Committee Report explained that:

To determine whether a country provides “adequate and effective means,” the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals effectively to enforce their intellectual property rights on their own behalf and whether the country’s system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.

The government of Vietnam has made notable progress in passing legislation to protect intellectual property rights. Since 1949, Vietnam has been a party to the Paris Convention for the Protection of Industrial Property (“Paris Convention”) and the Madrid Agreement on International Registration of Marks (“Madrid Agreement”). Vietnam has

also been a member of the World Intellectual Property Organization (WIPO) since 1976.\textsuperscript{78}

When Vietnam entered into the BTA with the U.S. in 2001, it made important commitments to protect intellectual property and to meet the basic standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO (“TRIPS”) in the ensuing two years.\textsuperscript{79} Since then, Vietnam has become an official party to a number of major intellectual property treaties, including the Berne Convention for the Protection of Literary and Artistic Works (“Bern Convention”) in 2004; the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (“Geneva Convention”) in 2005; and the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (“Brussels Convention”), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (“Madrid Protocol”), and the International Convention for the Protection of New Varieties of Plants (“UPOV Convention”) in 2006.\textsuperscript{80}

Finally, upon joining the WTO in 2007, Vietnam became a party to the TRIPS Agreement. Just after joining TRIPS, Vietnam also became a member to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“Rome Convention”) in 2007.\textsuperscript{81}

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Alongside these international agreements and commitments, Vietnam has also passed recent national legislation to strengthen protections for intellectual property rights. In particular, Vietnam passed a comprehensive Intellectual Property Law in 2005 that included protections for copyrights, industrial property rights (consisting of trademarks, inventions and industrial designs), and rights to plant variety. A new Civil Code was also passed in 2005. Together, this Intellectual Property Law and this new Civil Code replaced previous legislation and formed a broad and consolidated system of regulations on intellectual property. Various other decisions and decrees concerning copyrights, industrial property, plant varieties, and the enforcement of intellectual property rights have also been passed since then and have built upon this framework. Furthermore, Vietnamese law provides administrative procedures and remedies, compensation under civil procedures, and recourse to criminal prosecution under the 1999 Criminal Code.82

Despite these important legislative steps, enforcement of intellectual property rights remains a problem in Vietnam. Consequently, Vietnam remains on the U.S. Trade Representative Special 301 “Watch List.”83 Trademark infringement and copyright piracy are particularly prevalent, and Internet piracy has been on the rise. In fact, according to the International Intellectual Property Alliance (IIPA), 83% of business software and 95% of records and music in Vietnam were pirated copies in 2008. Total U.S. trade losses due to copyright piracy in Vietnam were estimated to be approximately $123 million.84 For the most part, the Vietnamese government has not proven to be very effective at

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deterring these violations of intellectual property rights and the penalties remain too lenient.

Vietnam is not alone in its problems of enforcing intellectual property rights. In fact, many other developing countries that receive U.S. GSP benefits also have significant problems enforcing intellectual property rights. Along with Vietnam, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Jamaica, Lebanon, Peru, the Philippines, Turkey, Ukraine, and Uzbekistan are all on this 2009 “Watch List,” yet unlike Vietnam, they all receive U.S. GSP benefits. In fact, Algeria, Argentina, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela have all earned the dishonorable distinction of being placed on the “Priority Watch List,” yet they continue to receive GSP benefits. In Indonesia, for example, it was estimated that 86% of business software and 95% of records and music had been pirated. Total U.S. trade losses due to copyright piracy in Indonesia were estimated to be approximately $302 million in 2008. In an even more extreme case, Russia was estimated to have lost the U.S. almost $2.8 billion due to copyright piracy.

Although many countries retain GSP benefits despite weak protection of intellectual property rights, prevalent trademark infringement and copyright piracy have resulted in refusals of GSP benefits in the past. For example, in 2001, Ukraine’s GSP benefits were suspended because it had become the largest producer and exporter of pirated CDs and DVDs. Then, in 2005, Ukraine passed legislation to strengthen its licensing regime and its enforcement efforts in order to prevent the illegal manufacturing and trade of these products. After this legislation was passed, the government of Ukraine

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actively inspected plants that were licensed to manufacture CDs and DVDs, it conducted raids on distributors of pirated products, and it imposed fines against violators. As a result, piracy of CDs and DVDs in Ukraine was reduced, and Ukraine’s GSP benefits were reinstated in 2006.\textsuperscript{87} Vietnam could learn from Ukraine’s experience.

Ultimately, Vietnam must take a number of steps to better protect intellectual property rights. Like the Ukrainian government, the Vietnamese government should undertake a concerted anti-piracy campaign, and it should impose higher fines and tougher criminal sanctions against large-scale producers and distributors of pirated goods. Vietnam should also enact effective regulations, and it should better utilize business license laws and the IP Code to improve its CD/DVD piracy problem. Furthermore, in order to better address Internet piracy, which has increasingly become an issue in Vietnam, the Vietnamese government should become a party to the WIPO Copyrights Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).\textsuperscript{88}

c. Required Protections of Worker Rights

Finally, we must consider efforts that Vietnam has made to afford “internationally recognized worker rights,”\textsuperscript{89} which includes freedom of association, collective bargaining, prohibition of forced labor or the worst forms of child labor, a minimum age for child labor, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.\textsuperscript{90}

\textsuperscript{89} 19 U.S.C. § 2462(b)(2)(G).
\textsuperscript{90} 19 U.S.C. § 2467(4).
Since the Doi Moi reforms of the mid-1980s, some significant advancements in worker rights have been made in Vietnam. In 1992, Vietnam rejoined the International Labor Organization (ILO). A comprehensive Labor Code was then created in 1994 with ILO assistance, and it has been updated periodically since then. This Labor Code establishes a minimum wage, maximum working hours, maternity leave, and overtime pay, it provides workers the right to strike, and it requires that trade unions be established in all enterprises.\(^9\) Vietnam has also ratified eighteen ILO Conventions, including five of the eight core conventions of the ILO, covering compulsory labor, income inequality, discrimination, minimum age, and the worst forms of child labor.\(^2\)

Despite these progressive reforms, a shortage of qualified staff, training, and funds make implementation and enforcement of many of these labor laws difficult.\(^3\) More important, Vietnam’s labor laws fall short of several key internationally recognized worker rights. In particular, (i) the right to freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike are problematic and must be addressed.

**i. **Freedom of Association

Convention 87 on the freedom of association is one of the core ILO conventions. It has been ratified by 149 countries, but not by Vietnam. This convention provides all workers and employers the right to form and join organizations of their own choosing without prior authorization. Of the 131 U.S. GSP beneficiary countries, only 19 have not ratified this convention, including Afghanistan, Bhutan, Brazil, East Timor, Guinea-

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Bissau, India, Iraq, Jordan, Kenya, Lebanon, Nepal, Oman, Solomon Islands, Somalia, Thailand, Tonga, Tuvalu, and Uzbekistan.\(^94\)

Vietnam currently fails to permit independent labor unions. Vietnamese workers are not free to join or form unions unless they are affiliated with and have been approved by the party-controlled Vietnam General Confederation of Labor (VGCL). The freedom of association cannot exist in any meaningful way unless the workers are legally permitted to establish and affiliate with organizations that are free from government control. In spite of the government’s policy, hundreds of unaffiliated labor associations have been organized by workers who have felt that they were not well represented by the official union.\(^95\) However, these organizations do not have the legal protections that officially recognized unions have.\(^96\) Indeed, according to Human Rights Watch, members of independent trade unions have been targeted and unfairly harassed, intimidated, and arrested.\(^97\)

**ii. The Right to Collective Bargaining**

ILO Convention 98 is a core ILO convention that provides the right to collective bargaining, prohibits discrimination against union members, and requires governments to set up a system for voluntary collective bargaining between employers and employees. This core ILO convention has been ratified by 159 countries, but it has not been ratified

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by Vietnam. Of the 131 U.S. GSP beneficiary countries, only 10 have not ratified this convention, including Afghanistan, Bhutan, East Timor, India, Oman, Solomon Islands, Somalia, Thailand, Tonga, and Tuvalu.98

Under Article 153 of the Vietnamese Labor Code, the VGCL is required to organize a union within six months of the creation of any new business. However, only 85% of state-owned enterprises, 60% of foreign-invested enterprises, and 30% of private enterprises have been unionized.99

Furthermore, only unions affiliated with the VGCL have the right to bargain collectively on behalf of workers. The representatives of these VGCL-affiliated unions, however, often have close ties to management or are management officials themselves. Consequently, many of these unions do not adequately represent the workers’ interests and do not effectively bargain with management.100

iii. The Right to Strike

Vietnam’s Labor Code allows VGCL-affiliated unions the right to strike under certain conditions. However, there are also significant restrictions to this right. To begin with, there is an extensive and cumbersome process of mediation and arbitration that must be completed before a strike can take place legally.101

In addition, a very high percentage of workers are required to approve of a strike before it may be legally organized. Under Vietnamese law, at least 50% of workers in an

enterprise with less than 300 workers must vote in favor of a strike before it may be
legally called. In fact, if an enterprise has 300 workers or more, at least 75% of workers
must vote in approval of the strike before it may be legally called. 102

Furthermore, the labor code prohibits strikes in 54 occupational sectors and in
certain businesses that serve the public, and the government prohibits strikes in
businesses that it considers to be important to the national economy and defense. This is a
sweeping restriction that prohibits strikes in enterprises involved in electricity production,
post and telecommunications, banking, public works, the oil and gas industry, and
railway, maritime, and air transportation. The prime minister may also forbid any strike
that he considers to be detrimental to the national economy or public safety. 103

Despite all of these restrictions on strikes, there were a record 762 labor strikes in
2008. Most of these strikes were deemed “illegal” because they either were not conducted
through the VGCL or did not go through the long and burdensome conciliation and
arbitration procedures. 104

In 1990, Liberia had its GSP benefits suspended because it had prohibited the
right to strike. Since then, the Liberian government made concerted efforts to improve
worker rights. Liberia repealed the decree that prohibited strikes, and worked with the
ILO to meet certain ILO obligations that it had neglected. As a result of its reforms,

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Liberia’s benefits under the U.S. GSP program were reinstated in 2006.\textsuperscript{105} The Vietnamese government should take similar steps, in order to qualify for GSP benefits.

The freedom of association, the right to collective bargaining, and the right to strike are fundamental labor protections. Vietnam should pass legislation to allow for these rights in practice, it should eliminate the requirement that all unions be affiliated with the VGCL, and it should reform the current, cumbersome process of mediation and arbitration. Unless Vietnam does a better job at providing these rights to its workers, it will continue to be denied U.S. GSP benefits.

\textbf{V. Conclusion}

The Vietnam War ended over thirty years ago. Since then, relations between the U.S. and Vietnam have improved immensely, and the two countries have become valuable trading partners. Although Vietnam may still be a Communist country, it has made dramatic reforms over the past twenty years that have demonstrated its strong commitment to liberalizing its markets and integrating into the global economy. These reforms have caused a boom in Vietnamese exports that have spurred remarkable economic growth.

Despite this recent economic progress, Vietnam remains a very poor country that could benefit considerably from preferential treatment under the U.S. GSP program. Indeed, it is poorer than many of the poorest developing countries that are currently receiving those benefits. Ultimately, the lower tariffs and more competitive prices for Vietnamese products in U.S. markets would help strengthen Vietnam’s developing economy.

economy and alleviate poverty in Vietnam. At the same time, it would help U.S. consumers and U.S. businesses keep their costs down.

However, in order to encourage countries to strengthen their protections for various rights, the U.S. withholds GSP trade benefits until certain eligibility standards are met. Vietnam’s compliance with several of these eligibility criteria is problematic. Specifically, Vietnam’s protections for intellectual property rights and worker rights are inadequate. In order to receive U.S. GSP trade benefits, Vietnam will have to rein in trademark infringement, copyright piracy, and Internet piracy. Finally, Vietnam will also have to do more to protect the freedom of association, the right to organize and bargain collectively, and the right to strike. The Vietnamese government has been resistant to providing some of these rights, but perhaps the U.S. GSP will help to inspire reform.