Fordham International Law Journal

Volume 29, *Issue* 2 2005 *Article* 3

The Limits of American Generosity

Raj Bhala*

*

The Limits of American Generosity

Raj Bhala

Abstract

This Article discusses generosity and its relevance in international trade law. Generosity, then - in international trade law - does matter, at least if a better world for the poor is imagined and if their world view is acknowledged. With good reason, many individual Americans - from the Great Plains of Kansas to the five boroughs of New York City - regard themselves as generous people. They give as private citizens, and through their favorite non-governmental organizations ("NGOs"), especially their churches, mosques, synagogues, and other houses of worship. Yet, from overseas, America is not perceived as a generous nation - at least not anymore. The generation of American officials who created and implemented the Marshall Plan has died or retired, and so too has the generation of foreigners who remember it, or other American legislative beneficence. Today, leading intellectuals from Turkey to New Zealand see only the hand, visible or invisible, of national self-interest in American laws that affect them.

THE LIMITS OF AMERICAN GENEROSITY

*Raj Bhala**

Reminds me of my safari in Africa.
Somebody forgot the corkscrew and for several days
we had to live on nothing but food and water.
—W.C. Fields

I. *GENEROSITY AND INTERNATIONAL TRADE LAW*

A camel never sees its own hump.
—African Proverb

A. *Generosity Matters*

What does it mean to be "generous"? The *Oxford American Dictionary* provides the following definition and a list of synonyms:

> 1. giving or given freely. 2. magnanimous; noble-minded; unprejudiced. 3.a. ample; abundant; copious . . . . b. . . . rich and full. . . .
> 1. bountiful, charitable, lavish, openhanded, free, liberal, unstinting, ungrudging, munificent, handsome, . . . bounteous. 2. . . . benevolent, charitable, beneficent, . . . bighearted, unselfish, forgiving, humanitarian, philanthropic, humane, kindly, noble, noble-minded, good; disinterested, . . . unbiased, liberal-minded, broad-minded, tolerant, liberal. 3.a. . . . plentiful, . . . lavish, overflowing, bountiful . . . ; large, substantial, sizable, . . . considerable, biggish, big.[1]

Query whether American trade law toward Sub-Saharan Africa ("SSA"), manifest in the African Growth and Opportunity Act

---

* Rice Distinguished Professor, The University of Kansas School of Law, Green Hall, 1535 West 15th Street, Lawrence, Kansas, U.S.A. 66045. Telephone: (785) 864-9224; Fax: (785) 864-5054. E-mail: bhala@ku.edu. J.D., 1989, Harvard; M.Sc. (Management), 1986, Oxford University; M.Sc. (Economics), 1985, London School of Economics; A.B. (Economics), 1984, Duke University; Marshall Scholar, 1984-1986. Member, New York and District of Columbia Bars, Royal Society for Asian Affairs, Council on Foreign Relations, and American Law Institute. Author, MODERN GATT LAW (Sweet & Maxwell, 2005); INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (Lexis Publishing, 2d ed. 2000, 3d ed. forthcoming 2007-2008). The author is indebted to his research assistant, Dan Spencer IV, J.D., Class of 2006, The University of Kansas School of Law, for his help on earlier drafts.

1. OXFORD AMERICAN DICTIONARY AND THESAURUS 610 (2003).

("AGOA"),[2] is "generous." Do the technical details of AGOA comport with the standard lexicographic meaning of "generous"—a meaning that is entirely consistent with the common sense understanding of the word? Or, do these details reveal an uncharitable, begrudging approach?

There is an easy answer to these questions. International trade law is not about generosity. It is about the practical implementation of economic policy that tends unevenly toward free—or freer—trade. The questions do not matter. They presume a paradigm that does not exist. Maybe it should not exist. Is it constructed from a rhetorically alluring but conceptually dubious amalgam of left-leaning development economic theory and religiously-based social justice theory?

This easy answer, however, lacks imagination and deceives itself about reality. Why see the world of trade law as it is? Why not envision a paradigm in which the tendency to liberalize trade complements a primary orientation to help poor countries? For the poor in such countries, and indeed for the poor in rich countries, trade law ought to be about more than the imperfect exercise of Adam Smith's principle of absolute advantage and David Ricardo's principle of comparative advantage ("imperfect" because of the many exceptions in the law to trade liberalization). The paradigm ought to include a comprehensible set of rules that go beyond protecting the self-interest of domestic producers in developed countries (the "imperfections"), and focus on promoting independence in a liberal trade regime among would-be producers and exporters in poor countries. After all, the latter group remains in dire need. (There is little doubt the U.S. Congress is well aware of this need in the African context, because AGOA contains "Sense of the Congress" provisions with "Findings" about the need to provide SSA with debt relief, funds for HIV/AIDS treatment, and help against desertification.)[3] In this altered paradigm, when pressed, opting to pre-

2. 19 U.S.C.S. §§ 3701-3741 (2005).

3. *See* 19 U.S.C.S. § 3731 (on debt relief, finding in section 3731(a) that the burden of external debt is a major impediment to growth); § 3739 (on HIV/AIDS, finding in section 3739(a) that 21 million people in Sub-Saharan Africa ("SSA") are infected, eighty-three percent of the estimated 11.7 million deaths worldwide have been in SSA, and the disease inflicts serious damage on African economies); § 3741 (on desertification, finding in section 3741(a) that it affects one-sixth of the world's population and one-quarter of the total land area, and imposes an annual cost of US$42 billion). The "Sense of the Congress" portions of these provisions, in sections 3731(b), 3739(b), and

fer the relatively poorer over outright free trade is a kind of acceptable legal triage, consistent with deeply-rooted principles of social justice.

Generosity, then—in international trade law—does matter, at least if a better world for the poor is imagined and if their world view is acknowledged. With good reason, many individual Americans—from the Great Plains of Kansas to the five boroughs of New York City—regard themselves as generous people. They give as private citizens, and through their favorite non-governmental organizations ("NGOs"), especially their churches, mosques, synagogues, and other houses of worship. Yet, from overseas, America is not perceived as a generous nation—at least not anymore. The generation of American officials who created and implemented the Marshall Plan has died or retired, and so too has the generation of foreigners who remember it, or other American legislative beneficence. Today, leading intellectuals from Turkey to New Zealand see only the hand, visible or invisible, of national self-interest in American laws that affect them.

Is that hand in American trade law, specifically in the one dimension of trade law designed to help poor countries—preferential trading arrangements ("PTAs")? The answer is "yes." Evidence to support this answer includes the PTA America built for

---

3741(b), along with a section on private sector assistance to combat HIV/AIDS (section 3738), contain advice from Congress to the President as to policy initiatives that should be undertaken. Other African Growth and Opportunity Act ("AGOA") provisions indicate the awareness on Capitol Hill of challenges and needs in SSA. For example, Congress conveys its sense through AGOA that:

- The Overseas Private Investment Corporation ("OPIC") should initiate equity funds to support infrastructure projects in SSA, particularly to expand opportunities for women entrepreneurs,
- The Export-Import Bank should expand its financial commitments, specifically its loan, guarantee, and insurance programs, in SSA, and
- The U.S. Agency for International Development ("USAID") should continue to support programs that promote the long-term economic development of SSA, specifically with respect to primary and vocational education, health care, democratization and good governance, food security, a stable environment for private sector-led growth, decentralization and local participation, enhanced technical and managerial capacity, and environmental protection.

See 19 U.S.C.S. §§ 3733, 3734, 3737. Also pursuant to AGOA, Congress directs the Secretary of Agriculture to consult with Land Grant Colleges and Universities on ways to improve the flow of American farming techniques to SSA (e.g., insect and sanitation procedures, soil conservation, equipment use and maintenance, crop yield maximization, and crop marketing), and calls for the donation to eligible SSA countries of air traffic control equipment that no longer is in use. *See* 19 U.S.C.S. §§ 3740, 3736.

SSA, namely, AGOA. Yet, AGOA bespeaks the limits of American generosity. This PTA is rife with conditions an SSA country must fulfill to receive its benefits—duty-free, quota-free treatment for originating exports—and these conditions are troubling on economic, political, and religious grounds.[4] Stated differently, the protectionist devil embedded in the details of AGOA means the hand America extends to SSA is not fully open.

If the United States cannot give selflessly to SSA, a region averaging an annual per capita income of roughly US$500, is there any instance in its trade law in which it can?[5] After all, to state the obvious (but not to succumb to politically correct terminology), much of economic life in SSA is backward, and progress requires self-giving help that eventually will allow it to help itself. Of the roughly forty-nine least-developed countries, most of them are in SSA.[6] By many indicators, whether conventional

---

4. AGOA also contains provisions nakedly designed to advance American market access in SSA. For example, Congress mandates the expansion of the Foreign Commercial Service of the U.S. Department of Commerce ("DOC") in SSA, so as to help American businesses identify export opportunities in SSA. *See* 19 U.S.C.S. § 3735(a)-(b). Congress also directs the International Trade Administration ("ITA") of the DOC to target the tariff and non-tariff barriers that are preventing sales of American goods and services in SSA, and to negotiate with SSA authorities for enhanced market access for American companies. *See* 19 U.S.C.S. § 3735(c). Further, Congress declares that a comprehensive trade and development policy toward SSA is an important goal. *See* 19 U.S.C.S. § 3732(a). It directs the President to provide technical assistance to SSA on matters such as the fostering of private sector relationships between the United States and SSA, the liberalization of trade, promotion of exports, membership and participation in the World Trade Organization ("WTO"), compliance with WTO standards, addressing agricultural trade policy concerns (e.g., market liberalization, export development, and agribusiness investment), and increasing trade in services. *See* 19 U.S.C.S. § 3732(b). Notably, this list is one-sided. It does not include the often-articulated concerns about American trade law and policy from the perspective of SSA, such as reducing tariff peaks, eliminating tariff escalation, or slashing agricultural export subsidies.

5. *See* 19 U.S.C.S. § 3701(6) (stating the per capita income statistic as a congressional finding).

6. With a population of about 140 million, the largest least-developed country is in South Asia—Bangladesh. For an excellent account of modern African history, particularly colonialism in the early 20th century (1914-1930), colonialism under strain (1930-1945), nationalist movements and decolonization (1950s-1970s), and development challenges (1980s and 1990s), see MARTIN MEREDITH, THE FATE OF AFRICA (2005), and BASIL DAVIDSON, MODERN AFRICA: A SOCIAL AND POLITICAL HISTORY (3d ed. 1994). For an extensively researched tour de force on the race to colonize among five European Powers (Belgium, Britain, France, Germany, Italy) and the "four Cs" (Commerce, Christianity, Civilization, and Conquest), see THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912 (1991). For a text on the modern political history of Africa, depicting the complexity and diversity

measures of economic growth or broader measures of human development, the performance of SSA is dreadful, and the plight of the majority of people in SSA is monstrous.[7] Negotiating trade deals such as the accessions to the World Trade Organization ("WTO") for China and the Kingdom of Saudi Arabia necessarily raise concerns about economic, political, and national security interests for the United States.[8] Perhaps in such bargains it is easier to appreciate why the normal paradigm of what international trade law is about dominates. However, most (though not all) SSA countries ("SSACs") do not manifest the same obvious, direct, and large strategic importance (though, even on this point reasonable minds can differ).[9] For these countries, it would seem an altered paradigm in which generosity matters seems not only compelling but also, from a self-interested view, inexpensive.

Why not, then, re-conceptualize AGOA as unconditional generosity from the richest country to the poorest of countries?[10] If the answer is the United States cannot or will not (or both) take this legislative step, then is there any space at all for generosity in American trade policy? To be sure, hardheaded American trade negotiators may be tired, understandably so, of whining from or about poverty-stricken Third World nations.[11] Cor-

---

of the African continent, see NAOMI CHAZAN, PETER LEWIS, ROBERT A. MORTIMER, DONALD ROTHCHILD & STEPHEN JOHN STEDMAN, POLITICS AND SOCIETY IN CONTEMPORARY AFRICA (3d ed. 1999).

7. On the modern political economy of Africa, including the relationship of Africa to world markets and the incursion of foreign powers and imposition of post-colonial systems, see GEORGE B.N. AYITTEY, AFRICA IN CHAOS (1998).

8. On these two accessions, see, for example, Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 INT'L LAW. 741 (2004), and Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000). On Vietnam, see, for example, the work of Professor David Gantz, University of Arizona College of Law, posted at the website of the United States-Vietnam Trade Council, http://dev.usvtc.org/trade/wto/Gantz/Gantz.htm (last visited Nov. 14, 2005).

9. *See, e.g.*, A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT'L L.J. 1706, 1711 (1995).

10. Interestingly, at least one voice calls for re-conceptualization of political organization in SSA. Stephen Ellis, a researcher at the African Studies Center in Leiden, the Netherlands, argues for radical intervention through an international trusteeship for SSACs that are abject failures, such as Liberia, Sierra Leone, and Somalia. As he puts it, "[s]ick states there cannot be restored with the medicines and surgical techniques of a bygone era. What is required instead are international joint ventures . . . ." Stephen Ellis, *How to Rebuild Africa*, FOREIGN AFF., Sept.-Oct. 2005, at 135, 148.

11. At the same time, there are many stereotypes about developing and least-developed countries, including many in Africa. For a candid discussion of myths and

rectly, they—along with prominent economists—point out the benefits from a PTA are akin to an asset the value of which is diminishing.[12] As America's most-favored nation ("MFN") tariff rates decline through successive rounds of multilateral trade negotiations, the margin of preference created by PTAs erodes to single-digit levels. The cost of compliance with preferential rules of origin further erodes this margin. As Oxfam International observes:

> Complexity is a heavy burden on producers, who have to make decisions about which imports to use in the face of often quite different rules for different markets. Administrative costs are another problem. Exporters have to provide documentation on the location of a good's production, the number of machines used, the workers employed, and the production process used; manufacturers have to submit to on-site visits and inspections to verify the documentation. Even in relatively well-off countries, the administrative costs can be high: approximately 3 per cent of the total value of the product. In poorer countries, they are likely to be much higher. It is a paradox that rules which are supposed to encourage the economic development of the poorest countries may actually *deter* investment through their complexity. Simpler rules of origin would require less documentary proof and therefore place less of a burden upon LDC [least- developed country] exporters, helping these countries to realize greater benefits from trade preferences.[13]

In the face of such difficulties, it is logically asked, why not focus less on preferences and more on internal reform, including rule of law, anti-corruption drives, and conflict management? Why not stay with the conventional paradigm, and re-emphasize the

---

preconceptions about Africa—cannibalism, ferocious animals, impenetrable jungles, oddly-clad tribesman, safaris, and the like—see CURTIS A. KEIM, MISTAKING AFRICA: CURIOSITIES AND INVENTIONS OF THE AMERICAN MIND (1999).

12. *See, e.g.*, Jagdish Bhagwati, *The Poor's Best Hope—Trading for Development*, ECONOMIST, June 22, 2002, at 24. Economic critiques sometimes discount, or ignore entirely, the benefits associated with dispute resolution under regional trade agreements ("RTAs"), perhaps because of the difficulty of quantification. For a comparative analysis of adjudication under African RTAs and the multilateral system, see Maurice Oduor, *Resolving Trade Disputes in Africa: Choosing Between Multilateralism and Regionalism: The Case of COMESA and the WTO*, 13 TUL. J. INT'L & COMP. L. 177 (2005).

13. Oxfam Int'l, *Stitched Up: How Rich-Country Protectionism in Textiles and Clothing Trade Prevents Poverty Alleviation* 22-23 (Oxfam Briefing Paper No. 60, Apr. 2004), *available at* http://www.oxfam.org/en/files/bp60_textiles.pdf.

unilateral dismantling of trade barriers, as classical and neoclassical economic theory prescribes?[14]

Fair enough, but might there be a reason to this advice, a mixture of intellectualism and common sense, with some heartfelt sagaciousness? To a poor man with next to nothing, one dollar doubles his earnings and is consequential even in an inflationary environment. As is widely reported, 1.1 billion people live on less than US$1 per day, and about 2.8 billion people live on less than US$2 per day.[15] Cases of economic needs more pressing than those manifest in SSA do not exist on such a large scale in any other part of the world. If there is a critique to be made about generosity, or the lack thereof, by the First to the Third World, then surely its greatest force is in the context of SSA.

True, plenty of blame can be put on governments, and on individual leaders. Many scholars—including African intellectu-

---

14. For a collection of essays on Africa as a peripheral region, and the problems of post-Cold War conflict in Africa, see AFRICA IN WORLD POLITICS: POST-COLD WAR CHALLENGES (John W. Harbeson & Donald Rothchild eds., 2d ed. 1995). *See also* Andrew Balls & Chris Giles, *Leadership Key in Poor Nations, Says Wolfowitz*, FIN. TIMES (London), Sept. 26, 2005, at 2 (quoting the first Presidential Address of World Bank President Paul Wolfowitz: "Sustainable development depends as much on leadership and accountability, on civil society and women, on the private sector and on the rule of law, as much as it does on labor or capital."). A significant economic initiative is the "New Partnership for Africa's Development" ("NEPAD"), supported by the Group of Seven ("G-7"), the United Nations General Assembly, and African leaders. *See generally* IAN TAYLOR, NEPAD: TOWARD AFRICA'S DEVELOPMENT OR ANOTHER FALSE START? (2005); Victor Mosoti, *The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion*, 5 SAN DIEGO INT'L L.J. 145 (2004). NEPAD originated on October 23, 2001 in Abuja, Nigeria, after many discussions about a new vision for development, an African renaissance, the importance of a partnership with mutual obligations, the need for a peer review mechanism to assess performance of a country by other countries (which NEPAD creates—the "African Peer Review Mechanism" ("APRM"), whereby governments voluntarily submit to scrutiny of their economic management and political standards), and the potential benefits of globalization. The NEPAD Secretariat is located in Johannesburg, South Africa, and depends heavily on the support of the South African government for facilities and staff. There is a debate as to whether the 53-nation African Union ("AU") ought to take over NEPAD, which would entail moving the Secretariat to Addis Ababa, Ethiopia, where the AU is headquartered. The AU has established a peace and security council, and a pan-African parliament. However, the principal argument against such a takeover and move is that NEPAD would become bogged down in AU bureaucracy. *See* David White, *Leaders Split over Plan for AU to Take Over NEPAD*, FIN. TIMES (London), Jan. 28, 2005, at 4.

15. The World Bank defines the international poverty line at US$1.08 per day, using 1993 dollars in purchasing power parity terms. As of 2001, 1.1 billion people were below this line, and on average they fell short by US$113. *See Aspirations and Obligations*, ECONOMIST, Sept. 10, 2005, at 67.

als—candidly expose the self-inflicted wounds that so depress outside observers.[16] However, disastrous policies and ghastly behavior are not the point. It also is true there is more to development in SSA than the growth of particular sectors, even ones as important as textiles[17] and apparel[18] ("T&A"). Input supply problems, decrepit infrastructure, remoteness from markets, and a general perception that SSA is not a business-friendly environment contribute to or exacerbate the woes of the region.[19]

Indeed, as the World Bank observes in its 2005 *Doing Business* publication (an annual report), poor African countries impose more regulatory obstacles to establishing and operating businesses and generating jobs, and have achieved less reform, than countries in any other part of the world.[20] Ranking countries based on the time, cost, and minimum capital requirement to start a business, the difficulty of hiring and firing workers, the

---

16. For a powerful attack on African dictators, which discusses the economic and political ruination they have wrought, and an argument that it is naïve to blame external factors for the misery of Africa when, in truth, one-party states led by "presidents for life," who are tyrannical kleptocrats far worse than the colonialists they replaced, are to blame for black neo-colonialism, see GEORGE B.N. AYITTEY, AFRICA BETRAYED (1992). For an argument that internal political and economic mismanagement and adverse global developments threaten the survival of African countries, and a discussion that the encounter between African and Western concepts of sovereignty has been awkward, ambiguous, unsatisfactory, and tragic, see CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL (1996). *See also* Kimberly Medlock Wigger, Comment, *Ethiopia: A Dichotomy of Despair and Hope*, 5 TUL. J. COMP. & INT'L L. 389 (1998) (calling upon Ethiopia to eliminate objectionable trade practices so it can reap the full benefits of AGOA). An excellent example of a trade-related self-inflicted wound comes from Nigeria. Mosquito bed nets impregnated with insecticide cost less than US$4, and reduce the risk of infants dying from diseases like malaria by fourteen percent (down to sixty-three percent—still unacceptably high). Yet, from time to time, Nigeria has imposed a tariff of up to forty percent on imported nets, to protect its domestic net making industry. Moreover, the cost of distributing nets exceeds the cost of production. *See The $25 Billion Question*, ECONOMIST, July 2, 2005, at 24, 26.

17. Technically, a "textile" is any material made from a fiber or other extended linear material, such as thread or yarn. There are multiple classes of textiles, including woven, knitted, knotted (e.g., macramé), or tufted cloth, and also non-woven fabrics, such as felt. *See* 7 NEW ENCYCLOPAEDIA BRITANNICA 647 (15th ed. 1994); *see also* 21 *id.* at 570.

18. In contrast, "apparel" refers to clothes, i.e., dress or garments. *See* OXFORD AMERICAN DICTIONARY AND THESAURUS, *supra* note 1, at 62.

19. *See* Stephen E. Lamar, *The Apparel Industry and African Economic Development*, 30 LAW & POL'Y INT'L BUS. 601, 601 (1999); *see also* DAVID K. LEONARD & SCOTT STRAUSS, AFRICA'S STALLED DEVELOPMENT: INTERNATIONAL CAUSES AND CURES (2003) (analyzing civil conflict and other factors inimical to development).

20. *See* Andrew Balls, *African Nations Fare Poorly in Business Rankings*, FIN. TIMES (London), Sept. 13, 2005, at 9.

tax regime, the complexity and cost of getting licenses and registering property, access to credit, investor protection, and impediments to cross-border trade, Sub-Saharan African countries dominate the bottom rungs.[21] Sudan, Chad, the Central African Republic, Burkina Faso, and Congo hold the last five spots.[22] In the top five spots are New Zealand, Singapore, the United States, Canada, and Norway.[23] Not surprisingly, to avoid the red tape, more than forty percent of the economy of SSA is informal, which is the highest percentage in the world.[24] But, again, these ignominious facts are not the point.

To anticipate the analysis later, grounded in part on Catholic social justice teaching, the Good Samaritan neither put conditions on help, nor scrutinized the unfortunate man as to his predicament.[25] He also eschewed lecturing the man on the practical limits of his assistance. Rather, the Good Samaritan helped with an open hand.

B. *Generosity and Trade with Africa*

Notwithstanding various American foreign aid programs, the first serious trade legislation enacted by the Congress to promote trade with SSA was section 134 of the Uruguay Round Agreements Act ("URAA"), the implementing legislation for the Uruguay Round of multilateral trade accords, which Congress approved on December 8, 1994.[26] That section obligated the President to establish a comprehensive trade and development

---

21. *See id.* at 9.

22. *See id.*

23. *See id.*

24. *See Different Skills Required*, ECONOMIST, July 2, 2005, at 61.

25. The confines of an article do not permit an exposition of this teaching. Put succinctly, while different scholars number the postulates of social justice differently, there are three that most, if not all, authors would count as fundamental: The protection of human dignity, the pursuit of the common good, and the exercise of a preferential option for the poor. For one explanation of the teaching and application to special and differential treatment in the General Agreement on Tariffs and Trade ("GATT"), see RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE pts. VIII–IX (2003). For a compilation of the social justice teachings of the Catholic Church, see PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (2005). For a discussion of the dignity of the human person and the preferential option for the poor, see KEVIN E. MCKENNA, A CONCISE GUIDE TO CATHOLIC SOCIAL TEACHING pts. I, III-IV (2002).

26. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 134, 108 Stat. 4809, 4840 (codified in scattered sections of 19 U.S.C.) (approved Dec. 8, 1994). Section 134 is at 19 U.S.C.S. § 3554 (2005).

policy for Africa. For the next five and one-half years, the response was a quintessentially inside-the-Beltway one.

Starting in February of 1996, the President produced annual reports—there were five in total, the last one under section 134 of the URAA coming in January of 2000.[27] Essentially, the reports called for study committees, articulated policy frameworks and objectives—including the continued pre-eminence of American leadership in multilateral economic organizations—spoke of a partnership with Africa, extolled the efforts by American government agencies to promote sustainable economic development in SSA and the integration of the region into the multilateral trading system, and signaled support for legislative proposals.[28] In Congress, bills were introduced to confer upon SSA assorted trade benefits, all of which would have been conditional on the type of exported merchandise and country from which it was exported.[29]

---

27. *See* Letter from President Clinton to the Chairmen and Ranking Members of the Senate Committees on Finance and Foreign Relations and the House Committees on Ways and Means and International Relations (Jan. 21, 2000), *available at* http://usinfo.state.gov/regional/af/unmonth/a0012102.htm.

28. AGOA also calls for annual comprehensive reports (beginning no later than May 18, 2001, and continuing through 2008) by the President to Congress on American trade and investment policy toward SSA, and implementation of related legislation. *See* African Growth and Opportunity Act § 106, 19 U.S.C.S. § 3705 (2005); *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT (2005) (the fifth of eight annual reports).

29. The bills started on September 26, 1996, with H.R. 4198 in the 104th Congress, on which no action was taken. This bill called for benefits only to SSA countries pursuing market economic reforms. It also envisioned a discussion forum that might lead to a free trade area ("FTA") with some SSACs, and the elimination of textile and apparel ("T&A") quotas on products from Kenya and Mauritius (the only SSA countries at the time on which the United States had imposed quotas). H.R. 4198 was reintroduced on April 24, 1997 in the 105th Congress as H.R. 1432. The reintroduced version contained new language about extending existing benefits from the Generalized System of Preferences ("GSP") program to SSACs that met strict eligibility criteria. On March 11, 1998, the House of Representatives passed H.R. 1432. But the analog in the Senate, Title I of S. 2400, called the "Africa Growth and Opportunity Act," introduced on July 21, 1998, differed from the House version by requiring that T&A imports from SSA be made from fabric of American origin. The Senate did not consider S. 2400 in the 105th Congress, thus no further action occurred. On February 2, 1999, H.R. 1432 was reintroduced as H.R. 434 to the 106th Congress. The House passed it on July 16, 1999. In the Senate, S. 1387 was introduced on July 16, 1999, and the text of Title I of this bill resembled that of S. 2400. On November 3, 1999, the Senate passed an amended version of H.R. 434, calling it the "Trade and Development Act of 2000," with Title I called the "African Growth and Opportunity Act," and thereby replaced the text of S. 1387. On May 4, 2000, the Conference Report on H.R. 434 was filed (as House of Representa-

In other words, notwithstanding political rhetoric to the contrary, promoting trade with SSA never was viewed as an urgent matter calling for unprecedented generosity in a singularly desperate situation. It never was a radical initiative based, for example, on religiously-based social justice principles elevated near the level of economic logic or political expediency. Rather, a trade program ostensibly tailored for SSA always was conceived of in the familiar legal constructs of PTAs, most notably the GSP, and the protection these schemes afford American producers of like or directly competitive products, especially in the T&A sector.[30] Not surprisingly, the program that finally emerged said, and continues to say, a good deal about the limits of American generosity.

On May 18, 2000, finally the establishment in Washington, D.C. acted. Congress passed the Trade and Development Act of 2000.[31] Signed by President Bill Clinton on this date, the legislation took effect on October 1, 2000.[32] Specifically, Title I is the African Growth and Opportunity Act, or AGOA, which is codified at title 19, sections 3701 to 3741 of the United States Code, with the provisions on trade policy and SSA benefits in sections 3701 to 3724.[33] The function of AGOA is to provide preferential

tives Report 106–606) and passed by the House, with the African Growth and Opportunity Act as Title I of the Report. The Senate passed the same Report on May 11, 2000. *See* STAFF OF H.R. COMM. ON WAYS & MEANS, 108TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 45-46 (Comm. Print 2003) [hereinafter U.S. TRADE STATUTES COMPILATION]; H.R. REP. NO. 106-606 (2000) (Conf. Rep.). The most recent edition of this publication, known informally as the "Blue Book," was not released until late October 2005. *See* STAFF OF H.R. COMM. ON WAYS & MEANS, 109TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES pt. I (Comm. Print 2005). The discussion of AGOA, at pages 44-58, is substantially the same, with an update for AGOA III (explained below) in the 2005 edition. Regarding Kenya and Mauritius, AGOA contains a special provision for them requiring the President to eliminate all remaining quotas on T&A items within 30 days of these countries adopting an effective visa system to prevent illegal transshipment of these articles, or the use of counterfeit documents relating to them. *See* 19 U.S.C.S. § 3721(c).

30. *See* Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483, 509-11 (2004).

31. *See* U.S. CUSTOMS SERV., IMPORTING INTO THE UNITED STATES 91 (2002), *available at* http://www.customs.gov/linkhandler/cgov/toolbox/publications/trade/iius.ctt/iius.doc.

32. *See* Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (approved May 18, 2000); U.S. CUSTOMS SERV., *supra* note 31, at 91.

33. The full text of AGOA is available at the official AGOA website, http://www.agoa.gov (last visited Nov. 14, 2005). Also available on this website are the customs regulations for AGOA (at section 10.211-.217 of the customs regulations), the rules governing the implementation of the GSP provisions applicable to AGOA, and the *Afri-*

trade treatment for certain products originating in eligible SSACs for a limited period.[34] The key words (as explained below) are "certain," "originating," "eligible," and "limited." The legislation authorizes the President to grant unilateral preferential trade benefits to an SSAC, but only if it pursues economic and political reform, and satisfies other criteria, only with respect to its exports that satisfy an array of technical requirements, and only up through a sunset date.[35]

Technically, the original AGOA legislation is AGOA I. Under the Administration of President George W. Bush, through the Trade Act of 2002, amendments to AGOA I were made, known as AGOA II, particularly concerning the requirements for duty-free treatment of apparel articles.[36] The President signed AGOA II on August 6, 2002, and it entered into force effective immediately upon enactment (i.e., the signature date).[37] Under the AGOA Acceleration Act of 2004, signed on July 12, 2004, the Bush Administration made modifications to the program, including an extension of the overall program through September 30, 2015.[38] This legislation is called AGOA III, and it entered into force on July 13, 2004.[39] Based on AGOA I, the starting date for trade preferences was October 1, 2000, and the sunset date was September 30, 2008. AGOA II did not change the start or sunset dates: Rather, it amended some of the substantive features of the program.[40] Hence, new legislation was needed for AGOA benefits to continue beyond 2008, and will be needed again for them to continue beyond 2015.[41]

There is little doubt AGOA enjoys bipartisan support. Whether it is effective as a "trade, not aid" kind of policy is another matter. Advocates for AGOA are wont to trot out statistics showing rising volumes and values of trade with SSA, or at least

---

can Growth and Opportunity Act Implementation Guide (prepared by the U.S. Trade Representative ("USTR")). Sections 3731-3741, which are not discussed herein, deal with issues related to economic development, and contain Sense of Congress statements, generally on matters not directly linked to trade. There are no sections 3725-3730.

34. *See* U.S. CUSTOMS SERV., *supra* note 31, at 91.

35. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 45.

36. *See* Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933; *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 45.

37. *See generally* Trade Act of 2002.

38. *See* 19 U.S.C.S. § 2466b (2005).

39. *See id.*

40. *See generally* Trade Act of 2002.

41. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 46.

certain sectors in individual SSACs.[42] Increased exports from SSA are particularly noteworthy and welcome. Indeed, depending on the time period and merchandise categories selected, such demonstrations are possible. For example, as a percentage of gross domestic product ("GDP"), overall exports from SSACs rose between 2001 and 2005.[43] However, as intimated, AGOA is not a free trade deal.

Not every poor African country is eligible for the program. Even if a country is a beneficiary, not every category of merchandise qualifies for the benefits. Finally, even if a country and merchandise qualify, complicated preferential rules of origin must be satisfied. As an economic matter, therefore, the extent to which SSACs gain from AGOA must be considered. As a matter of social justice, it must be asked whether they could gain more if the rules on country and product eligibility, and on origin, were relaxed. In brief, this Article poses the question, is AGOA a classic instance of ungenerous giving by the rich man to the poor man?

II. *AGOA ELIGIBILITY FOR WHOM?*

Do not try to fight a lion
if you are not one yourself.

—African Proverb

A. *The Deceptive List*

That AGOA is about neither free trade nor unconditional charity is evident from a cursory glance at the Harmonized Tariff Schedule of the United States ("HTSUS"). General Note 3(c)(i) to the HTSUS explains what is suggested by such a look, namely, that in the "Special" sub-column of the "Rates of Duty 1" column, the letter "D" indicates "special tariff treatment *may* be provided."[44] Overall, about 1835 products receive the symbol "D" in

42. *See* Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?*, 14 KAN. J.L. & PUB. POL'Y 307, 342-43 (2005). *But see* J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U. J. INT'L L. & POL. 651, 671 (2001).

43. *See* INT'L MONETARY FUND, REGIONAL ECONOMIC OUTLOOK: SUB-SAHARAN AFRICA 37 (Supp. 2005), *available at* http://www.imf.org/external/pubs/ft/afr/reo/2005/eng/02/pdf/ssareo.pdf.

44. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES GN-7, general note

the HTSUS and, therefore, are eligible for duty-free treatment under AGOA.[45] The list is also published in the *Federal Register* and maintained on an official website.[46] Not every country in SSA, however, actually qualifies for AGOA benefits.

Section 107 of AGOA, as well as General Note 16 of the HTSUS, list the countries in SSA potentially eligible for AGOA benefits.[47] There are forty-eight such countries, defined as "sub-Saharan African country" (i.e., SSAC). Table 1 lists them below, along with six key economic and demographic indicators:[48]

1. Population.[49]
2. Per capita GDP, in U.S. dollars and purchasing power parity ("PPP") terms.[50]
3. Percentage of population below poverty line.[51]
4. Distribution of family income, as measured by a Gini Index.[52]

3(c)(i) (2005) (emphasis added) [HTSUS]; *see also* SCOTT WARREN TAYLOR, BASIC PRINCIPLES OF TARIFF CLASSIFICATION 37 (2005); U.S. CUSTOMS SERV., *supra* note 31, at 94.

45. *See* U.S. CUSTOMS SERV., *supra* note 31, at 94. Whether an SSAC actually makes and exports a particular product is a separate but critical matter.

46. *See id.* The official website is http://www.agoa.gov (last visited Nov. 14, 2005).

47. This section is codified at 19 U.S.C. § 3706 (2000).

48. All data in Table 1 are from the CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2005) [hereinafter CIA WORLD FACTBOOK], *available at* http://www.cia.gov/cia/publications/factbook/. The data are current as of August 30, 2005, or the most recent available year (for some countries or variables, data are from previous years). Average totals for each variable are calculated by the author. For additional data sources on SSACs, see, for example, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 AFRICAN GROWTH AND OPPORTUNITY ACT COMPETITIVENESS REPORT (2005) (giving country-specific import and export data).

49. Population estimates for many SSACs reflect the effects of HIV/AIDS. These countries are Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Democratic Republic of the Congo, Côte d'Ivoire, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Nigeria, Republic of the Congo, Rwanda, South Africa, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/fields/2119.html (entry for "Population").

50. The concept of purchasing power parity ("PPP") is discussed in standard economic development texts, and in RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE (3d ed. forthcoming 2007-2008) (manuscript ch. 41, on file with author). *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/fields/2004.html (entry for "GDP—per capita").

51. There is no standard definition of the poverty line used in every country (though the US$1 or $2 figure is widely quoted). Different countries define that line differently, with richer countries generally using a higher figure than poor countries. *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/fields/2046.html (entry for "Population below poverty line").

52. The concept of a Gini coefficient is discussed in standard economic develop-

5. Composition of GDP by sectors, namely, agricultural, industrial, and services.[53]
6. Labor force by occupation, i.e., percentage of labor force in each sector.[54]

"NA" indicates the data in question are "Not Available.") Table 1 reveals considerable diversity among SSACs on the variables. However, it also reveals depressingly familiar patterns.

Those patterns are low per capita GDP, a high incidence of poverty, skewed income distribution, economies that are substantially agrarian with little industry or services, and predominantly rural populations. Average and total figures for the SSACs, as well as contrasts with the United States, are at the bottom of Table 1. The stark disparities speak for themselves. It is worth highlighting the American average per capita GDP is seventeen times that of the SSAC average, and whereas half the population in SSACs is below the poverty line, the U.S. figure is twelve percent.[55]

---

ment texts, and in BHALA, *supra* note 50 (manuscript ch. 41). Briefly, this coefficient measures the degree of inequality in the distribution of family income in a particular country. Mathematically, it is calculated by plotting (in a box) cumulative family income on the vertical axis, against the number of families (arranged from richest to poorest) on the horizontal axis. The result is called a Lorenz curve. The coefficient is the ratio of (1) the area between the Lorenz curve for a country and a forty-five-degree line to (2) the area of the entire triangle beneath the forty-five-degree line. The 45-degree line represents absolute equality, where all families have the same income. A Gini coefficient of zero would mean the Lorenz Curve overlaps fully with this line, and the country is perfectly equal in terms of income distribution. If the coefficient is one, then all income is distributed to one family, and the Lorenz Curve is the same as the horizontal axis and right vertical side of the box. *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/fields/2172.html (entry for "Distribution of family income—Gini index"). Normally, a Gini coefficient is reported as between zero and one. The CIA apparently scales up by a factor of 100, thus yielding results from 0 to 100.

53. These figures show the contribution of agriculture, industry, and services to total GDP. If data are incomplete, the figures sum to less than 100%. *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/fields/2012.html (entry for "GDP—composition by sector").

54. This variable shows the percentage of the labor force employed in each sector. If the data are incomplete, the figures sum to less than 100%. *See id.* at http://www.cia.gov/cia/publications/factbook/fields/2048.html (entry for "Labor force—by occupation").

55. By no means are these statistics the only relevant ones. The United Nations Development Program publishes a Human Development Index ("HDI"), which takes into account education and life expectancy, as well as per capita income. In 2003, Norway topped the HDI, and the United States ranked 10th in the world. At the bottom was Niger (number 177). South Africa, though it ranked number 52 in terms of per capita GDP, was at number 120 on the HDI, and had fallen 35 places since 1990, prima-

TABLE 1: Statistical Profile of Sub-Saharan Africa[56]

Country	Population	Per Capita GDP (U.S. dollars, PPP)	Population Below Poverty Line (percent)	Gini Index (0 to 100, 100 most unequal)	GDP Composition by Sector (percent)	Labor Force Composition by Sector (percent)
Angola	11,190,786	2100	70	NA	Agriculture: 8 Industry: 67 Services: 25	Agriculture: 85 Industry and Services combined: 15
Benin	7,460,025	1200	33	NA	Agriculture: 36.3 Industry: 14.3 Services: 49.4	Agriculture: NA Industry: NA Services: NA
Botswana	1,640,115	9200	47	NA	Agriculture: 4 Industry: 44 Services: 52	Agriculture: NA Industry: NA Services: NA
Burkina Faso	13,925,313	1200	45	48.2	Agriculture: 39.5 Industry: 19.3 Services: 41.3	Agriculture: 90 Industry: NA Services: NA
Burundi	6,370,609	600	68	42.5	Agriculture: 48.1 Industry: 19 Services: 32.9	Agriculture: 93.6 Industry: 2.3 Services: 4.1
Cameroon	16,380,005	1900	48	47.7	Agriculture: 43.7 Industry: 20.1 Services: 36.2	Agriculture: 70 Industry: 13 Other: 17
Cape Verde	418,224	1400	30	NA	Agriculture: 12.1 Industry: 21.9 Services: 66	Agriculture: NA Industry: NA Services: NA
Central African Republic	3,799,897	1100	NA	61.3	Agriculture: 55 Industry: 20 Services: 25	Agriculture: NA Industry: NA Services: NA
Chad	9,826,419	1600	80	NA	Agriculture: 22.6 Industry: 35.6 Services: 41.7	Agriculture: greater than 80 Industry: NA Services: NA
Comoros	671,247	700	60	NA	Agriculture: 40 Industry: 4 Services: 56	Agriculture: 80 Industry: NA Services: NA
Congo-Brazzaville (Republic of Congo)	3,039,126	800	NA	NA	Agriculture: 7.4 Industry: 52 Services: 40.6	Agriculture: NA Industry: NA Services: NA
Côte d'Ivoire	17,248,040	1500	37	36.7	Agriculture: 27.8 Industry: 19.4 Services: 52.8	Agriculture: 68 Industry: NA Services: NA
Democratic Republic of Congo (Zaire until May 1997)	60,085,804	700	NA	NA	Agriculture: 55 Industry: 11 Services: 34	Agriculture: NA Industry: NA Services: NA
Djibouti	476,703	1300	50	NA	Agriculture: 3.5 Industry: 15.8 Services: 80.7	Agriculture: NA Industry: NA Services: NA

rily because of the HIV/AIDS epidemic. *See Emerging-Market Indicators*, ECONOMIST, Sept. 17, 2005, at 106.

56. *See* CIA WORLD FACTBOOK, *supra* note 48.

Country	Population	Per Capita GDP (U.S. dollars, PPP)	Population Below Poverty Line (percent)	Gini Index (0 to 100, 100 most unequal)	GDP Composition by Sector (percent)	Labor Force Composition by Sector (percent)
Equatorial Guinea	535,881	2700	NA	NA	Agriculture: 3 Industry: 95.7 Services: 1.3	Agriculture: NA Industry: NA Services: NA
Eritrea	4,561,599	900	50	NA	Agriculture: 12.4 Industry: 25.9 Services: 61.7	Agriculture: 80 Industry and Services combined: 20
Ethiopia	73,053,286	800	50	40	Agriculture: 47 Industry: 12.4 Services: 40.6	Agriculture: 80 Industry: 8 Services: 12
Gabon	1,389,201	5900	NA	NA	Agriculture: 7.4 Industry: 46.7 Services: 45.9	Agriculture: 60 Industry: 15 Services: 25
Gambia	1,593,256	1800	NA	NA	Agriculture: 26.8 Industry: 14.5 Services: 58.7	Agriculture: 75 Industry: 19 Government: 6
Ghana	21,029,853	2300	31.4	40.7	Agriculture: 34.3 Industry: 24.2 Services: 41.4	Agriculture: 60 Industry: 15 Services: 25
Guinea	9,467,866	2100	40	40.3	Agriculture: 25 Industry: 38.2 Services: 36.8	Agriculture: 80 Industry and Services combined: 20
Guinea-Bissau	1,416,027	700	NA	NA	Agriculture: 62 Industry: 12 Services: 26	Agriculture: 82 Industry: NA Services: NA
Kenya	33,829,590	1100	50	44.9	Agriculture: 19.3 Industry: 18.5 Services: 62.4	Agriculture: 75 Industry: NA Services: NA
Lesotho	1,867,035	3200	49	56	Agriculture: 15.2 Industry: 43.9 Services: 40.9	Agriculture: 86 Industry: NA Services: NA
Liberia	3,482,211	900	80	NA	Agriculture: 76.9 Industry: 5.4 Services: 17.7	Agriculture: 70 Industry: 8 Services: 22
Madagascar	18,040,341	800	50	38.1	Agriculture: 29.3 Industry: 16.7 Services: 54	Agriculture: NA Industry: NA Services: NA
Malawi	12,158,924	600	55	NA	Agriculture: 54.8 Industry: 19.2 Services: 26	Agriculture: 90 Industry: NA Services: NA
Mali	12,291,529	900	64	50.5	Agriculture: 45 Industry: 17 Services: 38	Agriculture: 80 Industry: NA Services: NA
Mauritania	3,086,859	1800	40	37.3	Agriculture: 25 Industry: 29 Services: 46	Agriculture: 50 Industry: 10 Services: 40
Mauritius	1,230,602	12,800	10	37	Agriculture: 7.6 Industry: 30 Services: 62.4	Agriculture: 14 Industry: 36 Services: 50
Mozambique	19,406,703	1200	70	39.6	Agriculture: 21.1 Industry: 32.1 Services: 46.9	Agriculture: 81 Industry: 6 Services: 13

Country	Population	Per Capita GDP (U.S. dollars, PPP)	Population Below Poverty Line (percent)	Gini Index (0 to 100, 100 most unequal)	GDP Composition by Sector (percent)	Labor Force Composition by Sector (percent)
Namibia	2,030,692	7300	50	70	Agriculture: 11.3 Industry: 30.8 Services: 57.9	Agriculture: 47 Industry: 20 Services: 33
Niger	11,665,937	900	63	50.5	Agriculture: 39 Industry: 17 Services: 44	Agriculture: 90 Industry: 6 Services: 4
Nigeria	128,771,988	1000	60	50.6	Agriculture: 36.3 Industry: 30.5 Services: 33.3	Agriculture: 70 Industry: 10 Services: 20
Rwanda	8,440,820	1300	60	28.9	Agriculture: 41.1 Industry: 21.2 Services: 37.7	Agriculture: 90 Industry: NA Services: NA
São Tomé and Principe	187,410	1200	54	NA	Agriculture: 16.5 Industry: 15.4 Services: 68.1	Agriculture: NA Industry: NA Services: NA
Senegal	11,126,832	1700	54	41.3	Agriculture: 15.9 Industry: 21.4 Services: 62.7	Agriculture: 70 Industry: NA Services: NA
Seychelles	81,188	7800	NA	NA	Agriculture: 2.8 Industry: 28.7 Services: 68.9	Agriculture: 10 Industry: 19 Services: 71
Sierra Leone	6,017,643	600	68	62.9	Agriculture: 49 Industry: 30 Services: 21	Agriculture: NA Industry: NA Services: NA
Somalia	8,591,629	600	NA	NA	Agriculture: 65 Industry: 10 Services: 25	Agriculture: 71 Industry and Services combined: 29
South Africa	44,344,136	11,100	50	59.3	Agriculture: 3.6 Industry: 31.2 Services: 65.2	Agriculture: 30 Industry: 25 Services: 45
Sudan	40,187,486	1900	40	NA	Agriculture: 38.7 Industry: 20.3 Services: 41	Agriculture: 80 Industry: 7 Government: 13
Swaziland	1,173,900	5100	40	NA	Agriculture: 16.1 Industry: 43.4 Services: 40.5	Agriculture: NA Industry: NA Services: NA
Tanzania	36,766,356	700	36	38.2	Agriculture: 43.2 Industry: 17.2 Services: 39.6	Agriculture: 80 Industry and Services combined: 20
Togo	5,681,519	1600	32	NA	Agriculture: 39.5 Industry: 20.4 Services: 40.1	Agriculture: 65 Industry: 5 Services: 30
Uganda	27,269,482	1500	35	37.4	Agriculture: 35.8 Industry: 20.8 Services: 43.6	Agriculture: 82 Industry: 5 Services: 13
Zambia	11,261,795	900	86	52.6	Agriculture: 14.9 Industry: 28.9 Services: 56.1	Agriculture: 85 Industry: 6 Services: 9
Zimbabwe	12,746,990	1900	70	50.1	Agriculture: 18.1 Industry: 24.3 Services: 57.7	Agriculture: 66 Industry: 10 Services: 24

Country	Population	Per Capita GDP (U.S. dollars, PPP)	Population Below Poverty Line (percent)	Gini Index (0 to 100, 100 most unequal)	GDP Composition by Sector (percent)	Labor Force Composition by Sector (percent)
SSAC TOTAL	727,318,879	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
SSAC AVERAGE (if applicable)	15,152,476.65	2,352.08	51.42 (average of thirty-nine countries for which data are available)	46.25 (average of twenty-six countries for which data are available)	Not applicable	Not applicable
United States	295,734,134	40,100	12	45	Agriculture: 0.9 Industry: 19.7 Services: 79.4	Farming, forestry, and fishing: 0.7 Manufacturing, extraction, transportation, and crafts: 22.7 Managerial, professional, and technical: 34.9 Sales and office: 25.5 Other: 16.3

What countries does the section 107 list exclude? There are fifty-three countries in total on the African continent (or, fifty-four if Western Sahara is counted as an independent entity).[57] As the list of SSACs numbers forty-eight, obviously some countries on the continent are excluded. "Who?" and "why?" are the obvious questions.

The answer is all of North Africa. That is, most of the Arab part of the African continent is excluded. The relevant countries are Algeria, Egypt, Libya, Morocco, and Tunisia. The entire population on the continent is approximately 800 million, and these North African countries account for 158.6 million.[58] Thus, demographically speaking, the exclusion of North Africa is significant—about twenty percent of the continent.

Geographically speaking, it would be more accurate to dub the legislation not "AGOA," but "MSSAGOA," where "MSS" stands for "Most of Sub-Saharan," or "GNAGOA," where "GNA"

57. *See* CIA WORLD FACTBOOK, *supra* note 48, *available at* http://www.cia.gov/cia/publications/factbook/reference_maps/pdf/africa.pdf.

58. For the total population of the African continent, see United Nations Population Information Network, http://www.un.org/popin/data.html (last visited Nov. 14, 2005). For the population in North Africa, see CIA WORLD FACTBOOK, *supra* note 48 (The 158.6 million figure is the sum of the populations of Algeria, Egypt, Libya, Morocco, and Tunisia, which is 158,603,970).

stands for "Generally Non-Arab." Why exclude much of Arab Africa, particularly in a post–9/11 era in which the United States overtly seeks to enhance its national security by encouraging trade as a vehicle to promote prosperity, peace, and even democracy? A number of responses may be ventured. Economically, much of North Africa fares relatively better than SSA. Egypt, Morocco, and Tunisia are examples. Algeria and Libya are rich in energy resources such as oil and natural gas. One North African country, Morocco, benefits from a free trade agreement with the United States, while another, Egypt, ranks near the top of aid recipients from the United States.

Most significantly, the section 107 list of SSACs itself is deceptive. To be on it is to be a contender, not a prize-winner. That is, the listed countries are potential, not necessarily actual, recipients of AGOA preferences. Conceptually, there are at least three more steps for an SSAC to receive benefits. First, the President must designate them as an "eligible sub-Saharan African country" ("Eligible SSAC") by applying eight statutory criteria, explained below. Second, the President must designate an Eligible SSAC as a "beneficiary sub-Saharan African country" ("Beneficiary SSAC") using the same country-eligibility criteria that have long-existed in the GSP. Third, among Beneficiary SSACs, not all are treated equally. Further requirements, if satisfied, render a Beneficiary SSAC a recipient, in fact, of trade preferences on T&A articles.

For now, the point to appreciate is that AGOA never was conceived as an unconditional program for all African countries. No doubt there are political justifications for disallowing some countries—for example, governance by despicable regimes—from AGOA preferences. There is, however, at least one economic rationale for leaving open the possibility of AGOA eligibility, namely, that the poor are no less poor in many of the excluded countries as in the eligible countries. Moreover, in terms of social justice theory, it may be urged that underlying any calculation by a donor—such as the United States—to behave judiciously when giving to the poor must be an impulse to give, and give generously, regardless of fault by leaders under whom the poor suffered.

B. *The Eight Requirements*

The layman might think any SSAC receives AGOA benefits. Little could be further from the truth. To summarize the tortuous statutory language of AGOA and the GSP, there are differences among:

- Being geographically located in SSA, i.e., an SSAC.
- Being located in SSA and also eligible for AGOA benefits, i.e., an Eligible SSAC.
- Being located in SSA, eligible for AGOA benefits, and designated a beneficiary for those benefits, i.e., a Beneficiary SSAC.
- Actually receiving the benefits, or, to put it undiplomatically, a lucky Beneficiary SSAC.

Countries listed in the SSA region are listed in section 107 of AGOA.[59] But, as is clear from an earlier provision, section 104, not every country in SSA is an "eligible" one.[60] To be eligible, not just potentially eligible, for AGOA preferences, an SSAC must satisfy requirements set out in section 104(a) of AGOA, or at least must be making continuous progress toward meeting them.[61] There are eight such requirements. Yet, meeting all of them means a country is an Eligible SSAC—eligible for benefits, but not an actual recipient.

The eight requirements are not to be confused with the separate requisites in the GSP, which concern designation as a beneficiary developing country ("BDC") under that program. In other words, there is an important distinction between an Eligible SSAC in the language of section 104(a) of AGOA,[62] and a Beneficiary SSAC in the language of section 111(a) of AGOA.[63] In effect, meeting the eight AGOA eligibility requirements in section 104(a) qualifies an SSAC for AGOA preferences only in a general sense. To qualify in a meaningful sense, it is necessary to satisfy these eight requirements, plus the requirements of the GSP program, and thereby be designated a Beneficiary SSAC.

---

59. *See* 19 U.S.C.S. § 3706 (2005).

60. Section 104 is codified at 19 U.S.C. § 3703 (2000).

61. Section 104(a) is codified at 19 U.S.C. § 3703(a).

62. *See* 19 U.S.C.S. § 3703(a).

63. To make matters a bit more confusing, section 111(a) of AGOA is an amendment to the GSP statute, not placed with the rest of the AGOA provisions. Section 111(a) is codified at 19 U.S.C. § 2466a(a) (2000), *amended by* AGOA Acceleration Act of 2004, Pub. L. No. 108-274, § 7(a)(2), 118 Stat. 823, 823-24.

This necessity is evident from two legal facts, discernible only after several perusals of the relevant statutory provisions. First, benefits for T&A merchandise, which section 112 of AGOA establishes, are designed for "a beneficiary sub-Saharan African country described in [section 2466a(c), the GSP statute, as amended by section 111(a) of AGOA]."[64] Second, benefits for non-T&A merchandise, under the GSP program as amended by AGOA, are only for "a beneficiary sub-Saharan African country."[65] Put simply, to get any AGOA benefits on T&A articles, or GSP benefits on non-T&A merchandise, what matters is being a Beneficiary SSAC. To be a Beneficiary SSAC, there are two distinct sets of requirements, eight new ones created by AGOA, and the existing GSP requisites. Satisfying the eight AGOA requirements renders a country an Eligible SSAC. Satisfying these requirements, plus the GSP requisites, renders a country a Beneficiary SSAC.

The GSP requisites have existed for decades, and are described and critically analyzed elsewhere.[66] Suffice it to say they embody political, legal, and economic interests of the United States, and illustrate the argument that GSP preferences are not about unconditional generosity. As for the AGOA eligibility requirements, associated with each one of the eight of them are criteria, which ostensibly help clarify the interpretation and application of the requirements. Yet, the criteria tend to be ambiguous. Consequently, the requirements themselves are eminently malleable to suit the interests of the United States, and easily susceptible to American self-interest. The eight requirements and attendant criteria for designation as an Eligible SSAC are as follows:

---

64. 19 U.S.C.S. § 3721(a). As quoted above, section 3721(a) refers to 19 U.S.C.S. § 2466a(c) (2005), a provision of the GSP statute. Section 2466a(c) defines "beneficiary sub-Saharan African country" as a country listed in section 107 of AGOA, 19 U.S.C.S. § 3706, and that the President determines is eligible under "subsection (a) of this section," i.e., under section 2466a(a). In turn, section 2466a(a)(1) incorporates by reference two sets of eligibility requirements—the eight AGOA requirements (in section 2466a(a)(1)(A)), and the GSP requirements (in section 2466a(a)(1)(B)).

65. 19 U.S.C.S. § 2466a(a)(1). This provision, specifically section 2466a(a)(1)(A) and (B), makes clear that both sets of criteria must be satisfied to get GSP treatment.

66. *See* 19 U.S.C.S. § 2466a(a)(1)(A) (concerning the eight AGOA eligibility requirements); § 2466a(a)(1)(B) (concerning the GSP beneficiary requirements); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 17-19; BHALA, *supra* note 50 (manuscript ch. 45).

1. Market Economic Reforms[67]

A market-based economy must exist. Three criteria for market orientation are set out: (1) protection of private property; (2) incorporation of an open, rules-based system; (3) minimal interference by the government in the economy, particularly by eschewing price controls, subsidies, and ownership of assets. Overall, it is unclear whether these criteria are exclusive or minimal conditions.

Further, each criterion presents ambiguities. What determines whether private property is respected—a high standard like the Takings Clause of the Fifth Amendment to the U.S. Constitution, or something more akin to the standard on expropriation in Chapter 11 of the North American Free Trade Agreement ("NAFTA"),[68] or some other, lesser standard? In practical terms, does incorporation of an open, rules-based system mean WTO membership? How much government interference is minimal, and what happens if there is analogous behavior by the American government in its economy—for example, the price regulation of public utilities, direct or indirect subsidies to an industry, such as aircraft or airlines, or ownership of certain assets?

2. Liberal Political Reforms[69]

A Western-style liberal political system must exist. Four criteria are mentioned. There must be (1) rule of law, (2) political pluralism, (3) the right to due process, and (4) equal protection under the law. Here, there are unclear aspects of the criteria.

How is the rule of law fairly gauged—by an index constructed by an international organization, an independent NGO, a committee of jurists established by the International Bar Association, or some other body? What makes a political system "pluralist"—are multi-candidate elections sufficient, or must there be multiple parties, too? Must there be universal enfranchisement at a particular age, and is free speech in the style of the First

---

67. *See* 19 U.S.C.S. § 3703(a)(1)(A); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

68. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

69. *See* 19 U.S.C.S. § 3703(a)(1)(B); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

Amendment to the Constitution necessary? Does "due process" refer to both procedural and substantive rights, and by what yardstick is due process to be measured? What happens if certain groups within a country, such as prisoners from a conflict, are denied due process in a manner allegedly perpetrated by the United States—for example, prisoners in Guantánamo Bay? As for "equal protection," is the benchmark here U.S. Supreme Court jurisprudence on the concept?

3. Elimination of Barriers to American Trade[70]

Barriers to American trade and investment must be eliminated. There are three criteria, all focused on market access for American businesses into SSACs: (1) the provision of national treatment and measures to create an environment favorable to investment; (2) the protection of intellectual property ("IP"); and (3) the resolution of bilateral trade and investment disputes.

The ambiguities in these criteria concern their relationship to accepted multilateral standards. Does "national treatment" mean adherence to Article III, particularly paragraphs 1-2 and 4, of the General Agreement on Tariffs and Trade ("GATT")? Is a climate conducive to investment if the rules of the WTO Agreement on Trade-Related Investment Measures ("TRIMs")[71] apply, or are other factors relevant? Would IP protection through the WTO Agreement on Trade Related-Aspects of Intellectual Property Rights ("TRIPs")[72] suffice, or is proof of enforcement—to avoid disputes akin to those between the United States and China—needed too? As for disputes, must they all be resolved, and to the satisfaction of the United States?

4. Development Programs[73]

Broad-based economic policies must be put in place. There are six criteria: (1) the reduction of poverty; (2) improved

70. *See* 19 U.S.C.S. § 3703(a)(1)(C); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

71. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

72. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

73. *See* 19 U.S.C.S. § 3703(a)(1)(D); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

health care; (3) increased educational opportunities; (4) expanded physical infrastructure; (5) the promotion of private enterprise; and (6) the formation of capital markets through micro-credit and other programs. There is no particularized guidance, however, as to judging whether such policies exist or are effective.

Poverty itself is a complex concept.[74] In traditional development economics thinking, it refers to deprivation of income. This approach is challenged famously by Nobel-Prize winning economist Amartya Sen, in *Development as Freedom.*[75] Briefly, he argues poverty is the deprivation of capabilities—in effect, "unfreedom" caused not only by a lack of income, but also by economic, political, transparency, and security deficits.[76] From a Sen-like perspective, then, the six criteria are appropriate. Yet, less ambiguity as to how each criterion is measured would be useful, as a number of questions are left unresolved.

What, other than Gini coefficients, should be used to measure poverty? Is improved health care gauged just by life expectancy at birth, or do other statistics, such as disease incidence rates, and physicians per 1000 people, matter too? In considering educational opportunities, are all levels—primary, secondary, tertiary, and adult—equally relevant, and are enrollment rates for girls to be accorded at least as much significance as for boys? While there is no end to physical infrastructure improvement, which facilities matter most—airports, energy, housing, railways, roads, seaports, telecommunications, or some combination thereof? How is the promotion of private enterprise different from some of the criteria connected to the first eligibility requirement, such as private property and minimal government involvement, and the second eligibility requirement, such as the rule of law?

5. Combating Corruption[77]

A system must exist to combat corruption and bribery. Only one criterion is offered, and then by way of example—signing the Convention on Combating Bribery of Foreign Public Offi-

74. *See* BHALA, *supra* note 50 (manuscript chs. 41-42).

75. AMARTYA KUMAR SEN, DEVELOPMENT AS FREEDOM (1999).

76. *See id.* at 104-27.

77. *See* 19 U.S.C.S. § 3703(a)(1)(E); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

cials in International Business Transactions ("Anti-Bribery Convention"). This Convention, promulgated by the Organization for Economic Co-operation and Development ("OECD") in 1997, and signed and ratified by thirty-six countries, is a notable achievement.[78]

Possibly the most frequently mentioned criticism of post-independence African leaders has been the propensity of a large number of them to loot their countries.[79] Signing the OECD Anti–Bribery Convention is an easy first step, but one far short of dealing with the reality of bad acts by SSA officials. Would reference to reports by prominent NGOs, such as Transparency International, which periodically ranks countries on corruption criteria, be another useful criterion? Might it also be worthwhile to evaluate anti-corruption efforts by monitoring efforts to prosecute corruption cases, clean up customs services, and interview actual and potential victims (for example, exporters and importers)?

6. Protecting Worker Rights[80]

Internationally recognized worker rights must be protected. Five criteria define these rights:
(1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable working conditions with respect to minimum wages, hours of work, and occupational safety and health.

As these criteria are drawn from conventions of the International Labor Organization ("ILO"), which a large number of countries have ratified, they enjoy widespread support. The principal ILO Conventions on these rights are:

1. ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise ("ILO

---

78. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *adopted* Nov. 21, 1997, S. TREATY DOC. No. 105-43 (1998), 37 I.L.M. 1 (1998). The United States ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on December 8, 1998. *See* Org. for Econ. Co-operation & Dev. [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status (Jan. 28, 2005), *available at* http://www.oecd.org/dataoecd/59/13/1898632.pdf.

79. *See supra* note 16.

80. *See* 19 U.S.C.S. § 3703(a)(1)(F); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

Convention 87") (ratified by 144 countries);[81]

2. ILO Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively ("ILO Convention 98") (ratified by 154 countries);[82]
3. ILO Convention No. 105 Concerning the Abolition of Forced Labour ("ILO Convention 105") (ratified by 165 countries, but denounced by two countries);[83]
4. ILO Convention No. 5 Fixing the Minimum Age for Admission of Children to Industrial Employment ("ILO Convention 5") (ratified by seventy-two countries, yet denounced by all but ten of them);[84]
5. ILO Convention No. 7 Fixing the Minimum Age for Admission of Children to Employment at Sea ("ILO Convention 7") (ratified by fifty-three countries, yet denounced by all but nine of them);[85]
6. ILO Convention No. 1 Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week ("ILO Convention 1") (ratified by fifty-two countries, denounced by one of them);[86]
7. ILO Convention No. 30 Concerning the Regulation of Hours of Work in Commerce and Offices ("ILO Convention 30") (ratified by thirty countries, denounced by

---

81. *See* Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17 (entered into force June 4, 1950) [hereinafter ILO Convention No. 87], *available at* http://www.ilo.org/ilolex/. The full text of each ILO convention, plus ratification information, is available at the ILOLEX Database of International Labor Standards ("ILOLEX") web site, at http://www.ilo.org/ilolex/.

82. *See* Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951) [hereinafter ILO Convention No. 98].

83. *See* Convention (No. 105) Concerning the Abolition of Forced Labor, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959) [hereinafter ILO Convention No. 105].

84. *See* Convention (No. 5) Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, 38 U.N.T.S. 81 (entered into force June 13, 1921) [hereinafter ILO Convention No. 5].

85. *See* Convention (No. 7) Fixing the Minimum Age for Admission of Children to Employment at Sea, July 9, 1920, 38 U.N.T.S. 109 (entered into force Sept. 27, 1921) [hereinafter ILO Convention No. 7].

86. *See* Convention (No. 1) Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and 48 in the Week, Nov. 28, 1919, 38 U.N.T.S. 17 (entered into force June 13, 1921) [hereinafter ILO Convention No. 1].

one of them);[87] and

8. ILO Convention No. 155 Concerning Occupational Safety and Health and the Working Environment ("ILO Convention 155") (ratified by forty-five countries).[88]

Yet, these conventions are not without controversy.

For instance, as the list indicates, a number of countries have denounced various conventions. Moreover, from this list, the only convention the United States has ratified is ILO Convention 105 on Forced Labor.[89] Finally, each right raises important conceptual questions. For example, what is the right minimum age for children, or is the answer contextual?[90] Likewise, does the "acceptability" of working conditions depend, in part, on the industry and country at issue, or is there a minimum floor that ought to be applied universally?

7. American National Security and Foreign Policy[91]

A country must not engage in activities that undermine the national security or foreign policy interests of the United States. No criteria are associated with this requirement. Hence, it is the most open-ended of all eight requirements, and a number of questions are obvious. What are the interests of the United States? What is the distinction between America's national security and foreign policy interests (or, in reality, is there a distinction)? What would it take to undermine the undefined interests? Does not undermining these interests mean, in practice, neutrality, or is support (tacit, at least) required? What happens if some activities by an SSAC undermine one American interest, but its other acts are inconsequential or supportive vis-à-vis other interests?

---

87. *See* Convention (No. 30) Concerning the Regulation of Hours of Work in Commerce and Offices, June 28, 1930, 39 U.N.T.S. 85 (entered into force Aug. 29, 1933) [hereinafter ILO Convention No. 30].

88. *See* Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment, *adopted* June 22, 1981, 1331 U.N.T.S. 279 (entered into force Aug. 11, 1983) [hereinafter ILO Convention No. 155].

89. *See supra* notes 81-88.

90. *See* Raj Bhala, *Poverty, Islam, and Doha*, 36 INT'L LAW. 159 (2002) (discussing, inter alia, the plight of workers in the ready-made garment industry in Bangladesh).

91. *See* 19 U.S.C.S. § 3703(a)(2) (2005); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

8. Human Rights and Terrorism[92]

A country must not engage in gross violations of internationally recognized human rights. It also must cooperate in international efforts to eliminate human rights violations. Likewise, a country must not provide support for acts of international terrorism, and cooperate in international efforts to eliminate terrorist activities. In effect, there are two requirements in one—human rights, which is new to the list of requirements, and anti-terrorism, which is connected to, if not overlapping with, the seventh requirement.

There are no specific criteria for the human rights criterion. Rather, the criteria are implicit in the modifying words. "Gross" and "internationally recognized" indicate reference to accepted human rights conventions. Yet, it is not clear what constitutes "cooperation." With respect to the anti-terrorism requirement, there are no helpful modifying words. What is "international terrorism"? What does it mean to "provide support"? What does it mean to "cooperate"? Finally, as for both requirements, the word "eliminate" must be read as a venerable aspiration, not as a distinct requirement itself, because—as both a historical and realistic matter—there is little probability of permanent elimination of human rights violations.

In AGOA, Congress delegated to the President the authority to enforce the eight country-eligibility requirements.[93] Thus, as a practical matter, the power to give or take away AGOA preferences lies inside the White House. The ambiguities in the criteria associated with each requirement mean this power is considerable.

These criteria are not necessarily "wrong," nor are answers unavailable to the questions posed above. Rather, the questions highlight the fact—a political fact created by legal ambiguities in the criteria—that an American president has considerable discretion to interpret and apply the eligibility requirements to SSA. The President can take them seriously, through strict, nonpartisan analysis of the criteria, look at the criteria self-interestedly, by manipulating them to suit economic or political goals, or do anything in between.

---

92. *See* 19 U.S.C.S. § 3703(a)(3); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

93. *See* 19 U.S.C.S. § 2466a(a) (2005).

As a general proposition, there is nothing inherently wrong in setting requirements with ambiguous criteria and thereby conferring discretion to the President.[94] The point is simply the AGOA eligibility criteria contain considerable room for opportunistic mischief, and thereby for bounded generosity—as well as for magnanimity. This Janus face presents a large question: Why not drop most, if not all (except, perhaps, the eighth), of the country-eligibility requirements and attendant criteria? Justification for the eighth requirement may be that there is no charitable obligation to give to evil-doers, and human rights violators and terrorists count as such.

To return to the legalities of AGOA, it is section 111(a) that authorizes the President to designate an SSA country (from the section 107 list, above) as an eligible one, if that country meets the section 104(a) eligibility requirements as of the date AGOA was enacted (May 18, 2000).[95] Initially, President George W. Bush designated thirty-four of the forty-eight potentially eligible countries as actually eligible.[96] He excluded fourteen countries with a combined population of 183,484,671, and average per capita GDP of US$1664: Angola, Burkina Faso, Burundi, Comoros, the Democratic Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gambia, Liberia, Somalia, Sudan, Swaziland, Togo, and Zimbabwe.[97]

Subsequently, President Bush declared five of these countries to be Eligible SSACs: Swaziland (effective January 17, 2001), Côte d'Ivoire (effective May 16, 2002), Sierra Leone (as of October 2, 2000, but with delayed implementation until October 23, 2002), Democratic Republic of Congo (as of December 31, 2002, but with delayed implementation), and Gambia (also

---

94. *But see* Kevin C. Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 CORNELL INT'L L.J. 127 (1987) (arguing for reduced presidential discretion in the context of trade remedies).

95. How section 111(a) accomplishes this task is a bit tricky. In brief, § 111(a) amends Title V (i.e., Sub-Chapter V) of the Trade Act of 1974 by adding a new provision, section 506A, to that Act. Title V contains the GSP program (19 U.S.C.S. §§ 2461-2467), and section 506A appears at 19 U.S.C.S. § 2466a. Under section 506A(c) of the 1974 Act (19 U.S.C.S. § 2466a(2)), the President must include his country-eligibility determinations, along with explanations thereof, in his annual AGOA report mandated by section 106 of AGOA (19 U.S.C.S. § 3705).

96. *See* Proclamation No. 7350, 65 Fed. Reg. 59,321 (Oct. 2, 2000).

97. These data are current as of August 30, 2005. The per capita GDP are on PPP terms. *See supra* Table 1.

as of December 31, 2002, but with a delay).[98] The remaining seven countries are not yet eligible for AGOA preferences.

In the event the President determines an SSAC has not met the criteria, or is "not making *continual* progress" toward meeting any one of the first six of the eight requirements, the President "*shall* terminate" the eligibility of that country for AGOA preferences.[99] Termination is effective on January 1 of the year following the determination.[100] If this language—particularly the italicized words—is taken seriously, then the President has little discretion but to terminate otherwise eligible countries in many—maybe most—cases. Few countries—developed, developing, or least-developed—make "continual" progress across all six areas. Typicaly, change occurs at an erratic pace. In other words, only a reading of the termination language that does not take "continual" literally preserves eligibility.

C. *Not All Are Equal*

A significant point to note about SSACs designated as eligible for AGOA preferences—i.e., Eligible SSACs—is they are not all equal. That is true in two senses. First, as intimated at the outset, eligibility for AGOA preferences is not the same as beneficiary status for GSP treatment (i.e., being a BDC). That is because there are eight AGOA eligibility criteria, which are distinct from the GSP country-eligibility criteria. Both sets of criteria, however, must be satisfied to qualify as a Beneficiary SSAC and thereby become eligible for GSP treatment for non-T&A merchandise and AGOA preferences for T&A articles.

Assume an SSAC satisfies both sets of criteria, and thus not only is an Eligible SSAC, but also a Beneficiary SSAC. The second sense in which the American statutory scheme treats SSACs unequally is that not every Beneficiary SSAC automatically gets duty-free, quota-free treatment on T&A articles. In reality as well as in theory, several Beneficiary SSACs neither qualify for nor actually receive this treatment. In other words, with respect to T&A benefits, to be a Beneficiary SSAC is to be a contender, not a prize-winner. The list of T&A-eligible Beneficiaries is in chap-

98. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 47 n.48.

99. 19 U.S.C.S. § 3703(b) (emphasis added).

100. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48-49 (discussing this provision).

ter 98 of the HTSUS.[101] It consists of twenty-four of the Eligible SSACs, namely: Benin, Botswana, Cameroon, Cape Verde, Ethiopia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia.

These countries could be called "Beneficiary SSACT&As," for "beneficiary Sub-Saharan African country on textile and apparel." Indubitably, the increasing length of the acronyms, from "SSAC" to "SSACT&A," would be annoying. However, it would be more efficient than repeating the jumble of words set out in the relevant AGOA and GSP provisions. More importantly, the extended acronym would illustrate a theme about AGOA—spiraling conditionality. With its eligibility strictures, starting with being located in a desperately poor region and finishing with receiving benefits on T&A merchandise, AGOA is anything but bounteous assistance to bedeviled countries.

What factor delineates Beneficiary SSACs in general from Beneficiary SSACT&As? As explained later, the answer is customs rules on counterfeit documentation and transshipment. To be a Beneficiary SSACT&A, the United States must determine a Beneficiary SSAC has implemented procedures, including an effective visa system, to prevent unlawful T&A transshipment.[102] These procedures must conform to the ones set forth in Chapter 5 of NAFTA.[103] When a Beneficiary meets the criteria for T&A preferences, that country is listed on the AGOA website.[104]

Reference to NAFTA—along with incorporation of GSP beneficiary requisites—spotlights another theme in AGOA, namely, "piggy-backing." That is, AGOA applies to Beneficiary SSAC rules in existing regional and PTAs. There is nothing inherently wrong with using rules from one trade agreement in a different context. Indeed, the pattern helps avoid a proliferation of complexity. However, this maneuver presumes the contexts from which the rules are exported and into which they are imported are broadly similar. Are other GSP beneficiaries like

101. *See* HTSUS, *supra* note 44, at 98-XIX-1, U.S. note 1.
102. *See* 19 U.S.C.S. § 3722(a)(1)(A) (2005).
103. *See* NAFTA, *supra* note 68, at 358.
104. *See* U.S. Gov't Export Portal, Countries Eligible for AGOA Benefits, http://www.agoa.gov/eligibility/country_eligibility.html (last visited Nov. 15, 2005).

SSACs? Are Canada and Mexico like these countries? To ask the question is to suggest the answer that SSA is different because of its uniquely abject condition.

III. *THREE PROBLEMS*

God conceals himself from the mind of man,
but reveals himself to his heart.
—African Proverb

A. *Economic Dependency?*

From the articulation of AGOA country-eligibility requirements, three distinct areas of doubt arise. Taken together, or even individually, these problems adduce the limits of American generosity in AGOA. Significantly, each one is manifest even before considering the question of "eligibility for what?," that is, the substantive preferences treatment.

First, query whether some requirements create a kind of economic dependence among Beneficiary SSACs on the United States—or, perhaps, on developed countries more generally. Consider the first eligibility requirement. Adherents to the thesis of Francis Fukuyama in *The End of History and the Last Man* would agree there is no debate left about the superiority of a market-based economy over the known, tried alternatives.[105] Adherents to the thesis of Hernando de Soto in *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* would agree protecting private property is a (if not the) key to economic development.[106] However, if a prospective Beneficiary SSAC undertakes market-based reforms under American pressure to secure AGOA benefits, not at a pace suitable for the local context, then might one effect of liberalization be greater economic dependence, in some respects, on the United States?

For example, the first requirement calls for minimization of government "interference" in an economy, using examples of price controls, subsidies, and state-owned assets. Suppose a Beneficiary SSAC agrees to rapid privatization of all state-owned enterprises ("SOEs"). Is there a risk that U.S. interests and those of

105. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 205-06 (1992).

106. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6-7 (2000).

other developed countries will gobble up controlling equity stakes? In turn, might prices for goods and services supplied by the former SOEs—from garbage collection and health care to telecommunications and water—rise beyond the ability of many residents in the beneficiary to pay? Might concomitant service sector trade liberalization, under the General Agreement on Trade in Services ("GATS"),[107] benefit an urban elite relatively more than other segments of society? Might the urban and rural poor in the country be further impoverished, and thereby more dependent on direct foreign aid?

Consider the third and fourth eligibility requirements. The elimination of trade and investment barriers to American exporters and multinational corporations ("MNCs")—particularly the call for national treatment, IP protection, and dispute settlement mechanisms—is consistent with obligations in the GATT and WTO agreements.[108] However, those obligations are set out in multilateral treaties, whereas AGOA is a unilateral, discretionary program. Likewise, the fourth eligibility requirement calls for poverty-reduction measures, ranging from educational opportunities and physical infrastructure improvements to private enterprise support and capital markets development.[109] They are sensible enough, though typically found in agreements between multilateral or regional development banks and borrowing countries.[110] Might conditioning of AGOA benefits on satisfaction of these criteria do more than reinforce the multilateral obligations? That is, might they cause a Beneficiary SSAC to focus particularly on treatment favorable to American commercial interests? With attendant trade liberalization in goods and ser-

---

107. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

108. *See generally* RAJ BHALA, MODERN GATT LAW chs. 1-16 (2005) (concerning General Agreement on Tariffs and Trade ("GATT") market access obligations).

109. *See* 19 U.S.C.S. § 3703(a)(1)(D) (2005); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 48.

110. *See generally* JOHN W. HEAD, THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS chs. 2(III), 4 (2005) (evaluating, inter alia, criticisms of the lending operations of the World Bank and Asian Development Bank); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521 (2004) (concerning the International Monetary Fund ("IMF")); John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241 (2004) (concerning the World Bank and regional development banks).

vices markets, might the consequence be a massive influx of American goods that dwarfs the ability of African companies to compete, resulting in dependence on American suppliers? Might another consequence be reliance on American service providers for services like education, infrastructure development, and commercial and investment banking?

To spin out these scenarios is not to forecast they will occur. It is also not to challenge the wisdom of multilateral trade liberalization, nor to deem true the school of thought in economic development known as Dependency Theory.[111] Rather, the scenarios are meant only to give pause for reflection. Are the first, third, and fourth eligibility requirements better left to multilateral legal instruments and organizations? Are they appropriate in a program—AGOA—that possibly ought to be conceived of as purely charitable?

B. *Political Bullying?*

Why impose these political criteria on SSA? One answer is to evade the question by saying some of the criteria do not matter. That, in practice, some of them may not be real constraints on designation for AGOA eligibility. Another answer is AGOA benefits are a gift to be earned, not an entitlement based on status as a poor country. Surely, it is appropriate for a gift-giver to choose to whom, and why, to give? A different response, however, focuses not on the giver, but the recipient. Ought the only relevant criteria to be income-based, i.e., surely if a country is poor enough, then it ought to qualify?

Following this line, query whether some AGOA country-eligibility requirements amount to political bullying. The obvious affirmative example is the seventh requirement. It is nothing more than an effort to impose whatever influential American officials convince themselves is important at the moment on a SSAC. The presence of this condition in AGOA ought to have been an embarrassment to a great nation. As for the second, fifth, and eighth requirements, they embody laudable objectives, at least some of which are in the interest of SSACs.[112] Advancement of the rule of law, respecting human rights, and fighting

111. For discussions of this theory, see, for example, BHALA, *supra* note 50 (manuscript ch. 43).

112. *See* 19 U.S.C.S. § 3703(a)(1)(B), (a)(1)(E), (a)(3).

terrorism are illustrations. They are intrinsically good, and necessary for trade promotion. That also is true for anti-corruption drives.

However, is this comment equally true for other aspects of the second eligibility requirement, namely, political pluralism, and for the sixth requirement, concerning the protection of each of the enumerated workers rights, respectively? The post–1979 reforms in China offer an example on the sequencing of political and economic development that runs counter to these criteria.[113] Arguably, developments in the Kingdom of Saudi Arabia do, too.[114] The point is not to argue against political pluralism or worker rights.[115] Rather, it is to inquire about the wisdom of their placement in a PTA, and about what preferences really are and ought to be about.

C. *Social Justice?*

Third, and perhaps most deeply troubling, query whether some eligibility requirements appear incongruous with basic social justice principles that are, in turn, grounded in deep-seated religious precepts. As one faith-based perspective, consider whether these requirements comport with the pillars of Catholic social justice theory. Those pillars are respect for human dignity, promotion of the common good, and the preferential option for the poor.[116] The foundation for all three pillars is selfless giving—or, in a word, generosity.

It is not difficult to mount a case that the AGOA eligibility requirements are self-interested, indeed, nakedly so. To be sure, there is nothing unethical or irreligious with the fourth and fifth requirements.[117] Calling for poverty-reduction programs manifests the preferential option for the poor. Further, demanding anti-corruption efforts is sensible gift-giving, as it helps

113. *See* Alice E.S. Tay & Hamish Redd, *China: Trade, Law and Human Rights*, *in* CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 156-72 (Deborah Z. Cass et al. eds., 2003) (analyzing Chinese legal reforms in connection with its WTO accession).

114. *See generally* Bhala, *supra* note 8 (analyzing American demands on the Kingdom of Saudi Arabia in the context of WTO accession).

115. Regarding the sixth condition, internationally recognized worker rights, Oxfam International supports the inclusion in labor legislation in SSACs of International Labor Organization ("ILO") standards. *See* OXFAM INT'L, *supra* note 13, at 31.

116. For further information on these pillars, see *supra* note 25.

117. *See* 19 U.S.C.S. § 3703(a)(1)(D), (a)(1)(E).

ensure the benefits of duty-free, quota-free treatment flow to intended recipients, namely, African employers and employees responsible for production and exportation. The seventh requirement, however, evinces a lack of generosity.[118] Dignified self-respect might cause an SSAC to balk at this manifestly selfish condition.

Similarly, the third requirement is designed to help the United States gain market access in SSA.[119] The sixth requirement, noble as it sounds, arguably does little more than placate American labor interests.[120] At best, from an American perspective, it might raise the cost of production in Africa, thereby cutting into a competitive advantage enjoyed by African exporters. As for the first and second criteria, might they be an effort to export the models of American capitalism and liberal democracy, to mold the region in the American image?

Socially just regimes do not condition charity on the nature of the beneficiary. While it is fair enough to take steps to ensure the beneficiary does not abuse or squander gifts, it is not appropriate to make fine gradations among prospective beneficiaries based on largely self-interested criteria. Perhaps the quintessential model of socially just behavior is the New Testament parable of the Good Samaritan. This parable is set forth in Luke:

> But because he [a scholar of the law who stood up to test Jesus] wished to justify himself, he said to Jesus, "And who is my neighbor?" Jesus replied, "A man fell victim to robbers as he went down from Jerusalem to Jericho. They stripped and beat him and went off leaving him half-dead. A priest happened to be going down that road, but when he saw him, he passed by on the opposite side. Likewise a Levite came to the place, and when he saw him, he passed by on the opposite side. But a Samaritan traveler who came upon him was moved with compassion at the sight. He approached the victim, poured oil and wine over his wounds and bandaged

118. *See id.* § 3703(a)(2).

119. *See id.* § 3703(a)(1)(C).

120. *See* Jagdish Bhagwati, *An Opportunity for Democrats to Denounce Protectionism*, FIN. TIMES (London), Aug. 10, 2005, at 11 ("Terrified that trade with countries with lower wages and labour standards will produce more paupers in America by lowering U.S. wages, and will even reduce American labor standards, the AFL–CIO has long embraced the view that workers' only salvation is to raise the cost of production of competing industries abroad by requiring them to have the same labour standards as the U.S.").

> them. Then he lifted him up on his own animal, took him to an inn and cared for him. The next day he took out two silver coins and gave them to the innkeeper with the instruction, 'Take care of him. If you spend more than what I have given you, I shall repay you on my way back.' Which of these three, in your opinion, was neighbor to the robbers' victim?" He answered, "The one who treated him with mercy." Jesus said to him, "Go and do likewise."[121]

Imagine if the Samaritan took the deposition of the man, asking questions about his origin and nature, how he managed to fall victim to such a mess, and what plans he had to get out of it. Imagine, further, if the Samaritan required the man to sign a contract with him, whereby the man agrees to take certain actions, refrain from others, and indemnify the innkeeper against any loss—all because the Samaritan thinks (rightly or wrongly) these obligations will be good for the man. Only after signing is the man eligible for a ride on the Samaritan's animal, and a respite at the inn.

The consequence would be that the Good Samaritan would become a Conditional Samaritan. The man becomes a Servant mindful of the interests of the Samaritan in exchange for assistance. Query whether the AGOA eligibility criteria cast the United States and SSACs, respectively, in the role of Conditional Samaritan and Servant.

IV. *NON-TEXTILE AND APPAREL ARTICLES*

When there is no enemy within,
the enemies outside cannot hurt you.
—African Proverb

A. *Enhanced GSP Treatment*

All SSACs listed in section 107 of AGOA may qualify for regular and enhanced GSP treatment on non-T&A merchandise.[122] To do so, a country must satisfy two sets of requirements. First, it must meet all eight criteria (discussed above) in section 104 of

121. *Luke* 10:29-37 (The Catholic Study Bible).

122. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 46. Under AGOA III, the termination date for GSP benefits for all Beneficiary SSACs is September 30, 2015. *See* 19 U.S.C.S. § 2466b (2005).

AGOA,[123] and thus be an Eligible SSAC.[124] Second, the country must comply with all of the country-eligibility criteria in section 502 of the GSP statute, and thereby qualify as a Beneficiary SSAC.[125] Put simply, to proclaim SSACs are eligible for regular and enhanced GSP benefits is to tell only part of the story. Without pointing out they must comply with a double-set of statutory country-eligibility requirements—rules in AGOA and GSP—that proclamation is misleadingly generous.

Conversely, any otherwise-eligible SSAC (from the list in section 107 of AGOA, above) must be excluded if it fails to satisfy the GSP criteria for designation as a BDC. The term "BDC" applies to any developing or least-developed country satisfying the GSP country-eligibility rules. The term "Beneficiary SSAC" is a BDC located in SSA. Designation depends on annual monitoring and review by the President, and the Office of the U.S. Trade Representative maintains on its website a list of countries the President agrees satisfy certain conditions.[126] Similarly, the President must terminate beneficiary status to any previously-designated Beneficiary SSAC if that country fails to make "continual progress" toward meeting all of the eligibility criteria.[127] Thus, the list of Beneficiary SSACs in the U.S. Code and HTSUS creates the illusion of permanence to exporters and importers, and to the governments of the countries. In fact, Beneficiaries are such not because they are desperately poor, but because of grace from a U.S. President. Each SSAC must earn that grace by satisfying requirements consistent with American interests.

How does an SSA country gain status as a "beneficiary" for GSP treatment on non-T&A merchandise? The answer is satisfaction of GSP statutory criteria for BDC status, on which AGOA piggybacks. These criteria have existed in the 1974 Act, as amended, since the United States first implemented its GSP program on January 1, 1976.[128] These criteria are explained and analyzed in other sources.[129] Summing the limitations, there are

123. 19 U.S.C.S. § 3703(a).

124. *See* 19 U.S.C.S. § 2466a(a)(1)(A).

125. *See id.* § 2466a(1)(B) (referring to section 502, which is 19 U.S.C.S. § 2462).

126. *See id.* § 2466a(a)(2); *see also* U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES GUIDEBOOK 16 (2005), http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/asset_upload_file209_8359.pdf.

127. *See* 19 U.S.C.S. § 2466a(a)(3).

128. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 15-16.

129. Summarized, the GSP country-eligibility criteria are as follows:

- Two Income Criteria: There are two income-based criteria—
  (1) Developed countries are not eligible for preferential trade treatment under the GSP program. These countries are Australia, Canada, all members of the European Union ("EU"), Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland. *See* 19 U.S.C.S. § 2462(b)(1).
  (2) A BDC (or Beneficiary SSAC) may become a "high income" country as defined by the World Bank, and thereby lose its status as a beneficiary. *See id.* § 2462(e). The cut-off the World Bank uses for "high income" is a per capita gross national income ("GNI") of approximately US$10,066, which covers less than one-sixth of the population of the world (roughly 29 countries with a population of one million or more, totaling 0.9 billion people). *See* World Bank, Country Classification, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Nov. 15, 2005). Thus, for example, Bahrain, Brunei, Bermuda, and Nauru have been dropped from the list.
- Eight Political Considerations: There is an eight-point list of factors that render a country ineligible for designation by the President as a BDC—
  (1) A communist country is ineligible, unless the country already receives non-discriminatory (i.e., most-favored nation) treatment from the United States, is a WTO Member and a member of the IMF, and is "not dominated or controlled by international communism." 19 U.S.C.S. §2462(b)(2)(A).
  (2) A country is ineligible if it is a party to an arrangement, the goal of which is "to withhold supplies of vital commodity resources from international trade or to raise the price" of the commodity "to an unreasonable level," and the effect of which is "to cause serious disruption of the world economy." This limitation is for cartels, particularly the Organization of Petroleum Exporting Countries ("OPEC"). *Id.* § 2462(b)(2)(B).
  (3) A country is ineligible if it affords preferential trade treatment to exports from a developed country other than the United States, and this treatment "has, or is likely to have, a significant adverse effect" on U.S. commerce. This constraint is for "reverse preferences." *Id.* § 2462(b)(2)(C).
  (4) A country is ineligible if it has nationalized or expropriated American property, including intellectual property ("IP"), or has taken action that is similar in effect to a nationalization or expropriation (namely, nullifying or repudiating an existing contract, or imposing or enforcing taxes or restrictive maintenance or operational conditions). There are three exceptions: the country has provided adequate and effective compensation to the property owner, is in negotiations to provide compensation, or is engaged in arbitration over compensation. This "property rights" limit on eligibility protects not only individual American citizens, but also any corporation, partnership, or association that is fifty percent or more owned by a U.S. citizen. *See id.* § 2462(b)(2)(D).
  (5) A country is ineligible if it fails to recognize as binding, or enforce, an arbitral award in favor of the United States. This "arbitration" limit protects individual American citizens, and also any corporation, partnership, or association that is fifty percent or more owned by a U.S. citizen. *See id.* § 2462(b)(2)(E).

(6) A country is ineligible if it aids or abets international terrorism (e.g., by granting sanctuary from prosecution for an alleged act), or fails to support the efforts of the United States to combat terrorism. *See id.* § 2462(b)(2)(F).

(7) A country is ineligible if it fails to afford "internationally recognized worker rights." *Id.* § 2462(b)(2)(G). These rights track the five most important ones set forth by the ILO: the right of association; the right to organize and bargain collectively; a prohibition on forced or compulsory labor; a minimum age for the employment of children (as well as a prohibition on the worst forms of child labor); and acceptable conditions of work (specifically, as to minimum wages, work hours, and safety and health standards). *See id.* § 2467(4). There is no ILO convention on child soldiers. In the GSP context, however, this list is not exclusive. The President must report annually to Congress on the status of internationally recognized worker rights in each BDC (or Beneficiary SSAC). *See id.* § 2464.

(8) A country is ineligible if it "has not implemented its commitments to eliminate the worst forms of child labor." *Id.* § 2462(b)(2)(H). There are four "worst forms": slavery in any form (e.g., sale, trafficking, debt bondage, forced or compulsory labor generally or for the armed forces); prostitution and pornography; illicit activities (e.g., narcotics production and trafficking); and work that by its nature "is likely to harm the health, safety, or morals of children." *Id.* § 2467(6). The President's annual report on the status of internationally recognized worker rights in each BDC (or Beneficiary SSAC) must include discussion of efforts to eliminate the worst forms of child labor in that country. *See id.* § 2464; *see also* LORETTA E. BASS, CHILD LABOR IN SUB-SAHARAN AFRICA 4 (2004) (observing that the highest incidence of child labor is in Africa, where one out of three children work, and offering a systematic study of the problem).

- Seven Additional Factors: There are seven further requirements the President must consider in deciding whether to grant BDC status to a particular country:

(1) Has the country expressed a desire to be designated a BDC? *See* 19 U.S.C.S. § 2462(c)(1).

(2) Does the level of economic development of the country, measured by per capita gross national product ("GNP"), living standards, and other economic factors the President deems appropriate, make it an appropriate designee for BDC status? *See id.* § 2462(c)(2).

(3) Do other major developed countries extend GSP treatment to the country? *See id.* § 2462(c)(3).

(4) To what extent has the country assured the United States "it will provide equitable and reasonable access to the markets and basic commodity resources" of the country, and also assured the United States "it will refrain from engaging in unreasonable export practices"? *Id.* § 2462(c)(4).

(5) To what extent does the country provide "adequate and effective" IP rights? *Id.* § 2462(c)(5).

(6) To what extent has the country reduced trade distorting investment practices (e.g., export performance requirements) and barriers to trade in services? *See id.* § 2462(c)(6).

seventeen in total—two income criteria, eight political considerations, and seven additional factors.[130]

What help is it to gain status as a Beneficiary SSAC, and thereby qualify for GSP treatment? There are four enhancements over regular GSP treatment. However, asked differently, is it correct to assert the United States provides more generous treatment to Beneficiary SSACs than it does to other BDCs under the GSP? The answer is clearly "yes" with respect to only one enhancement—waiver of competitive need limitations.

The GSP statute contains competitive need limitations applicable to BDCs, which AGOA waives for eligible merchandise from Beneficiary SSACs.[131] Under the GSP program, merchandise eligible for duty-free treatment may be denied that preference if it exceeds a threshold export value (US$120 million in 2005) or a threshold percentage (fifty percent) of total imports.[132] In effect, once a GSP beneficiary has established an international comparative advantage in a category of merchandise, the United States denies that merchandise preferential treatment. Along with Beneficiary SSACs, least-developed BDCs also benefit from this waiver.

On the one hand, the denial makes sense. The preference contributed to a strong market position, but its improved market position evinces a lack of need for continuing the preference. An ongoing preference might tilt the playing field against other, non-beneficiary competitors. On the other hand, why penalize a GSP beneficiary for solid economic performance? When re-

---

(7) To what extent is the country taking steps to afford its workers internationally recognized worker rights? *See id.* § 2462(c)(7).

See U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 17-19; *see also* BHALA, *supra* note 50 (manuscript ch. 45).

130. Not all of the political limitations on the President's discretion are equally severe. The President cannot waive the first three limits. However, the President can designate a country as a BDC if it is not in full compliance with any one of the last five restrictions, if that designation "will be in the national economic interest of the United States." 19 U.S.C.S. § 2462(b)(2)(H). While the President must report to Congress on what would amount to a waiver of one or more of these eligibility criteria, the words "national economic interest" appear deliberately intended to give the President flexibility to escape a restriction. Further, the President must withdraw or suspend designation (by Executive Order or Presidential Proclamation) of any country as a BDC under "changed circumstances," where a country no longer satisfies the political considerations. 19 U.S.C.S. § 2462(d)(2).

131. *See* 19 U.S.C.S. § 2463(c)(2)(D).

132. *See id.* § 2463(c)(2)(A).

wards for good behavior stop, or penalties start, the obvious incentive is to cease good behavior just before an incentive is removed or a disincentive triggered. Fortunately for Beneficiary SSACs, there are no competitive need limitations. In theory, a Beneficiary SSAC could gain a commanding position in a particular American product market, yet continue to receive duty-free treatment. Consequently, in AGOA the United States sidestepped the dilemma associated with removing incentives for successful market performance.

There are three other enhancements to GSP treatment AGOA provides. One concerns product eligibility, and two affect the rule of origin. As to these differences, the answer to the question "Is a Beneficiary SSAC 'really' better off than a BDC?," the answer is "yes and no."

Regarding product eligibility, some non-T&A articles eligible for preferences under AGOA would not be eligible for GSP treatment. That is, AGOA applies duty-free treatment to a broader range of products than the GSP program.[133] The GSP statute contains a list of articles considered "import sensitive," and thus an actual or potential threat to one or more American producers.[134] Such articles are not eligible for duty-free treatment, even if they originate in a BDC.[135] AGOA essentially relaxes the strictures of this "Ineligible List" by deleting some items from it, thereby rendering them eligible for duty-free treatment if they originate in a Beneficiary SSAC.

In particular, if the International Trade Commission ("ITC") advises the President any of the following seven broad categories of merchandise coming from a Beneficiary SSAC are "not import-sensitive in the context of imports from beneficiary sub-Saharan African countries" (even if they are import sensitive from BDCs), then the President may provide duty-free treatment to the article:[136] watches, import-sensitive electronics, import-sensitive steel, footwear, leather goods (handbags, luggage, flat goods, work gloves, and wearing apparel), import-sensitive semi-manufactured and manufactured glass products, and any other

133. *See* U.S. CUSTOMS SERV., *supra* note 31, at 94.

134. *See* 19 U.S.C.S. § 2463(b)(1); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 19.

135. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 20.

136. *See* 19 U.S.C.S. § 2466a(b)(1).

articles that are import sensitive in the context of the GSP program.

These seven categories are a subset of the articles on the statutory "Ineligible List."[137] Under AGOA, articles in these categories are not automatically presumed to be import sensitive, insofar as their source is a Beneficiary SSAC. Rather, there is a possibility of showing they pose no actual or potential threat to domestic producers, in which case they may receive duty-free treatment.[138]

The two final AGOA enhancements to GSP-type treatment for Beneficiary SSACs concerns origination. As a general proposition, a rule (or rules) of origin is necessary in any PTA to ensure the benefits of the arrangement, namely, duty-free treatment accrued to the intended beneficiaries. Without origin requirements, the PTA would not make beneficiaries better off than competitors in third countries.[139] Accordingly, in the GSP statute, the basic rule of origin is a thirty-five percent value added test.[140] Essentially, the sum of (1) the cost or value of materials produced in a BDC and (2) the direct costs of processing operations in a BDC must equal or exceed thirty-five percent of the value of an article as appraised by the U.S. Customs and Border Protection ("CBP") (formerly, the Customs Service).[141] The article itself must be imported directly from the BDC to the United States. The AGOA rule of origin essentially tracks the general GSP rule.[142]

Under AGOA, however, this quantitative test benchmark is relaxed a bit, by allowing for up to fifteen percent of the appraised value of an article to consist of materials produced in the United States.[143] In other words, if fifteen percent (or less) of the cost or value of inputs used in a product made in a Beneficiary SSAC comes from American raw materials or intermediate

137. *See id.* § 2463(b)(1); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 19.

138. *See* Proclamation No. 7388, 65 Fed. Reg. 80,723 (Dec. 18, 2000) (listing the articles determined by the President not to be import-sensitive in the context of imports from Beneficiary SSACs, and thus eligible for duty-free treatment).

139. *See* OXFAM INT'L, *supra* note 13, at 60.

140. *See* 19 U.S.C.S. § 2463(a)(2)(A).

141. *See id.*

142. *See* U.S. CUSTOMS SERV., *supra* note 31, at 91; *see also* TAYLOR, *supra* note 44, at 37.

143. *See* 19 U.S.C.S. § 2466a(b)(2)(A).

goods, a question arises as to whether this amount should qualify in reaching the thirty-five percent value added threshold. The answer for a BDC seeking GSP treatment is "no." More precisely, applying the *Torrington* dual substantial transformation rule, the answer is "no, unless the American inputs are transformed substantially in the BDC into a new and different article, thereby conferring origination on them."[144] The answer under AGOA, however, is "yes."

Further, under AGOA, the cost or value of materials produced in a current or former Beneficiary SSAC counts toward meeting the thirty-five percent value added test.[145] A former Beneficiary is one that lost its status because it entered into an FTA with the United States.[146] The United States has been negotiating an FTA with the Southern African Customs Union ("SACU") for approximately four years, and Congress declares in AGOA its interest in FTAs with SSACs.[147] Yet, the United States currently has no FTA with any Beneficiary, and none appears likely any earlier than the end of 2006.[148] Nonetheless,

---

144. *See, e.g.*, *Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985).

145. *See* 19 U.S.C.S. § 2466a(b)(2)(B).

146. *See id.* § 2466a(c)(2); *see also* Eric J. Boos, *Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and Its Effects on the Least Developed Countries of Sub-Saharan Africa*, 11 TUL. J. INT'L & COMP. L. 181, 207-08 (2003) (discussing the AGOA provisions that create a framework for trade agreements between the United States and SSACs, but questioning the congressional intent behind AGOA and arguing that a genuine commitment to economic development in SSAC "appears to be lacking" because (1) "[t]he market-led arrangement completely favors the United States," (2) some benefits already existed for certain SSACs, particularly Gabon, Nigeria, and South Africa, and (3) "the United States only allows sub-Saharan African nations to participate in global markets in which they are at such a competitive disadvantage that they pose virtually no threat whatsoever").

147. *See* 19 U.S.C.S. § 3723(a) (2005).

148. *See id.* The remainder of this section of the statute concerns planning for the negotiations of an FTA with Beneficiary SSACs, and the subsequent section, title 19, section 3724 of the United States Code, creates the position of an Assistant USTR for African Affairs. The Southern African Customs Union ("SACU") members are Botswana, Lesotho, Namibia, South Africa, and Swaziland. The United States declared its intention to negotiate an FTA with SACU in November 2002. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 57-58. In the summer of 2005, the United States and SACU members agreed to meet every six to eight weeks until the end of 2006 to resolve specific issues. Working groups exist in the areas such as agricultural market access, non-agricultural market access, dispute settlement, electronic commerce, environmental rights, intellectual property rights, labor rights, sanitary and phytosanitary measures, services, and technical barriers to trade. Major impediments to expeditious progress on an FTA, according to both the United States and SACU members, have been the differing stages of development of those members, the lack of history of common policy

inputs from any SSAC that is or was a Beneficiary may qualify in meeting this Test. There is no quantitative limit (such as fifteen percent) on how many may be included.

In contrast, under the normal thirty-five percent Test, a BDC can count the cost or value of materials produced in the territory of another BDC only if the other BDC is a member of the same association of countries, i.e., an FTA or customs union, and the member BDCs are treated as a single country.[149] The same limitation—membership in a common FTA or customs union—applies to counting the direct costs of processing operations in its territory or in the territory of these other countries.[150] However, a BDC cannot count the value of an input from a BDC with which it does not share membership in a FTA or customs union toward meeting the thirty-five percent Test. In that instance, the input—to count—must be substantially transformed into a new and different article of commerce in the BDC seeking GSP treatment.[151]

B. *How Enhanced Are the Enhancements?*

How generous are the AGOA exceptions to the GSP Ineligible List? Aside from the waiver of competitive need limitations, "not very" is a possible response. Even this waiver could be considered insignificant on a showing that few if any Beneficiary SSACs would come close to the limits in the foreseeable future. Consider three legal facts.

First, there are two categories of articles on the Ineligible List for which the possibility of duty-free treatment under AGOA does not exist:[152]

1. Certain target articles: Articles subject to a trade remedy action, specifically, a safeguard remedy or national security action.
2. Certain agricultural products: The quantity of agricultural articles subject to a tariff rate quota that exceeds the in-quota threshold.

---

among them, and the evolving nature of SACU as an entity. *See* Gary G. Yerkey, *U.S. to Hold Free Trade Talks with SACU Countries Sept. 27-29*, 22 I.T.R. (BNA) 1481-82 (Sept. 15, 2005).

149. *See* 19 U.S.C.S. §§ 2463(a)(2)(A)(ii), 2467(2).

150. *See id.*

151. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50.

152. *See* 19 U.S.C.S. § 2463(b)(2)-(3).

Second, even though T&A articles are eligible for AGOA benefits despite being on the GSP Ineligible List, actual receipt of the benefits hinges on satisfying rules of origin.[153] These rules (discussed below) tend not only to be complicated, but also to serve the self-interest of American producers of certain T&A inputs. Put differently, to say the President has the discretion to extend duty-free treatment to all classes of merchandise from an SSA beneficiary country, except T&A products, would be misleading.[154]

Third, and most importantly, the AGOA exceptions do not confer eligibility for duty-free treatment—only potential eligibility. The United States will not admit an excepted article if that article is import sensitive.[155] The essential test—import sensitivity—applies, whether an article is from a BDC outside of SSA and seeks duty-free treatment under the GSP program, or from a Beneficiary SSAC and seeks this treatment under AGOA.[156] Indeed, some of the above-listed seven categories in the AGOA exceptions seem hardly to matter. For instance, an electronics article, steel article, semi-manufactured or manufactured glass article, or any other article that is not import sensitive arguably would be eligible for GSP treatment.

That is because the article would not fit into the Ineligible List, given the lack of import sensitivity. Consequently, for AGOA to state electronics, steel, glass, or other products that are not import sensitive get duty-free treatment does not change the essential test—showing no import sensitivity. The difference, in practice, is whether gauging import sensitivity in the focused context of Beneficiary SSACs renders an article not sensitive, in comparison with the relatively broader context of imports of the article from GSP beneficiaries. The answer is an empirical one. If a Beneficiary SSAC is an actual or potential significant producer and exporter of the product to the United States, then the chances of an affirmative import sensitivity determination are increased.

As for the other two enhancements, concerning the AGOA rule of origin, how generous are they? At first glance, the flexi-

153. *See id.* § 2463(b)(1).
154. *See* U.S. CUSTOMS SERV., *supra* note 31, at 94.
155. *See* 19 U.S.C.S. § 2466a(b)(1).
156. *See id.*; *see also id.* § 2463(b)(1).

bility afforded by AGOA to include American materials, up to fifteen percent, toward meeting the thirty-five percent Value Added Test sounds helpful. It alleviates the need to comply with the *Torrington* dual substantial transformation test. A Beneficiary SSAC can import American inputs and plug them directly into the production process, without having to transform them substantially into a distinct article. Stated differently, with a dual requirement, apparel would qualify as originating in a Beneficiary only if the transformation from yarn to fabric, and from fabric to apparel, occurred in that Beneficiary. Without the requirement, the single transformation in the Beneficiary from American fabric to apparel confers origin in the Beneficiary.[157]

But, closer inspection suggests this flexibility is not necessa-

157. Some T&A terminology is in order now, and for the subsequent discussion of preferences on T&A articles. "Yarn" is a product of substantial length, but relatively thin cross-section, comprised of interlocking fibers, and is used to produce textiles, as well as for sewing, knitting, weaving, and rope making. *See* 12 NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 823 (entry for "yarn"); *see also* IndiaMART Apparel Portal's Textile Terminology, http://apparel.indiamart.com/lib/textile/terminology09171998.html (entry for "Yarn") (last visited Nov. 17, 2005). Yarn is made by either a spinning or air texturizing ("taslanizing") process. *See* 12 NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 823 (entry for "yarn"). Essentially, a yarn is made from twisting plies together, with each ply being a single thread. The final yarn is a result of twisting or plying the threads together. *See id.* In brief, "yarn" is simply "thin fibers spun together." *See id.* A "thread," then, is a thin yarn used to make textiles, and of course in sewing. *See* 11 NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 17, at 735 (entry for "thread"). "Fibers" are materials that are continuous or discrete elongated pieces, similar to thread. They are used in the production of other materials, and can be spun into thread, as well as rope or filaments. Fibers may be natural, such as vegetable fibers like cotton, hemp, jute, and linen, or animal fibers like hair, silk, or wool, or they may be man-made (for example, acrylic, nylon, polyester, rayon, or spandex). *See* 4 *id.* at 759 (entry for "fibre"). Synthetic fibers, which are a subset of man-made fibers, are made from a chemical process, and sometimes are called "filaments." *See id.* "Fabric" is a generic term used for all flexible materials made of fibers or yarns. Fabric may be made through a variety of processes, including weaving (which typically is mechanized, and involves one of many types of loom), knitting (on machine or by hand), lace minding (involving knitting machines, hand, or both), braiding (i.e., plaiting), felting (involving matting and pressing fibers together to make cloth), bonding, fusing, or inter-locking. *See* India Mart, Indian Apparel Portal, Textile Terminology, http://apparel.indiamart.com/lib/textile/terminology09171998.html (entry for "Fabric") (last visited Nov. 17, 2005); *see also* Textile—Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Textile (entry for "Production methods") (last visited Nov. 17, 2005). "Cloth" and "materials" are synonyms for "fabric." *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 350 (4th ed. 2000) (entries for "Cloth," "Fabric"). Obviously, there are many types of fabric, including burlap, calico, canvas, corduroy, denim, flannel, gabardine, gingham, linen, muslin, satin, silk, twill, velvet, and worsted. *See id.* at 350 (entry for "Cloth").

rily generous to Beneficiary SSACs. Rather, the flexibility in calculating value added creates an incentive that favors American exporters. They can sell inputs to a Beneficiary knowing that their cost or value qualifies in the thirty-five percent value added test. If the Beneficiary would have sourced inputs from American exporters without this incentive to do so, i.e., based on market factors like price and quality, then the incentive does not distort trade. However, if the Beneficiary substitutes away from lower priced, higher quality inputs from non-American sources, then trade distortion occurs. Moreover, that trade distortion can lead to dependence of Beneficiaries on American sources.

As for the third enhancement, allowing inclusion of the cost or value of materials from other Beneficiary SSACs to qualify in computing value added in any one Beneficiary is helpful. It encourages cross-border integration of production among Beneficiaries, which may lead to FTAs, customs unions, or at least a strengthened regional economy. Arguably, however, this enhancement does not go far enough. It does not allow for inclusion of the direct costs of processing operations in another Beneficiary.

Suppose, for instance, cocoa grown in Ghana is shipped to Senegal, where it is cleaned and turned into chocolate powder. The powder is exported to Ethiopia, where it is blended with coffee beans to make a new kind of chocolate coffee drink. Ethiopia seeks duty-free treatment under AGOA for the finished drink product. Under the AGOA rule, to reach thirty-five percent value added, the cost of cocoa from Ghana counts. But, assuming the cleaning and "powderizing" in Senegal are processing, the costs associated with them do not count. A more generous enhancement would not treat the cost of materials favorably and discriminate against processing. That is, it would allow for all steps in a production chain to qualify.

A conceptually different point about generosity, or lack thereof, in the AGOA rule of origin goes to an inherency of a value-added test. A value-added test has the virtue of conceptual simplicity, but the vice of discriminating against low-cost countries. They are inexpensive production venues, and value-added is measured in a hard currency like the U.S. dollar. When the costs of production in a local currency of a Beneficiary SSAC are summed up and converted into dollars, the result may be paltry.

The figures may not sum up to thirty-five percent in, say, Gabon as quickly as a GSP beneficiary like Indonesia.

V. *SOME BASICS ABOUT APPAREL ARTICLES*

Everybody has been young before,
but not everybody has been old before.
—African Proverb

A. *The Production Process*

Certain—but not all—T&A merchandise may receive duty-free, quota-free treatment from the United States; however, as the CBP itself states, "strict conditions" must be met to qualify.[158] To the uninitiated, and even to the experienced international trade lawyer, these conditions appear to be a dizzying array of preferential rules of origin, the rationale for which is protection of T&A interests in the United States producing articles that are like or directly competitive with merchandise from a T&A Beneficiary. The appearance is not deceiving.

That said, it is not a mere conclusive assertion, nor a rigorous criticism, to say AGOA textile rules of origin are "ungenerous," or to say they are "too restrictive." There is a protectionist devil afflicting T&A Beneficiaries, but how does that devil operate? The answer is in the details of the T&A rules of origin (discussed later). To be sure, limited space does not permit an explication of each rule.[159] Indeed, by one count of the rules of origin in Chapter 98 of the HTSUS, there are ten such rules—a few broad ones, and several sub-sets of rules.

For now, to understand the different AGOA categories of rules of origin for apparel articles, it is important to recall the six basic steps in making T&A. That is because the AGOA T&A

158. *See* U.S. CUSTOMS SERV., *supra* note 31, at 91 (emphasis added). Since the date of this publication, and following changes made concerning homeland security in the wake of the attacks of September 11, 2001, the U.S. Customs Service has been renamed the U.S. Customs and Border Protection ("CBP"). The CBP website contains detailed information about AGOA import procedures. *See* CBP, http://www.customs.gov (last visited Nov. 17, 2005). In addition, the Office of Textiles and Apparel ("OTEXA") of the DOC maintains current data on (1) the apparel cap, (2) fabric and yarn not available in commercial quantities in the U.S., and (3) hand-loomed, handmade folklore articles on its website. *See* OTEXA, http://otexa.ita.doc.gov/ (last visited Nov. 17, 2005).

159. *See* HTSUS, *supra* note 44, at 98-XIX-1.

rules of origin are specified process rules, not value-added rules. In other words, in order for the finished merchandise to qualify for preferential treatment, these rules demand that particular production activity occur in a T&A Beneficiary. The basic steps are:

Step 1: Growing cotton or other fiber as raw materials, or manufacturing synthetic fibers, such as nylon or rayon. A rule of origin demanding all production activity from this step onward occur in one location is called a "*Fiber Forward Rule.*"[160] This kind of Rule is the most restrictive of all T&A specified process requirements. All economic activity must occur in one country, otherwise the finished article is considered not to originate in that country and, therefore, is disqualified from preferential treatment. In turn, the more restrictive a preferential rule of origin, the more protectionist it is. By making it difficult to obtain duty-free, quota-free treatment, a tighter rule confers greater protection on domestic (e.g., American) producers of like merchandise.

In theory, a "Seed Forward" or "Fertilizer Forward" Rule could be devised to afford even greater protection than a Fiber Forward Rule. The idea would be to require the seeds used to plant cotton (or other fiber), or the fertilizer used to help the crop grow, to originate in the same country in which all further activity occurs. Failure would mean the finished article would not qualify as originating in that country, hence duty-free, quota-free treatment would be devised. In practice, such a rule does not exist.

Step 2: Spinning yarn from fiber. A requirement that all activity from this step onward occur in a particular country is a "*Yarn Forward Rule.*"[161] A Yarn Forward Rule is the second most restrictive—and thereby protectionist—type of specified process requirement. In effect, it is used in AGOA, for instance, in the first and second of the preference categories (discussed below), in combination with Assembly Rules (also discussed below).

Step 3: Making fabric (also called cloth) from yarn. A mandate that all activity from this step onward occur in a particular

---

160. *See* U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: NAFTA TEXTILES AND TEXTILES ARTICLES (2005), *available at* http://www.cbp.gov/linkhandler/cgov/toolbox/legal/informed_compliance_pubs/textiles/icp003r2.ctt/icp003.pdf (last visited Nov. 17, 2005).

161. *See id.*

country is a "*Fabric Forward Rule.*"[162] A cursory glance at the first, second, third, seventh, and eighth AGOA preferential treatment categories suggests they rely (to varying degrees) on Fabric Forward Rules. However, the categories are in fact constructed in a protectionist manner, because of requirements about yarn.

A garment that is knit does not technically go through the fabric stage. The original AGOA legislation did not specify knit-to-shape garments as eligible for duty-free treatment, and the CBP issued draft regulations stipulating that they were ineligible.[163] AGOA II contained a "knit-to-shape amendment" clarifying knit-to-shape apparel is eligible.[164]

Step 4: Cutting fabric into pieces (or knitting to shape). A rule calling for all activity from this step onward to occur in a particular country is called "*Cutting Forward.*" Generally, a Cutting Forward origin rule is more liberal than Fiber, Yarn, or Fabric Forward Rules, because it allows activity in the early stages of the chain of production to occur in countries other than the potential beneficiary of preferential treatment. The second and sixth AGOA preference categories use a variant of a Cutting Forward Rule. However (as discussed below), in AGOA, the variants are protectionist because of requirements concerning yarn. The fourth AGOA preference category also uses a Cutting Forward Rule, albeit for knitting to shape sweaters.

Depending on the garment, cutting may occur in more than one country—so-called "hybrid cutting."[165] The original AGOA legislation did not specify that apparel made in a hybrid cutting process was eligible for duty-free treatment.[166] The CBP issued draft regulations that would have denied eligibility.[167] AGOA II contained amendments allowing for preferential treatment for apparel cut both in the United States and in a Beneficiary

162. *See id.*

163. *See generally Freeing Up Trade: AGOA II*, U.S. CUSTOMS TODAY (U.S. Customs Svc., Nov. 2002) [hereinafter *Freeing Up Trade*], *available at* http://www.cbp.gov/xp/CustomsToday/2002/November/african.xml.

164. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 51 (identifying item 1).

165. *See Freeing Up Trade*, *supra* note 163.

166. *See id.*; AGOA—BEFORE AND AFTER, http://www.agoa.gov/faq/AGOA_comparison_table.pdf (last visited Nov. 17, 2005).

167. *See id.*

SSAC.[168]

Step 5: Sewing pieces of cut fabric together. An obligation that all activity from this step onward to occur in a particular country is a "*Sewing Forward Rule*." This kind of rule is relatively liberal, i.e., not as protectionist as the previous rules, as it permits all previous steps to occur in other countries. Sometimes, cutting and sewing are considered parts of the same operation, and the attendant rule is "Cutting and Sewing Forward."

A variation of the Sewing Forward Rule exists in AGOA, namely, in the second and sixth preference categories. However, the variations are protectionist. In the second preferential category, the sewing thread must come from the United States, and in the sixth preferential category, non-U.S. fabric or yarn may be used only if it is in short supply in the United States.[169]

Step 6: Assembling pieces into a finished article (i.e., final assembly). A rule calling only for assembly to occur in a particular country—an "*Assembly Rule*"—is the most liberal of all specified process rules, in that it requires the least amount of economic activity to occur in the country seeking preferential treatment. The fourth AGOA preference category essentially fits this type. Ostensibly, the first and third categories are Assembly Rules. However (as explained below), strictures embedded in these categories concerning where fabric is from and cutting occurs render them considerably more restrictive than a simple Assembly Rule.

As intimated above, the AGOA preference categories are not pure in the sense of relying entirely on one kind of process forward occurring in a T&A Beneficiary. Rather, as explained in detail below, the categories are hybrids, blending different kinds of specified process rules.

B. *Four Preliminary Hurdles*

Before turning to the AGOA rules of origin for apparel, and considering the extent to which they embody a protectionist stance toward exports from T&A Beneficiary SSACs, it is worth observing "there is more than just the rules of origin." Even if an article fits within one of the categories for duty-free treat-

168. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 51 (identifying item 2).

169. *See* 19 C.F.R. § 10.213 (2005).

ment, the United States does not automatically accord that article an AGOA preference. Regardless of the category in which the article fits, there are two additional hurdles to cross after the rule of origin is satisfied. These hurdles are set out in the regulations of the CBP.[170]

The first hurdle concerns documents. Essentially, AGOA incorporates by reference, and imposes on Beneficiary SSACs, the customs procedures concerning documentation in Chapter Five of NAFTA.[171] The essential procedures, contained in NAFTA Article 502(1), are that an importer cannot obtain duty-free, quota free treatment without: A written declaration, based on a valid Certificate of Origin, stating the good qualifies as originating; possessing the Certificate when making the declaration; providing upon request of the relevant customs authority a copy of the Certificate; and promptly furnishing a corrected declaration and paying duties owed if the importer has reason to believe the Certificate contains erroneous information.[172] In practice, therefore, an importer seeking an AGOA preference must present specific documents to the CBP, most notably, a Certificate of Origin, which declares the T&A article in question originates in a Beneficiary SSAC.[173]

No Certificate of Origin is valid, however, unless the President determines the exporting country not only is a Beneficiary, but also has implemented and is following (or is making substantial progress toward implementing and following) the NAFTA Chapter Five rules. The Certificate itself provides written evidence the country of export is a Beneficiary SSAC and the article in question originates in that country and, therefore, qualifies for duty-free treatment.[174] Any exporter determined by the President to engage in transshipment (i.e., claiming a preference for

170. *See* 19 C.F.R. §§ 10.211–.217.

171. *See* 19 U.S.C.S. § 3722(b)(2) (2005).

172. *See* NAFTA, *supra* note 68, art. 502(1); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 55 n.59.

173. *See* 19 U.S.C.S. § 3722(b)(2).

174. In limited circumstances, described in Article 503 of NAFTA, no Certificate of Origin is needed. *See* 19 U.S.C.S. § 3722(b)(2). In brief, under Article 503, as implemented in U.S. law, no Certificate is required for an article imported from Mexico if the article is (1) a commercial product whose value is US$1000 or less (or a higher de minimis threshold, if a NAFTA Party requires), though an invoice may be required, (2) a non-commercial good worth less than US$1000 (or more, if the importing Party establishes a higher threshold), or (3) a good for which the importing Party has waived the requirement of a Certificate. A Certificate will be required, however, if an importer

an article based on "material" false information about the country of origin, manufacture, processing, or assembly of that article or any of its components, where "material" means information that, if disclosed, would show the article is ineligible for duty-free treatment) results in the exporter losing all AGOA benefits for five years.[175] Significantly, the penalty is targeted at individual exporters (and their successors and affiliates), not an entire Beneficiary SSAC.

The second hurdle concerns visas. Even though an SSAC is a Beneficiary and eligible for AGOA preferences on T&A articles, it cannot realize the benefits of duty-free treatment unless it has adopted an effective visa system in its local law, and implemented enforcement procedures, to prevent unlawful transshipment and the use of counterfeit documents.[176] There are a number of complementary obligations. For instance, the Beneficiary SSAC adopt domestic laws on transshipment to allow "verification teams" from the CBP access "to investigate thoroughly" allegations of transshipment through that country.[177] The Beneficiary must agree to provide timely reports to the CBP (on request) on imports and exports of articles covered by AGOA, cooperate fully with the CBP to prevent circumvention, and ensure its producers and exporters maintain complete records about AGOA–covered articles for at least two years after the articles are manufactured.[178] It also must provide to the CBP (again, on request) documentation on the country of origin of these articles (e.g., certifications from manufacturers and exporters, information about place of production, the number and identify of workers and machinery used in production, and other production records).[179] As with the first hurdle, the President holds the authority to make determinations as to whether a Beneficiary SSAC has an efficient visa.[180]

Neither of the first two hurdles is unreasonable or insur-

---

structures a series of transactions in a way to evade the obligation. *See* NAFTA, *supra* note 68, art. 503; *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 56 n.61.

175. *See* 19 U.S.C.S. § 3722(b)(3)-(4).

176. *See id.* § 3722(a)(1)(A).

177. *See id.* § 3722(a)(1)(B).

178. *See id.* § 3722(a)(1)(C)-(E).

179. *See id.* § 3722(a)(1)(F), (a)(2); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 55.

180. As to both hurdles, the President has delegated this authority to the USTR. *See* Proclamation No. 7350, 65 Fed. Reg. 59,321 (Oct. 4, 2000).

mountable. While there may be some question about imposing NAFTA obligations on AGOA Beneficiaries, protections against transshipment hardly are objectionable. To the contrary, they help ensure the benefits of duty-free treatment flow to the intended producers and exporters. There even is a positive externality associated with the second hurdle—improved recordkeeping in the governmental and private sectors in Beneficiary SSACs. Thus, the point is not the first two hurdles are unjustified. Indeed, there is multilateral textual precedent for combating T&A transshipment. Article 5 of the WTO Agreement on Textiles and Clothing ("ATC"), which was in force between January 1, 1995 and December 31, 2004, contained anti-transshipment provisions calling for investigation of suspected circumvention, including exchanging documents and other information, and facilitating plant visits.[181] Rather, the point is that as hurdles, they raise the time, expense, and difficulty associated with gaining AGOA benefits. Fortunately, AGOA obligates the CBP to provide technical assistance to Beneficiary SSACs to help them cross these hurdles.[182] The United States bears the expense of this assistance (allocating roughly US$5.9 million for this purpose).[183]

A third hurdle concerns "findings and trimmings." This term refers to items frequently added to apparel articles, such as bow buds, buttons, decorative lace trim, elastic strips (that are less than one inch width and used in the production of bras), eyes, hooks, labels, sewing thread, snaps, zippers, and zipper tapes.[184] In theory, the United States could argue apparel assembled in a T&A Beneficiary using any findings and trimmings that are neither from the United States nor from a Beneficiary does not originate within the Beneficiary and, therefore, is ineligible for duty-free treatment under AGOA.

To its credit, the United States does not take such a strict approach. Rather, it permits some room for sourcing findings and trimmings in third countries. A T&A Beneficiary is free to

181. *See* Agreement on Textiles and Clothing, art. 2.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

182. *See* 19 U.S.C.S. § 3722(c).

183. *See id.* § 3722(d).

184. *See id.* § 3721(d)(1)(A); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 53.

use findings and trimmings from a third country, but only up to twenty-five percent of the costs of the components of the assembled article.[185] If the value of findings and trimmings exceeds twenty-five percent, then the article is ineligible for an AGOA preference. For purposes of the second preference category (discussed below), however, thread is not considered a finding or trimming.[186] In practice, that means the thread must be from the United States.

Also to its credit, the United States exempts certain small components from the strictures of the preference categories, and provides a de minimis exception relevant to most of those categories. An article that fits within one of the preference categories remains eligible for duty-free treatment, even if certain of its components are from a third country (i.e., outside the United States or a Beneficiary SSAC). Those components are belts attached to an article, collars, cuffs, drawstrings, elbow patches, elastic straps, shoulder pads, and waistbands.[187] In other words, a T&A Beneficiary is free to source these components from any country. Further, several of the preference categories require use of fiber and yarn from the United States, a Beneficiary, or a former Beneficiary. Notwithstanding this stricture, up to ten percent of the total weight of all fibers or yarns can come from a third country.[188] As the de minimis threshold under AGOA and AGOA II was seven percent, the AGOA III threshold is relatively more liberal.[189]

Interlinings pose a fourth hurdle to an African producer/ exporter seeking AGOA preferences. Like the other hurdles, this hurdle illustrates the underlying and overwhelming tendency of the United States, through the details of AGOA, to keep a watchful protective eye on domestic producer interests, and favor them over poorer African counterparts on even the smallest of items.

To what extent is a T&A Beneficiary able to include third-country interlinings in apparel, and not risk losing duty-free

185. *See* § 3721(d)(1)(A); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 53.

186. *See* 19 U.S.C.S. § 3721(d)(1)(C); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 54.

187. *See* 19 U.S.C.S. § 3721(d)(3).

188. *See id.* § 3721(d)(2).

189. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 54.

treatment? The answer is that up to twenty-five percent of the cost of components of an assembled article may include interlinings that originate in neither the United States nor a Beneficiary.[190] However, the twenty-five percent threshold covers only three kinds of interlinings: chest-type plates; "hymo" pieces; and "sleeve headers."[191] All three must be woven (or weft-inserted warp knit construction) from coarse animal hair or man-made filaments.[192] All other interlinings must be from the United States or a Beneficiary. Moreover, at any point the President can terminate the allowance for third-country interlinings if he determines there are American manufacturers producing (in the United States) interlinings in commercial quantities.[193] Put succinctly, the rule on interlinings is that only a few of them can be from a third country, only up to twenty-five percent of the value of the article in which they are used, and only if Americans do not make them. Otherwise, use of a third-country interlining renders an article ineligible for duty-free treatment.

VI. *APPAREL RULES OF ORIGIN AND THE PROTECTIONIST DEVIL*

There is always something new out of Africa.
—Pliny the Elder

The inquiry, then, about generosity towards desperately poor Beneficiary SSACs becomes—in the context of T&A—an examination of how the protectionist devil operates in the details of rules of origin. There are eight categories of apparel articles potentially eligible for duty-free, quota-free treatment under AGOA (the preference titles listed below are unofficial, they are mnemonic aids to summarize the gist of the category).[194] Ap-

190. *See* 19 U.S.C.S. § 3721(d)(B)(i); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 54.

191. *See* 19 U.S.C.S. § 3721(d)(B)(ii); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 54.

192. *See* 19 U.S.C.S. § 3721(d)(B)(ii); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 54.

193. *See* 19 U.S.C.S. § 3721(d)(B)(iii). The President has delegated this authority to the Committee for Implementation of Textile Agreements ("CITA"). *See* Exec. Order No. 13,191, 66 Fed. Reg. 7271 (Jan. 22, 2001). CITA also is responsible for setting annual caps on apparel eligible for duty-free AGOA benefits. Thus, for example, CITA published a new twelve-month AGOA import cap at 70 Fed. Reg. 56,165 (Sept. 26, 2005).

194. *See* 19 U.S.C.S. § 3721(b)(1)-(6) (outlining eight categories of T&A prod-

parel from a T&A producer/exporter in a Beneficiary SSAC must fit within a category if, upon entry into the United States, its apparel exports are to benefit from duty-free, quota-free treatment. Examining each category reveals how the devil operates, and why the rules are properly characterized—from the perspective of T&A Beneficiary SSACs—as a "devil."

Briefly, of the eight categories, the first four categories, and the eighth category, call for some activity to occur in a T&A Beneficiary using inputs from the United States (or, in the third and seventh category, from a Beneficiary). The sixth category obviates the need for American inputs only if they are in short supply. The fifth and seventh categories, dealing respectively with sweaters and cultural products, are not as commercially important as the other categories. While the rules of origin are highly technical, the theme emerging from them is evident enough.

In the details of the origin rules of the first, second, third, fourth, sixth, and eighth AGOA preference categories, lives (indeed, thrives) the protectionist devil—and, in turn, is manifest in America's generosity, or lack thereof, toward T&A Beneficiaries. A donor shows most poignantly its generous spirit in the areas in which it faces the largest potential sacrifice, as does America in these categories. To be sure, generosity in a preferential trading program does not demand economic martyrdom. But, generosity is greater when it is not convenient or easy for a donor, and when it does not put undue strictures on the beneficiary to suit the commercial self-interest of the donor. Yet, again, the first, second, third, fourth, and sixth categories bear the most restrictive origin rules. Might the explanation lie in the prospect American producers are considerably less likely to produce merchandise that is like or directly competitive with articles in the fifth and seventh categories?

After all, as the examination below reveals, at least prima facie, the fifth category appears drafted in a way to exclude sweaters made in a T&A Beneficiary that could substitute for American-made sweaters. Possibly, a rule about using American cashmere or wool whose diameter is 21.5 microns or less does not exist in AGOA, because it would be unnecessary, as few (if any) such inputs are made in the United States. As for the sev-

ucts); *see also* U.S. CUSTOMS SERV., *supra* note 31, at 94-95 (describing six broad categories of T&A articles).

enth category, while there no doubt are American-made hand-loomed, hand-made, or folklore articles, and ethnic printed fabrics, such production is of small volume and not substitutable for African-made handicraft items. In contrast, precisely where American producers are most likely to be challenged—in the first, second, third, fourth, sixth, and eighth categories, which have the broadest potential array of merchandise—the origin rules are crafted to confer not generosity toward African producers and exporters, but protection for American producers of like or directly competitive products.

It is important to appreciate the particular relevance of the first, second, third, fourth, and sixth categories. Their relevance is evident in terms of commercial potential. These categories may contain the broadest array of T&A merchandise. By definition, the fifth category is limited not just to sweaters, but specifically to sweaters consisting of a certain weight of cashmere, or of a certain weight and diameter of wool. By definition, the seventh category is restricted to handicraft type articles. In contrast, the first, second, third, fourth, and sixth categories may contain articles as diverse as sleepwear for babies and neckties for men. Yet, it is in the categories of greatest potential commercial significance where the rules of origin are tightest.[195]

A. *The First Preference Category: United States Yarn-Forward with Beneficiary Assembly*[196]

Essentially, this category is for apparel articles sewn together in a T&A Beneficiary SSAC using American fabric, which is from American yarn.[197] Specifically, to qualify for duty-free treatment

195. At the same time, it is important not to underestimate the role of culture in the economic and political development of Africa, and hence the potential contribution of cultural industries. *See, e.g.*, CULTURE IN SUSTAINABLE DEVELOPMENT: INVESTING IN CULTURAL AND NATURAL ENDOWMENTS (Ismail Serageldin & Joan Martin-Brown eds., 1999) (containing proceedings from a 1998 conference sponsored by the World Bank and United Nations Educational, Scientific, and Cultural Organization ("UNESCO")); CULTURE AND DEVELOPMENT IN AFRICA (Ismael Serageldin & June Taboroff eds., 1994) (containing proceedings from a 1992 conference held at the World Bank).

196. *See* 19 U.S.C.S. § 3721(b)(1); *see also* HTSUS, *supra* note 44, at 98-II-3, U.S. note 7(a); U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 49-50 (identifying category 1); U.S. CUSTOMS SERV., *supra* note 31, at 94 (first category of T&A articles).

197. The idea of giving a preference to apparel assembled overseas from components cut in the United States is not new. Since roughly 1969, the United States has offered reduced or duty-free treatment for such apparel under its "807 Program." The name comes from Item 9802.00.80 in the HTSUS, which is the relevant provision stat-

under this category, an article must meet five requirements:

(1) The article must be sewn (or otherwise assembled) wholly in a T&A Beneficiary (or in multiple such Beneficiaries).
(2) The article must be made from fabric (cloth) wholly formed in the United States (or, if knit, must be from components knit-to-shape in the United States). The article could be made from both fabric and knit-to-shape components.
(3) The article must be wholly cut in the United States (or, if knit, the components knit-to-shape in the United States).
(4) The fabric itself must be from yarns wholly formed in the United States (or, if knit, the components must be from yarns wholly formed in the United States).
(5) Upon entry, the apparel must be classified in either one of two categories in the HTSUS.

The first category is subheading 9802.00.80. This subheading appears in Chapter 98, which consists of special classifications for articles exported and returned, having been advanced or improved abroad.[198] Items covered by this Chapter may enter the United States duty-free, or partially duty-free, under certain circumstances. These circumstances include re-importation of an article that was exported from the United States (without improvement in the condition of the article), articles subject to a personal exemption brought back to the United States by a citizen or permanent resident who traveled overseas, government importations, goods used for religious, educational, or scientific institutions, samples, and articles admitted under bond.[199] As for subheading 9802.00.80, it covers articles exported from and returned to the United States, having been advanced or improved abroad.[200] The second category is Chapter 61, which

---

ing that a tariff is owed only on the value added from the foreign assembly process. In an earlier HTSUS, the number of the provision was 807. Obviously, the 807 Program is designed to encourage apparel producers located overseas to use American inputs. While most countries are legally eligible for 807 treatment, many cannot make use of the benefit, because of the practical problem that transportation costs erode savings on tariffs. *See* Lamar, *supra* note 19, at 607-09 n.23.

198. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 6.

199. *See id.* at 6-7.

200. *See* 19 U.S.C.S. § 3721(b)(1)(A). The HTSUS description states that this subheading consists of:

covers "Articles of Apparel and Clothing Accessories, Knitted or Crocheted," and Chapter 62, which covers "Articles of Apparel and Clothing Accessories, Not Knitted or Crocheted."[201] The second category applies only to apparel that would have been classified in the first category, but for the fact they were embroidered, or subjected to a particular process. The processes include acid washing, enzyme washing, or stone washing, permapressing, oven baking, bleaching, garment dyeing, and screen printing.[202]

This category also includes apparel articles made from fabrics that are not from yarns, as long as the fabrics are wholly formed and cut in the United States, and the fabrics are classified under heading 5602 or 5603 of the HTSUS. Chapter 56 of the HTSUS deals with T&A articles from "wadding," "felt," "nonwovens," and "special yarns."[203] Heading 5602 contains "felt articles," regardless of "whether or not [they are] impregnated, coated, covered, or laminated".[204] Heading 5603 consists of non-woven articles, regardless of "whether or not [they are] im-

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting . . . .

HTSUS, *supra* note 44, at 98-II-6, subheading 9802.00.80. However, the description also states that the subheading excludes T&A articles assembled in Mexico (as they are entered under a different subheading, namely, 9802.00.90), articles entered under Subchapter XIX of Chapter 98 (which covers T&A articles eligible for AGOA preferences), and articles entered under Subchapter XX (which covers goods eligible for special treatment under the United States—Caribbean Basin Trade Partnership Act ("CBPTA")). In brief, T&A articles are classifiable under subheading 9802.00.80 if they have been assembled abroad from American components. Normally, the duty on such articles would be imposed on the full value of the article, less the cost of the American components. For articles eligible under AGOA, no duty is imposed. *See id.* (column titled "Rates of Duty"); *see also id.* at 98-III-1, U.S. note 4.

201. *See* 19 U.S.C.S. § 3721(b)(1)(A); *see also* HTSUS, *supra* note 44, at 61-1, 62-2. In effect, Chapter 61 covers only knitted or crocheted articles, and Chapter 62 covers all articles made of any textile fabric (other than wadding), other than articles that are knitted or crocheted.

202. *See* HTSUS, *supra* note 44, at 98-XIX-4, subheading 9819.11.03 (concerning these articles).

203. *See id.* at 56-1. Chapter 256 also covers T&A articles made of twine, cordage, or ropes and cables.

204. *See id.* at 56-3, heading 5602.

pregnated, coated, covered, or laminated").[205]

An understandable immediate reaction to this category is to ask why the United States insists on a T&A Beneficiary SSAC using American fabric that itself is made of American yarn? One answer is some Beneficiaries do not have the spinning and weaving capacity to produce enough fabric to supply their domestic apparel industry. This scenario is true, for instance, in Bangladesh (where T&A exports accounted in 2001 for 85.8% of merchandise exports, the highest figure in the world).[206] However, even if the same supply constraint exists in a Beneficiary SSAC, it does not follow that AGOA must mandate use of American fabric and yarn. Indeed, as Oxfam International points out:

> Rich countries try to justify these heavy requirements [preferential rules of origin for T&A] by saying that they encourage poor countries to develop textile production to supply their clothing sector. However, historical experience and contemporary production patterns undermine this argument. No small, poor country with a significant clothing industry has ever succeeded in developing a matching supply-capacity in textiles.[207]

Why not, then, let apparel producers in the Beneficiary choose input sources based on market considerations like price and quality? This query leads to deeper economic and social justice concerns (discussed later) about the rules of origin.

B. *The Second Preference Category: United States Yarn-Forward with Beneficiary Cutting and Sewing Forward Using American Thread*[208]

Essentially, this category is for apparel articles cut in a T&A Beneficiary SSAC from American-made fabric. The fabric must be made of American yarn, and then sewn together in the Beneficiary with American thread. Specifically, to qualify for duty-free treatment under this category, an article must satisfy five requirements.

205. *See id.* at 56-4, heading 5603.

206. *See* OXFAM INT'L, *supra* note 13, at 19, 33 tbl.A1.

207. *Id.* at 19.

208. *See* 19 U.S.C.S. § 3721(b)(2) (2005); *see also* HTSUS, *supra* note 44, at 98-XIX-4, subheading 9819.11.06 (concerning these articles); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50; U.S. CUSTOMS SERV., *supra* note 31, at 94 (listing the second category of T&A articles).

(1) The article must be sewn (or otherwise assembled) entirely in a T&A Beneficiary SSAC (or in multiple such Beneficiaries).
(2) The article must be made from fabric (cloth) wholly formed in the United States (or, if knit, must be from components knit-to-shape in the United States). (The article could be made from both fabric and knit-to-shape components.)
(3) The fabric itself must be from yarns wholly formed in the United States (or, if knit, the components must be from yarns wholly formed in the United States).
(4) The fabric must be cut in the T&A Beneficiary SSAC (or in multiple such Beneficiaries).
(5) After cutting, the article must be sewn (or otherwise assembled) using sewing thread from the United States.

The second preference category also includes apparel articles made from fabrics that are not from yarns, as long as the fabrics are wholly formed (but not cut) in the United States, and the fabrics are classified under heading 5602 or 5603 of the HTSUS (explained above).

The first three requirements are the same as in the first preference category. The latter two requirements, however, distinguish the categories. In brief, the second preference category is a cutting forward rule, whereas the first category is an assembly (sewing) forward rule.

In both categories, American fabric made of American yarn must be imported into a T&A Beneficiary SSAC. In the first preference category, the items imported already are cut in the United States. They can be sewn with or without American thread, but this flexibility comes at a cost—they must satisfy particular HTSUS classifications. In the second preference category, fabric is imported, and cutting goes on in the T&A Beneficiary SSAC. That is advantageous to the Beneficiary, as more is required than sewing. When it comes time to sew the cut fabric pieces, however, the thread must be American. The trade-off for using American thread is no HTSUS classification is mandated for the finished article.

C. *The Third Preference Category: Regional or Other Fabric*[209]

The first two preference categories mandate use of American fabric, which in turn is made of American yarn. The third category affords flexibility on the origin of the fabric and yarn, essentially providing duty-free treatment for apparel articles from regional fabric and yarn, but subject to quantitative limits, and only for a limited period. In particular, to qualify, an apparel article must satisfy three requirements:

(1) The article must be assembled wholly in a T&A Beneficiary SSAC (or multiple such Beneficiaries).

(2) The article must be made of fabric (cloth) wholly formed in a T&A Beneficiary SSAC (or multiple such Beneficiaries). The T&A Beneficiary in which assembly occurs need not be the same one as the Beneficiary in which fabric is made.

(3) The fabric (cloth) must be from yarn originating either in the United States or a T&A Beneficiary SSAC (or multiple such Beneficiaries, or a former Beneficiary, i.e., one that is party to an FTA with the United States). If the fabric originates in a T&A Beneficiary, then it need not be the same Beneficiary as the one in which the yarn originates.

This preference category is sometimes called "Apparel assembled from regional and other fabric."[210] A more accurate rubric would be "United States Yarn-Forward or Beneficiary Yarn-Forward with Beneficiary Fabric-Forward." By using the words "regional" and "other fabric," this appellation obfuscates the requirement that not all other fabric qualifies.

"Regional" refers only to fabric from yarn spun in a T&A Beneficiary SSAC, and "other" is restricted to fabric from American yarn. For example, men's dress shirts assembled in Kenya from cotton cloth derived from cotton yarn spun either in the same or another Beneficiary, or in the United States, would qualify. The shirts would not qualify if the cotton cloth came from Egypt or Pakistan, or if the cloth came from a Beneficiary or the United States, but the yarn came from Egypt or Pakistan.

Significantly, duty-free treatment of articles in this category

---

209. *See* 19 U.S.C.S. § 3721(b)(3); *see also* HTSUS, *supra* note 44, at 98-XIX-4, subheading 9819.11.09 (concerning these articles); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50 (describing category 2); U.S. CUSTOMS SERV., *supra* note 29, at 94 (identifying category 3).

210. U.S. CUSTOMS SERV., *supra* note 31, at 94.

is subject to an annual quota. In effect, this category is a tariff-rate quota ("TRQ"), which subjects over-quota shipments to the MFN rate. Under the initial AGOA legislation, the period of application was eight years, from 2000 to 2008. Each year of operation started on October 1, when AGOA entered into force, and ended on September 30. Thus, the first year of operation was October 1, 2000 to September 30, 2001, and the final year was scheduled to be October 1, 2007 to September 30, 2008.[211]

As Table 2 (below) shows, initially, the quota, or "cap," started at 1.5% of all apparel merchandise imported into the United States.[212] Under AGOA, the cap could grow by a total of two percentage points, up to a maximum of 3.5%, over the subsequent seven years. The growth occurred in equal annual increments, but in a way that for the final one-year period (October 1, 2007 through September 30, 2008), the cap could not exceed 3.5%.[213] Thus, in the final year, the ceiling of 3.5% was reached, and no growth occurred. In the preceding seven years, the cap grew by 0.286 percentage points each year (the difference between 3.5% and 1.5%, divided equally across seven periods).

To what is the cap—the specific percent figure for a particular year—applied? The answer is "square meter equivalents" ("SMEs"), a denomination that allows for comparison among different kinds of apparel articles, as diverse, for example, as wool sweaters and nylon tights. Thus, for instance, the initial cap, for the twelve months commencing October 1, 2000, was 246,500,393 SMEs.[214] In that year, no more than this amount of apparel from T&A Beneficiary SSACs could obtain preferential treatment in the form of a zero tariff.

Because of AGOA III, the initial AGOA legislation did not run its full course through September 30, 2008. Rather, AGOA III cut off the initial scheme on September 30, 2003, and established a new period through September 30, 2015. That is, under AGOA III, the preference period was reset to start on October 1,

211. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 382-83 (reprinting the original AGOA statute with AGOA II amendments).

212. *See id.* at 51 (identifying item 5); U.S. CUSTOMS SERV., *supra* note 31, at 95.

213. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 383 (reprinting the original AGOA statute with AGOA II amendments); U.S. CUSTOMS SERV., *supra* note 31, at 95.

214. *See* U.S. CUSTOMS SERV., *supra* note 31, at 95.

2003 and extended for eleven subsequent one year periods, the last one being October 1, 2014 until September 30, 2015.[215]

Likewise, AGOA III reset the base cap to 4.747% in the initial year (October 1, 2003 through September 30, 2004), in effect raising it from the 3.5% ceiling that would have been reached in the last year of operation of the original AGOA legislation.[216] Under AGOA III, the annual quantitative limit on apparel produced in a SSA T&A Beneficiary from regional fabric doubled, and the preferential period also doubled, from the earlier ceiling of 3.5% to a higher ceiling of 7%.[217] At first glance, the AGOA III changes look generous toward the Beneficiaries. Closer inspection, however, is revealing.

Specifically, for the one-year period beginning on October 1, 2003 (ending September 30, 2004), the cap was 4.747% of the aggregate SMEs of all apparel imported into the United States in the preceding twelve-month period.[218] In effect, duty-free treatment was offered to just under five percent of all apparel imports. This cap was allowed to grow in equal annual increments for the subsequent five years.[219] These increments were 0.563 percentage points (the difference between the 7% ceiling and the 4.747% base, divided into four equal amounts so as to reach 7% in the fifth year). By the fifth year (October 1, 2007 through September 30, 2008), however, the cap could not exceed seven percent.[220] Thereafter, until the final year, October 1, 2014 through September 30, 2015, the cap must remain at seven percent.[221]

Thus, under AGOA III in comparison with the original

---

215. *See* 19 U.S.C.S. § 3721(b)(3)(A)(i), (b)(3)(A)(ii)(II) (2005).

216. Under AGOA II, the cap rose from 1.5% to 3% in the year beginning October 1, 2000, and from 3.5% to 7% in the year beginning October 1, 2007, but also ensured that the cap was for the benefit of apparel made from regional or American fabric and yarn, not third country fabric. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 52.

217. *See id.* at 45.

218. *See* 19 U.S.C.S. § 3721(b)(3)(A)(ii)(I); *see also* HTSUS, *supra* note 44, at 98-XIX-1, U.S. note 2(b). The statutory language refers to the extension of preferential treatment to imported apparel articles in an amount that do not exceed the "applicable percentage" of the aggregate SME "of all apparel articles imported into the United States in the preceding 12-month period for which data are available." 19 U.S.C.S. § 3721(b)(3)(A)(i).

219. *See id.* § 3721(b)(3)(A)(ii)(I).

220. *See id.*

221. *See id.* § 3721(b)(3)(A)(ii)(II).

AGOA legislation, the cap is double from the 3.5% limit, and the preference period essentially doubled from 2008 to 2015. Are these changes indicative of American generosity toward Beneficiaries? The answer depends on the historical counterfactual scenario used as a benchmark. If the counterfactual is a shorter period with a 3.5% cap, then the answer is obvious—Beneficiaries are better off with AGOA III—because of the longer period and the seven percent cap—than they would have been with just the original AGOA legislation.

Consider a slightly different counterfactual scenario. Suppose the original AGOA rules applied for the AGOA III period, i.e., the initial regime extended until the 2014-2015. The 3.5% ceiling still would be reached in the 2007-2008 year, and would not increase. The only benefit would be that the period of preference would continue until 2014-2015. The ceiling of 3.5% versus 7% easily would offset that benefit, meaning AGOA III confers greater generosity than this alternative.

But, suppose both the period had been extended and the cap allowed to grow. Would T&A Beneficiary SSACs have been better off? The answer depends on the number of percentage points by which the cap increased each year. The most realistic assumption is to apply the same increments as existed under AGOA (0.286 percentage points) or AGOA III (0.563 percentage points). The answer also depends on the year in which the increments presumably commence. The most realistic assumption is to track AGOA III, and increase the cap subsequent to the year October 1, 2003 through September 30, 2004, i.e., 2004-2005. Finally, the answer depends on whether a ceiling cap is imposed. It is unrealistic to assume there would be no ceiling, as both AGOA and AGOA III contained 3.5% and 7% limits, respectively. The assumption most favorable to the United States, however, in terms of highlighting its potential generosity, is to assume no ceilings on caps.

With these assumptions, consider three distinct possibilities, all shown below, in Table 2. Scenario Number 1 is "AGOA Growth." Under the original AGOA legislation, that amount was 0.286%, i.e., the cap in any year until the final year, equaled the cap in the previous year plus 0.286 percentage points. The result would be a final cap of 6.360%. (This result assumes no "step up" from 3.5% to 4.747% in the year beginning October 1, 2003.) In this counterfactual scenario—extending the preference period and continuing growth at the original pace—the final cap is below the seven percent ceiling of AGOA III. Put directly, AGOA III is more generous than this counterfactual scenario, but not by much—not even one percent.[222]

Consider Scenario Number 2, "AGOA Growth Plus Step Up." In this counterfactual situation, there is an extended period, and an assumed "step up" from 3.5% to 4.747% in the year beginning October 1, 2003. This assumption is reasonable, because it occurred under AGOA III. If the growth in the cap, starting from the 4.747% base were 0.286 percentage points, i.e., the original AGOA increase amount, then what would the final cap be? The answer is 7.607%. That is a larger cap than the actual cap of seven percent under AGOA III, but only by about one-half of one percent.[223]

As a final counterfactual scenario, Scenario Number 3 is AGOA III "Growth Plus Step Up." Here, the supposition is an extended period, a "step up" from 3.5 to 4.747% in 2003, and growth increments of 0.563 percentage points. Under AGOA III, this step up occurred, and these increments are applied. Hence, Scenario Number 3 is not unrealistic. The final cap would be 10.378%. This figure is considerably higher than the seven percent ceiling actually existing under AGOA III. If this scenario is the counterfactual by which to judge AGOA III, then the United States cannot be said to have been generous in its legislation. To the contrary, AGOA III looks like a trick designed to cut back on the generosity it otherwise might have offered.[224]

The "bottom line" is the third preference category and is not as generous as it first appears. It promises flexibility to T&A Beneficiary SSACs by allowing them to use fabric made of yarn from either the United States or a Beneficiary. But, it imposes serious limits on the volume of apparel made from such fabric, in the form of a TRQ with caps allowed to grow modestly to low

---

222. If the period in which increments of 0.286 percentage points are added to the base cap of 4.747% is the year subsequent to October 1, 2007-September 30, 2008, i.e., 2008-2009, then the final cap is 5.216%.

223. If the period in which increments of 0.286 percentage points are added to the base cap of 4.747% is the year subsequent to October 1, 2007-September 30, 2008, i.e., 2008-2009, then the final cap is 6.463%.

224. If the period in which increments of 0.563 percentage points are added to the base cap of 4.747% is the year subsequent to October 1, 2007-September 30, 2008, i.e., 2008-2009, then the final cap is 8.126%.

TABLE 2: Cap on Duty-Free Treatment for Regional or Other Fabric Preference Category

Preference Year *(from October 1, through September 30)*	Actual Cap on Duty Free Treatment Under *AGOA* *(applied to SMEs of all apparel imports into U.S. in last twelve months)*	Actual Cap on Duty Free Treatment Under *AGOA III* *(applied to SMEs of all apparel imports into U.S. in last twelve months)*	Annual Increment to Actual Cap *(percentage points added to cap from previous year)*	Scenario #1: *AGOA* Growth *(Cap assuming AGOA Increment of 0.286 percentage points)*	Scenario #2: *AGOA* Growth Plus Step Up *(Cap assuming AGOA Increment of 0.286 percentage points and AGOA III step up to 4.747)*	Scenario #3: *AGOA III* Growth Plus Step Up *(Cap assuming AGOA Increment of 0.563 percentage points and AGOA III step up to 4.747)*
2000-2001	1.5%	—	0.286	—	—	—
2001-2002	1.786%	—	0.286	—	—	—
2002-2003	2.072%	—	0.286	—	—	—
2003-2004	2.385%	4.747%	0.286 (*AGOA*) 0.563 (*AGOA III*)	3.5%	4.747%	4.747%
2004-2005	2.644%	5.310%	0.286 (*AGOA*) 0.563 (*AGOA III*)	3.786%	5.033%	5.310%
2005-2006	2.930%	5.873%	0.286 (*AGOA*) 0.563 (*AGOA III*)	4.072%	5.319%	5.873%
2006-2007	3.216%	6.436%	0.286 (*AGOA*) 0.563 (*AGOA III*)	4.358%	5.605%	6.436%
2007-2008	3.5%	6.999%, i.e., 7%	0 (*AGOA* and *AGOA III* ceiling hit)	4.644%	5.891%	6.999%, i.e., 7%
2008-2009	—	7%	0 (*AGOA III* ceiling hit)	4.930%	6.177%	7.563%
2009-2010	—	7%	0 (*AGOA III* ceiling hit)	5.216%	6.463%	8.126%
2010-2011	—	7%	0 (*AGOA III* ceiling hit)	5.502%	6.749%	8.689%
2011-2012	—	7%	0 (*AGOA III* ceiling hit)	5.788%	7.035%	9.252%
2012-2013	—	7%	0 (ceiling hit)	6.074%	7.321%	9.815%
2014-2015	—	7%	0 (ceiling hit)	6.360%	7.607%	10.378%

ceiling levels. Lest there be any doubt about this verdict, consider the fact that a special safeguard remedy applies to this category.

In particular, if imports from Beneficiaries surge, then the United States can remove duty-free treatment.[225] The Secretary of Commerce is authorized to determine whether "there has been a surge in imports of an article [qualifying under the regional fabric preference category] . . . from a" Beneficiary SSAC.[226] Specifically, the Secretary must decide whether the article "is being imported in such increased quantities as to cause serious damage, or threat thereof, to the domestic industry producing a like or directly competitive article."[227] The list of factors the Secretary considers in making an injury determination is open-ended, and includes any economic variable with an effect on imports, such as capacity utilization, domestic production, employment, exports, inventories, investment, market share, prices, profits, and sales.[228] If the answer is affirmative, then the President must suspend duty-free treatment.[229] Any "interested party" can request a ruling from the Secretary.[230] The definition of this term includes not only producers (including workers, unions, and worker groups, as well as trade or business associations) of a like or directly competitive product, but also anyone (producers, workers, unions, and worker groups, and trade or business associations) "engaged in the manufacture, production, or sale of essential inputs for the like or directly competitive article."[231] In other words, the universe of potential claimants with standing to bring a surge mechanism case includes most of the commercial chain, upstream and downstream.

The surge mechanism might be dubbed (diplomatically) "noteworthy." It is a weapon against exports containing regional fabric, yet the weapon targets the apparel sectors of desperately poor countries. The legal aspects of this weapon make it all the more "noteworthy." That is evident by contrasting this mechanism with the legal criteria for an escape clause action under

225. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 52-53.
226. 19 U.S.C.S. § 3721(b)(3)(C)(ii).
227. *Id.*
228. *See id.* § 3721(b)(3)(C)(iii).
229. *See id.* § 3721(b)(3)(C)(ii).
230. *See id.*
231. *Id.* § 3721(b)(3)(C)(v).

section 201 of the Trade Act of 1974.[232] These criteria accord (though not completely) with the general safeguard remedy in Article XIX of GATT.[233] The contrast shows the criteria associated with an AGOA surge mechanism are less rigorous than the requirements for an escape clause action, meaning it appears comparatively easier to get relief against African apparel.

To invoke the escape clause, increased imports must be "a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[234] The investigation is conducted not by one executive branch official, but rather by an independent agency—the ITC.[235] An affirmative determination results in a recommendation to the President for relief, but the President may choose not to raise trade barriers, because such action is "appropriate and feasible."[236] As indicated, the causation test in the surge mechanism is unmodified, i.e., it does not have the descriptive adjective "substantial." Any causal contribution is enough to justify relief. In contrast to a section 201 case, in a surge mechanism case, it is not necessary to show there is no cause more important than the imports from a Beneficiary.

Also in contrast to a section 201 case, in a surge mechanism case, one member of the President's cabinet makes the decision. The President has no choice but to suspend duty-free treatment if the decision is positive. Finally, the universe of potential petitioners in a section 201 case does not expressly include upstream producers, workers, or associations. Rather, the petitioner must be "an entity, including a trade association, firm, certified or organized union, or group of workers, which is representative of an industry."[237] In turn, the industry must be the one subject to actual or threatened serious injury.[238]

---

232. *See id.* §§ 2251-2254 (2005).
233. *See* BHALA, *supra* note 108, at 953; *see generally id.* at 939-998.
234. § 2251(a).
235. *See id.* §§ 2251(a), 2252.
236. *Id.* §§ 2253(a)(1)(A), 2251(a), 2252(e).
237. *Id.* § 2252(a).
238. *See id.* § 2251(a).

D. *The Fourth Preference Category: Third Country Fabric*[239]

One dimension of the regional fabric category is, in effect, a separate rule of origin category. There is a special rule for a T&A Beneficiary SSAC designated as "lesser developed," sometimes called the "Third Country Fabric Provision."[240] The basic rule for qualifying as "lesser developed" is a per capita GNP of less than US$1500 (as of 1998, measured by the World Bank).[241] However, AGOA identifies three countries by name as "lesser developed"—Botswana, Namibia, and Mauritius—that have higher per capita incomes.[242] Indeed, the per capita income of Mauritius, around US$10,000, is considerably higher, and that country sometimes is cited as a success story.[243]

The special rule is an apparel article wholly assembled (or knit-to-shape) in a lesser developed Beneficiary (or multiple such Beneficiaries) may qualify for duty-free treatment, regardless of the country or origin of the fabric or yarn used to make the articles. In effect, the lesser developed Beneficiary can source inputs from anywhere in the world. However, this special rule is subject to two limitations.

First, the special rule applies only through September 30, 2007, which is just half the length of extension of other AGOA benefits.[244] Second, there is a cap, which is defined in terms of an "applicable percentage" of SMEs of all apparel articles imported into the United States in the previous twelve-month period for which data are available.[245] The cap rises, then falls.[246] In the first year (October 1, 2003 through September 30, 2004), the applicable percentage was 2.3571%. In the second year, (October 1, 2004 through September 30, 2005), it was 2.6428%. In the third year (October 1, 2005 through September 30,

239. *See id.* § 3721(b)(3)(B) (2005); *see also* HTSUS, *supra* note 44, at 98-XIX-4, subheading 9819.11.12 (concerning these articles).

240. *See, e.g.*, OXFAM INT'L, *supra* note 13, at 22).

241. *See* 19 U.S.C.S. § 3721(b)(3)(B)(iii)(I).

242. *See id.* § 3721(b)(3)(B)(iii)(II)-(III), (b)(3)(B)(iv); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 51.

243. *See, e.g.*, MARTIN WOLF, WHY GLOBALIZATION WORKS 198 (2004) (explaining how Mauritius moved up the value added chain from sugar plantations to textile and apparel production to labor-intensive manufacturing).

244. *See* 19 U.S.C. § 3721(b)(3)(B)(i). Initially, the sunset date was September 30, 2004. *See* U.S. CUSTOMS SERV., *supra* note 31, at 91.

245. *See* 19 U.S.C.S. § 3721(b)(3)(B)(ii).

246. *See id.* § 3721(b)(3)(B)(ii)(I)-(IV).

2006), it peaked at 2.9285%. In the final year (October 1, 2006 through September 30, 2007), the cap drops to just 1.6071%.

E. *The Fifth Preference Category: Beneficiary Knit to Shape-Forward for Certain Sweaters*[247]

Certain kinds of sweaters potentially qualify for duty-free treatment. To qualify, the sweaters must satisfy two requirements: (1) The sweaters are knit-to-shape in a T&A Beneficiary SSAC; (2) The sweaters are made either of cashmere or fine merino wool.

If the sweaters are cashmere, then their chief weight must consist of cashmere. They also must be classified under subheading 6110.10 of the HTSUS, which covers sweaters, pullovers, sweatshirts, waistcoats (i.e., vests), and other similar articles that are knitted or crocheted.[248] If the sweaters are wool, then they must contain fifty percent or more merino wool, and the diameter of that wool must be no finer (i.e., not exceed) 21.5 microns.[249] As indicated earlier, this preference category is narrow and unlikely to be of great commercial significance.

F. *The Sixth Preference Category: Short Supply and NAFTA Parity*[250]

Are there any circumstances in which the United States will accord duty-free treatment to apparel from a T&A Beneficiary SSAC, which is not a lesser developed country, even though the fabric, or the yarn making up the fabric, is neither American nor from a Beneficiary? Asked succinctly, can apparel made of third country fabric or yarn qualify? The answer is "yes, under the

247. *See id.* § 3721(b)(4); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50 (describing category 3); HTSUS, *supra* note 44, at 91-XIX-5, sub-headings 9819.11.15, 9819.11.18 (concerning these articles); U.S. CUSTOMS SERV., *supra* note 31, at 95 (describing category 4).

248. The statutory reference to HTSUS item 6110.10 does not correspond to an actual sub-heading in the HTSUS. In the HTSUS, heading 6110 is as described above. The next item listed is sub-heading 6110.11.00, which covers sweaters, pullovers, etc., made of wool or fine animal hair. *See* HTSUS, *supra* note 44, at 61-43.

249. *See* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 51 (concerning the correction by AGOA II of an earlier drafting problem about yarn diameter).

250. *See* 19 U.S.C.S. § 3721(b)(5); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50 (describing category 4); HTSUS, *supra* note 44, at 91-XIX-5, sub-headings 9819.11.21, 9819.11.24 (concerning these articles); U.S. CUSTOMS SERV., *supra* note 31, at 95 (describing category 5).

sixth preference category, the origin or fabric or yarn is irrelevant."

The usual rubric for this category is the "Third Country Fabric" provision. A full (but cumbersome) title for this category might be "Beneficiary Cutting and Sewing Forward with a NAFTA Rule of Origin or with Short-Supply Fabric or Yarn." That is because to qualify, the apparel must be cut (or knit to shape), sewn, and further assembled in a Beneficiary. But, duty-free treatment depends on satisfaction of a short-supply test, plus the applicable NAFTA rule of origin.[251]

The short-supply test is that the fabric, or the yarn used in the fabric, is "not available in commercial quantities in the United States."[252] The exact NAFTA rule of origin depends on the customs classification of the apparel article. They are (for the most part) change-in-tariff-heading ("CTH") rules, also known as "tariff shift" rules.[253] In theory, at least, this kind of rule of origin determines whether a sufficient amount of economic activity occurred in a country to justify conferral of origin in that country. As a general proposition, the greater the shift (e.g., at the four digit HTSUS classification level), the greater the economic activity in a country. Conversely, the smaller the shift (e.g., at the eight digit level), the more modest the activity.

To apply a CTH rule, two sets of records must be available to answer two questions. First, what HTSUS classification applied to the imported components before they were manufactured into a finished apparel article? Second, what HTSUS classification applied to the finished apparel article? The first question concerns customs classification by a Beneficiary (i.e., when the materials imported were imported into the Beneficiary). The second question concerns classification upon entry of the finished article into the United States. Of course, applying the

251. *See* 19 U.S.C.S. § 3721(b)(5)(A), 3721(e)(3). Note that entry may occur under two HTSUS sub-headings. *See* HTSUS, *supra* note 44, at 91-XIX-5, sub-heading 9819.11.21 (mentioning General Note 12 to the HTSUS, which concerns NAFTA); *id.* at sub-heading 9819.11.24 (concerning short supply). Generally, NAFTA sets out a yarn-forward rule of origin for garments to obtain duty-free, quota-free treatment. *See* Lamar, *supra* note 19, at 607 n.25.

252. 19 U.S.C. § 3721(b)(5)(A). Note the phrase "such fabrics or yarns" in subparagraph (5)(A), which refers to the language in paragraph (5) concerning "fabric or yarn not available in commercial quantities in the United States." *See id.*

253. *See* NAFTA, *supra* note 68, Annex 401; *see also* HTSUS, *supra* note 44, GN-31, general note 12(b)(ii)(A).

rule also presumes an exporter in a T&A Beneficiary SSAC has access directly, or through counsel, to NAFTA. Annex 401 of NAFTA contains the rules of origin (including for Chapters 50 to 63 of the HTSUS, which cover T&A merchandise), and they are reproduced in the General Notes to the HTSUS.[254] While this may be true for prominent, well-connected exporters, it is difficult to imagine either NAFTA or the HTSUS is a bestseller anywhere on the African continent. Put simply, aside from the complexity of the CTH rules, access to them is difficult, and both problems raise the cost of compliance with AGOA to qualify for duty-free treatment.

No less significant a concern is the oddity of AGOA incorporating by reference the Annex 401 origin rules. True, it may be preferable to creating a whole new set of origin rules. But, why give the relatively poorer countries of SSA the same treatment as Mexican apparel exporters? The origin requirement creates a kind of legal parity among two patently unequal categories of exporters whenever fabric or yarn is neither American nor African, subjecting the poorer ones to the same origin strictures as the comparatively better-off ones. Evidently, the scale of relative deprivation plays no role in the fifth preference category.

Implicit in the short-supply test outlined above is permanence, i.e., that the fabric or yarn in question is unavailable in commercial quantities in the United States now and in the long run. Silk might be one example of such a fabric. However, what if the fabric or yarn is available, but not immediately, nor in the short or medium term? In that instance, if an "interested party" requests, the President may proclaim duty-free treatment for yarns or fabrics that "cannot be supplied by the domestic industry in commercial quantities in a *timely* manner."[255]

To qualify, such apparel must come from fabric or yarn not available in commercial quantities in the United States (the first prong), and that American producers cannot supply in commer-

254. *See* NAFTA, *supra* note 68, Annex 401; *see also* HTSUS, *supra* note 44, at GN-40 to -41, general note 12(r).

255. 19 U.S.C.S. § 3721(b)(5)(B)(i) (emphasis added). Before making this proclamation, the President must obtain advice from an appropriate advisory committee, and the International Trade Commission ("ITC"), submit a report to the House Ways and Means Committee and Senate Finance Committee, and adhere to certain time frames. *See id.* § 3721(b)(5)(B)(ii)-(v). The advisory committee to which AGOA refers is established under section 135 of the Trade Act of 1974. *See id.* § 2155 (2005).

cial quantities in a timely manner (the second prong). In brief, the apparel qualifies, despite consisting of non-American fabric or yarn, if the inputs are in short supply in the United States. The President makes the short-supply determination, though in practice the President has delegated this authority to OTEXA at the Department of Commerce.[256] The criteria applied are that the fabric or yarn in question "cannot be supplied by the domestic [American] industry in commercial quantities in a timely manner."[257]

G. *The Seventh Preference Category: Cultural Textile and Apparel*[258]

Certain T&A goods, specifically, ones that are hand-loomed, handmade, or folklore articles, or ethnic printed fabrics, potentially qualify for preferential treatment. Conceptually, there are three stages for qualification. First, the prospective T&A Beneficiary SSAC must consult with the United States as to the eligibility of the good. Second, the United States must decide whether the good indeed qualifies as a hand-loomed, handmade, or folklore article, or an ethnic printed fabric. Third, if the United States renders an affirmative determination in the second step, then a competent authority in the beneficiary country must certify the good as an eligible hand-loomed, hand-made, or folklore article, or ethnic printed fabric.

This category poses virtually no competitive threat to any American producer. Almost by definition, African cultural T&A articles do not have like or directly competitive products. Put simply, generosity through duty-free treatment in this category hardly is self-giving. The practical benefit from this generosity, for exporters, depends on the value and volume of exports in this category. Once again, almost by definition, small, cottage-industry-like producers, are among the likeliest of beneficiaries. How significant they are in a national economy, and the role they play in boosting growth, is dubious. After all, few if any countries reached developed country status through a handicrafts industry.

256. *See* Exec. Order No. 13,197, 66 Fed. Reg. 7271 (Jan. 22, 2001).

257. 19 U.S.C.S. § 3721(b)(5)(B)(i).

258. *See id.* § 3721(b)(6); *see also* U.S. TRADE STATUTES COMPILATION, *supra* note 29, at 50 (describing category 5); HTSUS, *supra* note 44, at 91-XIX-5, sub-heading 9819.11.27 (concerning these articles); U.S. CUSTOMS SERV., *supra* note 31, at 95 (describing category 6).

H. *The Eighth Preference Category: Multi-Jurisdictional Apparel*[259]

The eighth and final AGOA preference category covers apparel assembled in a T&A Beneficiary SSAC from components originating in both a Beneficiary and the United States. Accordingly, the category might be called "Beneficiary Assembly Forward with Beneficiary or American Components." In specific, sewing may occur in a Beneficiary using American thread, where the components stitched together come from, and are cut in, the United States and a Beneficiary (or former Beneficiary) SSAC. The fabric must be American. This fabric must consist of American yarn (or components knit-to-shape in the United States and one or more Beneficiary or former Beneficiary, or both).[260]

As an example, suppose the apparel article in question is a 100% cotton men's dress shirt. The pockets and sleeves are cut in the United States, while the body is cut in one Beneficiary. In a second Beneficiary, with American thread, the pockets, sleeves, and body, are stitched together (along with other components, like collars and cuffs, that may come from any country).[261] The pockets, sleeves, and body are from cotton fabric made of cotton spun in the United States. The article would qualify for duty-free treatment under this category.

This category gives a T&A Beneficiary SSAC a modicum of flexibility in sourcing components. It can choose from multiple jurisdictions, without having to source all components from one jurisdiction. However, it is constrained to choose from the United States, a fellow Beneficiary, or a domestic source. The insistence on American fabric made of American yarn is a familiar stricture. An essentially similar one exists in the first and second preference category. Thus, the flavor of all three categories is—put colloquially—"you (the Beneficiary) can have duty-free treatment, but only if you use our (American) fabric and yarn."

VII. *THREE PROBLEMS AGAIN*

However long the night, the dawn will break.

---

259. *See* 19 U.S.C.S. § 3721(b)(7); HTSUS, *supra* note 44, at 91-XIX-5, sub-heading 9819.11.30 (concerning these articles).

260. Fabric not from yarns qualifies, as long as such fabric is classified under headings 5602 or 5603 of the HTSUS. *See* 19 U.S.C.S. § 3721(b)(7).

261. *See id.* § 3721(d)(3)(A).

—African Proverb

A. *Trade Distortion?*

Apparel articles are among the classic examples of low-value added manufactured items that development economists, such as Walt Rostow (in *The Stages of Economic Growth*), identify as significant to countries advancing to and beyond the "take off" for industrialization.[262] From the perspective of a poor country, these products tend to be ones in which they have a keen export interest, and thus ones in which the preferential rules of origin matter greatly. As Oxfam International observes, "[w]orld trade has great potential to reduce poverty, and textiles and clothing, the largest industrial sector of developing countries, can clearly play a role in this."[263]

Trade in T&A constitutes roughly eight percent of all trade in manufactured goods.[264] The leading example of "high dependence" on T&A (defined as earning more than fifty percent of export revenue from one sector) is Bangladesh, for which T&A account for 85.8% of the merchandise export revenue.[265] Rounding out the top five in terms of T&A as a percentage of national merchandise exports are Macao (84.4%), Cambodia (72.5%), Pakistan (72.1%), and El Salvador (60.2%).[266] Exports in this sector play a prominent role for at least one SSAC, Mauritius: 56.6% (number six).[267] They also play a significant role in North African countries such as Tunisia (number ten, with 42.4%) and Morocco (number twelve at 34.9%), and Egypt (number twenty-three with 12.8%).[268] In India, twenty percent of industrial production comes from T&A, and this sector em-

262. *See* W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 39 (2d ed., 1971).

263. *See* OXFAM INT'L, *supra* note 13, at 30.

264. *See id.* at 7. For current statistics on T&A trade, see the WTO website, http://www.wto.org (particularly Charts on Regional Shares in World Trade in Textiles). Generally, Asia holds the largest regional share in this trade, with over forty percent of world T&A exports coming from Asia, and with over twenty-five percent of world T&A imports going to Asia. Africa holds the smallest share, with less than a five percent share in world exports and imports. *See* World Trade Organization, *Background Statistical Information with Respect to Trade in Textiles and Clothing*, G/L/692 (Sept. 20, 2004).

265. *See* OXFAM INT'L, *supra* note 13, at 33 tbl.A1 (showing data reported by the World Bank for 2001).

266. *See id.* at 33.

267. It is noteworthy that no T&A Beneficiary SSAC figures on the top twenty-five list, except for Mauritius. *See id.*

268. *See id.* at 33.

ploys fifteen million people.[269] Further, there are multiplier effects from T&A production and exports. Businesses develop around this activity, from fruit and newsagents to haircutting and pharmacies. There also are significant externalities, including the employment and potential empowerment (as well as exploitation) of women.[270] With respect to apparel, seventy percent of apparel exports come from developing countries.[271]

To pick up on the question of "why?," why is it appropriate to characterize the preferential rules of origin for these articles as "devilish" from the vantage point of a prospective Beneficiary SSAC? This question is serious because surely the rules can be defended on the ground many SSACs do not have the capacity to weave, cut, or assemble fabric, and indeed do not even have significant domestic yarn production. In other words, inputs into apparel articles are not readily available anyway, so what is wrong with rules of origin requiring use of American inputs?[272]

One answer, in brief, is distortion. This response arises out of conventional neo-classical economic theory. These rules create an artificial distortion about sourcing inputs. Consider the reality of global T&A production as seen by Victor Fung, the Chairman of Li & Fung, the major garment supplier in Hong Kong to American and European clothing brands:

> We might decide to buy yarn from a Korean producer but have it woven and dyed in Taiwan. So we pick the yarn and ship it to Taiwan. The Japanese have the best zippers and buttons, but they manufacture them mostly in China. Okay, so we go to YKK, a big Japanese manufacturer, and we order the right zippers from their Chinese plants. Then we determine that . . . the best place to make the garments is Thailand. So we ship everything there. . . . We're not asking which country can do the best job overall. Instead, we're pulling

269. *See id.* at 14.

270. *See generally* MICHAEL KEVANE, WOMEN AND DEVELOPMENT IN AFRICA: HOW GENDER WORKS (2004) (discussing gender differences concerning land and labor rights, bargaining power, and household affairs, and linking these differences to poor economic performance).

271. *See* OXFAM INT'L, *supra* note 13, at 29.

272. *See* Lamar, *supra* note 19, at 616-17 (noting the lack of inputs, and explaining that "[o]ne of the major elements in any sourcing strategy is determining if there are sufficient quantities of fabric and other inputs for garment production . . . . [q]uality, cost, and the unreliability of textile mill operations often disqualify local fabrics," and that while raw materials, like cotton and wool, are produced in many African countries, as of the late 1990s, only Mauritius and South Africa had modern textile production).

> apart the value chain and optimizing each step—and we're doing it globally. . . . If you talk to the big global consumer-products companies, they are all moving in this direction—toward being best on a global scale.[273]

Yet, the AGOA preferential rules of origin seem either oblivious, or to flout deliberately, this free market logic.[274] It will not do to criticize SSA for lacking globally-minded entrepreneurs like Victor Fung, or to castigate African rulers for bad governance and corruption, without also engaging in introspection. What technical American trade rules impede the likes of Victor Fung in SSA? In AGOA, the first and third preference categories are not based on pure assembly rules. Rather, they combine assembly operations in an SSA T&A beneficiary with yarn-forward requirements. Likewise, the second preference category is not a pure cutting-forward rule. Rather, it contains a yarn-forward requirement. The eighth category suffers from the same problem.

These strictures discourage would-be African entrepreneurs in a T&A SSAC Beneficiary from obtaining fabric from the cheapest cost or highest quality sources, and creating an efficient, vertically integrated, global production chain like that of Li & Fung. Rather, under the first and third categories, they must pay attention to the country of origin of the yarn in the fabric, not the price and quality of the yarn. Under the second category, they must focus on the source of the thread, not its price and quality. Under the eighth category, they most focus on the source of fabric, yarn, and thread. If the fabric, yarn, or thread is not American, then any hope of duty-free, quota free treatment from the United States is lost. The economic fact that substitute material from a third country, such as Egypt or Pakistan, may be cheaper or better quality than the American inputs, is legally irrelevant.

One response to the trade distortion critique might be the AGOA preferential rules of origin encourage regional development. Some of them allow for use of fabric or yarn from more

273. OXFAM INT'L, *supra* note 13, at 20.

274. A related concern for SSACs, and indeed many small T&A exporting countries, is the elimination as of December 31, 2004 of quota reservations pursuant to the WTO Agreement on Textiles and Clothing ("ATC"). For an analysis of this problem, see Viji Rangaswami, *A Stitch in Time: Helping Vulnerable Countries Meet the Challenges of Apparel Quota Elimination*, POL'Y OUTLOOK, Oct. 2005, *available at* http://www.carnegieendowment.org/files/PO20.Rangaswami.FINAL.pdf.

than one Beneficiary. The third and eighth preference categories are illustrations. Such allowance is known as "regional cumulation," indicating a proportion of the inputs into a finished garment may come from other countries in the region of the beneficiary, yet not vitiate eligibility for preferential treatment. Oxfam International dubs regional cumulation a "flawed trade instrument," stating "there is no development rationale for promoting *regional* rather than *global* cumulation."[275] It adds:

> The USA's African Growth and Opportunity Act (AGOA) . . . contains imperfect rules on cumulation. The Act stipulates that apparel exported from African countries to the USA must use either US or African fabrics to qualify for AGOA benefits, *notably discriminating against fabrics produced in Asia.* One recent study [by the World Bank] estimates that Mauritius *would have* seen its total exports increase by 36 per cent between 2001 and 2004 under AGOA, rather than 5 per cent, had restrictive rules of origin *not* been in place.[276]

Whether the points Oxfam makes are true generally, or depend on the industry and regional in question, is a matter best left to development economists.

For now, four points should be emphasized. First, not all AGOA rules encourage regional development. If they did, then why are they—as Oxfam International puts it—"unreasonably demanding"?[277] Second, the rules are inconsistent, if not disingenuous, in promoting development in SSA. They address development in the American T&A industry as much as they do in SSA, and arguably because of fears of competition from foreign suppliers in Asia, there is no analog to AGOA for developing or least-developed countries in Asia.[278] Third, whether a rule of origin is an appropriate tool to encourage regional development is worthy of examination. Surely there are more direct, efficient legal instruments. Fourth, and most fundamentally, there may well be strong arguments against promoting regional versus global development.

275. OXFAM INT'L, *supra* note 13, at 21.

276. *Id.* at 22 (emphasis added); *see also* A. MATTOO, D. ROY & A. SUBRAMANIAN, THE AFRICAN GROWTH AND OPPORTUNITY ACT AND ITS RULES OF ORIGIN: GENEROSITY UNDERMINED? 4, 14 (World Bank Dev. Research Group, Policy Research Working Paper No. 2908, 2002).

277. *See* OXFAM INT'L, *supra* note 13, at 23.

278. *See id.*

B. *Economic Dependency?*

Applying dependency theory, the rules of origin tie a T&A Beneficiary SSAC to the United States, or at least encourage that outcome. As Oxfam International observes, "agreements [like AGOA and the European "Everything But Arms" program] that are supposed to benefit poor countries actually serve to promote the production of textiles in rich countries, to the detriment of the developing world as a whole."[279] In the context of AGOA (as intimated earlier), this tying is patent in all but the fifth and seventh preference categories, and effected through hybrid specified process rules of origin. Rather than, for example, a pure assembly rule in the first and third preferential categories, or a pure cutting forward rule in the second and eighth preferential categories, there are added mandates about the American origin of fabric, yarn, or thread. Such mandates encourage a Beneficiary to become dependent on the United States for inputs.

This encouragement is ironic. In the aftermath of the Second World War, when the United States actively engaged in the drafting of the GATT at the 1946 London Preparatory Conference and the 1947 Geneva Preparatory Conference, it argued strongly against the preferential trading arrangements of the European colonial powers.[280] Tying peripheral countries in Africa, Asia, and the Caribbean to the center countries like the United Kingdom and France was incongruous with free trade and the development interests of the poor countries. The American argument was not entirely successful. But, it did at least limit the schemes to the parameters set forth in Article I(2) of GATT, a restricted exception to the MFN obligation in Article I(1).[281]

Does AGOA bespeak an historic reversal of American efforts to resist center–periphery type links? Does it reveal a neo-colonial tolerance (indeed, support) for vertical integration of the T&A production through such links? Why does AGOA confer no meaningful reward for economic integration among poor countries, for instance, where a Beneficiary SSAC seeks high-quality, low-cost cotton from Egypt or Pakistan? Is it too cynical a response to say AGOA is about divide and rule? These questions are not pleasant to pose, nor should an ideologically-driven

279. *See id.* at 20.

280. *See* BHALA, *supra* note 108, at 53; *see generally id.* at chs. 2-3.

281. *See id.* at 76-77; *see generally id.* at chs. 2-3.

answer be presumed. But, AGOA is not pleasant reading for an international trade lawyer or scholar who believes, perhaps mistakenly or foolishly, that international trade law can be about more than politically-motivated protection, that it can be a policy instrument to assist poor countries.

Another irony about AGOA is the first and second rationales may be practically inconsequential. From a legal standpoint, the rules of origin are complex.[282] The cost of understanding and complying with them surely are high, all the more so for an African producer/exporter with limited resources to spend on competent trade counsel (if it even exists nearby). As suggested at the outset, the cost may approach the margin of preference, cut into that margin, or even dwarf it. To the extent compliance costs create a disincentive to obtain AGOA benefits, neither trade distortion nor dependency will follow. This problem is known as "missing preferences," as Oxfam International explains:

> The smaller and poorer a country is, the less able it is to establish a supporting textile industry that would enable it to meet the conditions to get duty-free access to rich country markets. These countries are therefore penalized by "missing preferences" to an even greater degree than the average developing country.[283]

Obviously, the problem of missing preferences is the heart of this irony. It means the ostensible purpose of AGOA—to provide a preference—is unfulfilled.

The problem of missing preferences is perhaps even more likely to arise when an African producer-exporter seeks to ship merchandise to multiple importing countries. Suppose, for instance, the producer-exporter aspires to gain a foothold not only in the American market, but also in the EU market. To gain preferential access, it will be necessary to satisfy AGOA origin

282. As another example of intricacy in rules of origin, Oxfam International cites the new *U.S.-Singapore Free Trade Agreement.* The rules in that accord run about 240 pages. *See* OXFAM INT'L, *supra* note 13, at 22.

283. OXFAM INT'L, *supra* note 13, at 21. Oxfam reports (as of 2001) high percentages of products that originate in certain least-developed countries and are eligible for duty-free treatment by the EU under the "Everything But Arms" program initiative, but which do not obtain this treatment: 94.6% of exports from Afghanistan; 73.8% of exports from the Maldives; 64% of exports from Cambodia; 49.9% of exports from Bangladesh; and 41.1% of exports from Laos. *See id.* tbl.2.

rules for the American market, and EU origin rules for the European market. To the extent the rules differ, the problem of understanding and applying them increases. If the producer/exporter seeks entry for its merchandise into still more markets, and the importing countries have non-harmonized rules, then the problem is yet worse. Heterogeneous rules of origin are dubbed the "spaghetti-bowl effect."[284] The point is to see the interaction between this effect and missing preferences, as producer-exporters simply—and rationally, from a cost-benefit perspective—elect not to seek preferential access.

C. *Social Justice?*

The first two reasons are grounded in development economic theory. There is a third reason, perhaps the most fundamental of all, for branding "devilish" on AGOA rules of origin for apparel articles. That reason is moral, indeed, religious: these rules are entirely at variance with the preferential option for the poor, which is a tenet of Catholic social justice theory (and, in all likelihood, of justice criteria in other faiths).

This tenet is grounded in Gospel teaching and articulated and elaborated in the Magisterium of the Church through (inter alia) Papal encyclicals starting in 1891 with *Rerum Novarum* (On the Condition of the Working Classes), by Pope Leo XIII, and emphasized by Pope John Paul II in encyclicals such as *Labourem Exercens* (On Human Work) (1981), *Sollicitudo Rei Socialis* (On Social Concern) (1987), and *Centesimus Annus* (On the Hundredth Anniversary of Rerum Novarum) (1991).[285] In brief, it demands primacy in public policy choices be given to the interests of the poor over the well-to-do. America has moved from a generic thirty-five percent value added test to a product-specific set of rules of origin. That is selfish. Each U.S.-based company can insert into what is or ought to be a charitable program its own special device to make sure generosity stops where its self-interest, however real or remote, begins.

In sharp contrast, Canada adopted in 2003 an "Initiative for Least Developed Countries," making it the only major developed

---

284. *See* Jagdish Bhagwati & Arvinid Panagariya, *Bilateral Trade Treaties Are a Sham*, FIN. TIMES (London), July 14, 2003, at 17.

285. *See* Papal Encyclicals, http://www.papalencyclicals.net (last visited Nov. 17, 2005).

country to fulfill its promise at the Doha Ministerial Conference in November of 2001 to provide duty-free, quota-free treatment on T&A articles from least developed countries.[286] The Initiative imposes a two-pronged test to qualify for such treatment, and only one prong need be satisfied. Either an article is made in a least-developed country, regardless of value added at the final stage of production (i.e., there is no value-added threshold for the final stage), or at least twenty-five percent of the value added to an article occurs in the final stage in a least-developed country, but inputs may come from any other country in the world, and there is no dual substantial transformation requirement concerning yarn-to-fabric and fabric-to clothing.[287] Yet, under AGOA, the keen export interest in T&A of Beneficiary SSACs is subordinated to producers of T&A producing like merchandise made in the United States.

True, the American T&A sector feels itself, for good reason, under siege from cheaper imports. Hundreds of thousands of jobs have been lost in recent years, as the unsuccessful Vice Presidential candidate, former Senator John Edwards, in the election of 2004 noted repeatedly.[288] From that perspective, to give GSP treatment to such imports would wound further the decline of the American T&A sector, or at least complicate its orderly contraction. Accordingly, the GSP statutory product exemptions bespeak a calculating generosity to poor countries. That is manifest in the fourth preference category, designed for the poorest countries in SSA, with its early sunset rule and TRQ thresholds. American willingness to give duty-free treatment extends only to the line of a potential threat to domestic producers.

The socially just response, however, is not to cut back on generosity toward the poorest countries. Rather, it is to help the shrinking American T&A sector though more generous trade adjustment assistance ("TAA").[289] Generosity is a positive sum

---

286. *See* OXFAM INT'L, *supra* note 13, at 23. The author understands from private conversations with trade officials in Auckland, New Zealand in spring 2003 that, as a down payment in the Doha Round, New Zealand offers duty-free, quota free treatment on textiles, clothing, and footwear from least-developed countries.

287. *See id.* at 19-20.

288. *See* Jim Rutenberg, *The Ad Campaign; Edwards Vows to Protect Jobs*, N.Y. TIMES, Feb. 3, 2004, at 20.

289. *See, e.g.*, OXFAM INT'L, *supra* note 13, at 29 tbl.A1 (discussing TAA, and observing (1) support for income, job search, re-employment services, relocation, and retraining is critical, (2) only a small percentage of eligible workers benefit from TAA, (3)

game, and TAA reform is an important play in that game. However, this reform is for another article.

TAA tends to be poorly designed, underfunded, overly bureaucratic, and unresponsive to the real needs of dislocated workers, and (4) recommending trade adjustment assistance ("TAA") be improved by cutting "red tape," eliminating the 90 to 180 degree review process during which workers get no assistance, increasing assistance levels, and setting up local reception centers in affected areas); Lamar, *supra* note 19, at 611 (noting 300,000 jobs lost in the American apparel sector between 1991-1998, observing that foreign competition is not the only culprit, and pointing out that technological advances have led to lower employment levels, but also higher productivity and increased average hourly wages).