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

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I. Introduction

The U.S. Generalized System of Preferences (GSP) is a program that encourages economic development through trade. It grants preferential, duty-free treatment to the products of beneficiary developing countries (BDCs), giving these countries' products a competitive advantage in U.S. markets, and lowering costs for American business and consumers.

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In May 2008, Vietnam officially requested to receive these trade benefits under the U.S. GSP.[1] If these trade benefits are granted, both the United States and Vietnam could benefit considerably. However, Vietnam's compliance with the GSP eligibility criteria is problematic. Ultimately, Vietnam's protections for both intellectual property rights and internationally recognized worker rights are inadequate.

This article initially provides a brief background on GSP programs and lays out their legal basis within the World Trade Organization (WTO). The next section gives an overview of the U.S. GSP program and outlines its country and its product eligibility requirements. Finally, this article examines Vietnam's economic background, analyzes Vietnam's prospects for eligibility under the U.S. GSP program, and focuses on key reforms that Vietnam will need to make in order to attain U.S. GSP trade benefits.

II. Generalized System of Preferences Background

The Most Favored Nation (MFN) principle generally prohibits WTO members from granting trade benefits to certain countries while withholding those benefits from others. For a long time, however, developing countries sought an exception to the MFN principle so they could receive preferential trade benefits from more developed countries. It was not until the Enabling Clause was adopted in 1979 that developing countries were allowed significant differential and more favorable treatment under the GATT/WTO system. This, consequently, provides the legal basis for national GSP programs under which many developing countries now receive special trade benefits.

A. Developing Countries and the WTO

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

By the 1980s, however, many developing countries began to change their outlook on open-trade policies. A growing number of these developing countries liberalized their economies, opened up their markets, and joined the WTO system. Consequently, the multilateral structure of the WTO has enabled develop-

[1] Letter from the Embassy of Vietnam to the United States Trade Representative (May 9, 2008), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file29_15061.pdf.

ing countries to join together to leverage their numbers in advancing their interests in trade negotiations.

B. The Most Favored Nation Principle

The MFN principle is a cornerstone of GATT/WTO trade law. It is enshrined in Article I of the GATT and obligates members to treat "like" products of all other member countries no worse than they treat the imports of their most favored trading partner.[2] This fundamental principle prohibits members of GATT/WTO from taxing imports of the same item from different countries at different rates. Consequently, it also prohibits preferential treatment for developing countries.

Nevertheless, developing countries have sought special treatment that would improve their competitiveness in developed countries' markets and promote their economic development through trade. The developing countries persisted in arguing that equal treatment of unequal partners is unfair and ultimately succeeded in persuading GATT members to recognize that the MFN principle should be relaxed to allow wealthier countries to reduce trade barriers on products from developing countries.

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

C. The Enabling Clause

Effectively, it was not until the Enabling Clause was adopted as part of the Tokyo Round in 1979 that developing countries were granted significant differential and more favorable treatment under GATT. Paragraph 1 of the Enabling Clause explicitly provides an exception to the MFN principle, asserting that: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties."[3]

Ultimately, the Enabling Clause allows GATT/WTO members to provide developing countries with trading preferences that would otherwise violate the MFN principle. As a result, it provides the legal basis for creating formal GSP programs, which establishes the rules on exactly how these trade preferences are provided. Paragraph 2(a) and footnote three of the Enabling Clause provide that a GSP program may only give preferential treatment in accordance with the Preamble to the 1971 Waiver Decision. Consequently, preferential treatment under

[2] General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

[3] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980), *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf [hereinafter Enabling Clause].

the Enabling Clause must be generalized, non-reciprocal, non-discriminatory, and beneficial to the developing countries.[4]

Over the years, more than twenty-five countries have established their own GSP programs, each consisting of different beneficiaries, products, and types of preferences granted.[5] Currently there are thirteen distinct GSP programs provided by the following countries: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, Russia, Switzerland, Turkey, and the United States.[6]

III. Introduction to the U.S. GSP

The United States first implemented its GSP program in 1976, and has periodically renewed its program since.[7] The program provides preferential, duty-free treatment for 3,448 products from 131 beneficiary developing countries (BDCs). Furthermore, forty-four of these countries have been designated as least developed beneficiary developing countries (LDBDCs), and are given duty-free treatment for an additional 1,434 products.[8] For many beneficiary countries, such as Paraguay, Lebanon, Tunisia, Fiji, and Armenia, exports under the U.S. GSP program represent a major portion of their total exports. In fact, total imports entering the United States under its GSP program in 2008 were worth approximately $31.7 billion.[9]

A. Country Eligibility

The President ultimately decides which countries are eligible for GSP treatment.[10] Title V of the 1974 Trade Act ("GSP Statute") provides the guidelines for eligibility under the U.S. GSP program. The GSP Statute outlines various factors to be considered before granting a country BDC status, including several economic factors[11] as well as certain mandatory and discretionary eligibility criteria.[12]

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[4] *See id*. ¶2(a) n.3.

[5] Office of the United States Trade Representative [USTR], U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) GUIDEBOOK 16 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file403_8359.pdf.

[6] United Nations Conference on Trade and Development, About GSP, http://www.unctad.org/Templates/Page.asp?intItemID=2309& (last visited Mar. 18, 2010).

[7] USTR, Generalized System of Preferences, http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html (last visited Mar. 18, 2010) [hereinafter Generalized System of Preferences].

[8] USTR, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT 221 (2009), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file937_15405.pdf [hereinafter 2009 TRADE POLICY AGENDA].

[9] Press Release, USTR, Obama Administration Completes 2008 Annual Review of the Generalized System of Preferences (June 30, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/june/obama-administration-completes-2008-annual-review-gen.

[10] Trade Act of 1974, 19 U.S.C.A. § 2462(a)(1) (effective Aug. 6, 2002).

[11] Trade Act of 1974, 19 U.S.C.A. § 2461 (effective Aug. 20, 1996).

[12] 19 U.S.C.A. § 2462(b)-(c).

First, in modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account several economic factors. Such economic factors include: the anticipated effects on the economic development of the country, the country's GSP treatment from other developed countries, the likely impact on U.S. producers, and the country's competitiveness with respect to eligible products.[13]

Second, the mandatory criteria exclude the following from eligibility: communist countries, certain export cartel members, countries that expropriate U.S. property, countries that fail to recognize arbitral awards in favor of U.S. citizens, countries that aid and abet international terrorism, and countries that do not afford internationally recognized worker rights and have not eliminated the worst forms of child labor.[14]

Finally, the President may also consider discretionary criteria, such as: the desire of the country to be a GSP beneficiary, the level of economic development of the country, the country's GSP treatment from other developed countries, the country's assurances of reasonable access to its markets, protections of intellectual property rights, actions taken to reduce trade distorting investment practices and barriers to trade in services, and steps taken to protect worker rights.[15]

B. Eligible Products

Approximately 5,000 products are eligible for duty-free import from LDBDCs, and most of those products are also eligible for duty-free import from the rest of the BDCs.[16] The top U.S. GSP imports in 2008 by trade value were crude petroleum oils, oils from bituminous minerals (which are only eligible for duty-free import from LDBDCs), biodiesel, certain ferrochromium, silver jewelry valued over $18 per dozen, gold necklaces and neck chains, new radial tires for automobiles, aluminum alloys, gold and platinum jewelry (not including necklaces and neck chains), and methanol.[17]

However, several limitations on product eligibility have been established in the U.S. GSP system in order to safeguard the interests of U.S. producers. Certain products are deemed "sensitive" and are excluded from GSP eligibility altogether, including certain textiles, watches, electronics, steel articles, footwear, handbags, luggage, glass products, and agricultural products.[18] In addition, the GSP statute establishes "competitive needs limitations" (CNLs) that automatically suspend GSP eligibility if imports of a particular product from a country reach certain thresholds.[19] Finally, a BDC country may be "graduated" and re-

[13] 19 U.S.C.A. § 2461.

[14] 19 U.S.C.A. § 2462(b)(2).

[15] 19 U.S.C.A. § 2462(c).

[16] *See* Press Release, USTR, *supra* note 9.

[17] 2009 Trade Policy Agenda, *supra* note 8 at 223.

[18] Trade Act of 1974, 19 U.S.C.A. § 2463(b) (effective Dec. 20, 2006).

[19] 19 U.S.C.A. § 2463(c).

moved from GSP eligibility once it becomes more developed or reasonably competitive.[20]

IV. Vietnam's Eligibility Under The U.S. GSP

Although Vietnam and the United States have had a difficult past, times have changed. Now, more than thirty years after the end of the Vietnam War and more than fifteen years since the fall of the Soviet Union and the end of the Cold War, the relationship between the two countries has improved immensely. This section first gives a brief review of Vietnam's economic and political background and then presents a comprehensive analysis of Vietnam's eligibility under the U.S. GSP program.

A. Background on Vietnam

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

The Vietnam War raged on for many years between the communist state of North Vietnam and the anti-communist state of South Vietnam, which was provided a great amount of military support by the United States. When Saigon fell on April 30, 1975 to the forces of North Vietnam, North and South Vietnam were reunified as a single, communist state. The war had finally come to an end, but the Vietnamese economy had been devastated by the many years of bloodshed and destruction.

Once the United States withdrew from Vietnam, it imposed a trade embargo on Vietnam under the Trading with the Enemy Act (TWEA),[21] cutting off all trade.[22] Vietnam was isolated from the United States and its anti-communist allies and became especially dependent upon trade with the Soviet Union.[23] Vietnam also received billions of dollars per year in economic and military aid from the Soviet Union.[24]

In the early 1980s, the Vietnamese Government collectivized land ownership and repressed private business. Sadly, these new policies only seemed to exacerbate Vietnam's economic problems. Industries that had once been stable began to fail, and the population was pushed to the brink of famine.[25] To make matters worse, as the Soviet Union's economy also began to struggle it cut its aid to Vietnam.[26]

In the midst of this crisis and increased isolation, the Vietnamese Government ushered in a dramatic set of reforms in the mid-1980s called "Doi Moi" (meaning

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[20] 19 U.S.C. § 2462(e).

[21] Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411, 50 U.S.C.A. App. §§ 1-44.

[22] Ky Tran-Tong, *A Would-Be Tiger: Assessing Vietnam's Prospects for Gaining Most Favored Nation Status from the United States*, 38 Wm. & Mary L. Rev. 1583, 1586 (1997).

[23] William J. Duiker, Vietnam: Revolution in Transition 211 (Westview Press 1995) (1983).

[24] U.S. Department of State, Background Note: Vietnam, http://www.state.gov/r/pa/ei/bgn/4130.htm (last visited Mar. 18, 2010) [hereinafter Background Note: Vietnam].

[25] *Half-Way from Rags to Riches*, Economist, Apr. 26, 2008, at 62, *available at* 2008 WL 7732613.

[26] Tran-Tong, *supra* note 22, at 1587.

renewal). The Doi Moi reforms were similar to the reforms introduced by Deng Xiaoping in China just a few years earlier.[27] Once China had opened its economy in 1978 and focused on export production, it began to experience dramatic growth.[28] Under the Doi Moi reforms, the Vietnamese Government abandoned centralized state planning, permitted free-market enterprises, gave farmers greater control over what they produced, opened the country to foreign investment, and began actively promoting export-led growth.[29]

After the Soviet Union finally collapsed in 1991, Vietnam took even greater steps to open up its markets and assimilate into the rest of the global economy. In fact, Vietnam joined the International Monetary Fund (IMF), the World Bank, the Asian Development Bank in the 1990s; it joined the Association of Southeast Asian Nations (ASEAN) in 1995, and the Asia-Pacific Economic Cooperation forum (APEC) in 1998.[30]

Relations between the United States and Vietnam also improved. The United States finally lifted its trade embargo on Vietnam in 1994. Thereafter, Vietnam entered into a Bilateral Trade Agreement (BTA) with the U.S. in 2001, was granted Normal Trade Relations (NTR) status by Congress in 2006, and concluded a Trade and Investment Framework Agreement (TIFA) with the United States in 2007.

Reforms that Vietnam made in compliance with the U.S. BTA—increasing protections for investments, strengthening enforcement of intellectual property rights, increasing transparency, and reforming trade in goods and services—helped Vietnam to subsequently join the WTO in 2007. To fulfill WTO requirements, Vietnam has revised most of its trade and investment laws, has opened up big sectors of its economy to foreign investors and exporters, and has become even more integrated into the global economy.[31]

2. *Vietnam's Current Trade and Economy*

These reforms have transformed Vietnam dramatically over the years into one of the most open economies in the world. In 2008, exports accounted for a massive seventy-two percent of the Vietnamese GDP,[32] and the sum of Vietnam's imports and exports had risen to 160 percent of its GDP.[33] This boom in Vietnamese exports has, in turn, helped to spur remarkable growth. In fact, because of these reforms, Vietnam's GDP has been growing by an average of approximately seven percent to eight percent annually since 1990.[34]

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[27] *Half-Way from Rags to Riches*, *supra* note 25.

[28] *The Export Trap: Asia's Failing Export-Led Growth Model*, ECONOMIST.COM, Mar. 25, 2009 (Westlaw).

[29] *Half-Way from Rags to Riches*, *supra* note 25.

[30] Background Note: Vietnam, *supra* note 24.

[31] Background Note: Vietnam, *supra* note 24.

[32] Background Note: Vietnam, *supra* note 24.

[33] *Half-Way from Rags to Riches*, *supra* note 25.

[34] Background Note: Vietnam, *supra* note 24.

Vietnam's major exports include garments and textiles, crude oil, footwear, fishery and seafood products, rice (Vietnam is now the world's second largest exporter of rice), wood products, coffee, rubber, and handicrafts.[35] Vietnam will also begin exporting microchips once Intel opens its new one billion dollar factory.[36]

Vietnam's principal imports include machinery, oil and gas, iron and steel, garment materials, and plastics.[37] Many of these primary imports are needed for the production of Vietnam's exports and have increased significantly as well. Indeed, despite Vietnam's historic level of exports in 2008, valued at $62.9 billion, it nevertheless ran a trade deficit of $17.5 billion.[38]

Trade between Vietnam and the United States has burgeoned in particular and Vietnam has become a valuable trading partner to the United States.[39] In fact, Vietnam's exports to the United States increased 900 percent from 2001 to 2007.[40] Vietnamese exports to the United States have steadily increased and came to a total value of $12.9 billion in 2008.[41] The United States is now Vietnam's third biggest trading partner and has become Vietnam's biggest export market.[42] Vietnam's top exports to the United States currently include clothing and textiles, furniture, footwear, and crude oil.[43]

Despite Vietnam's reforms and impressive growth, it remains a very poor country. Vietnam is made up of about 86 million people with a GDP of approximately $85 billion in 2008.[44] According to the most recent World Bank report, the gross national income (GNI) per capita for Vietnam was only $890 in 2008, compared to the estimated 2008 U.S. GNI per capita of $47,580.[45]

The United States has extended BDC status under its GSP program to 131 developing countries.[46] However, many of these countries are more developed and have a much higher GNI per capita than Vietnam. Consider, for example, Croatia, Turkey, and even Vietnam's neighbor, Thailand. In 2008, Croatia's GNI per capita was estimated to be $13,570, Turkey's $9,340, and Thailand's

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35 Background Note: Vietnam, *supra* note 24.

36 *Halfway from Rags to Riches*, *supra* note 25.

37 Background Note: Vietnam, *supra* note 24.

38 Background Note: Vietnam, *supra* note 24.

39 Background Note: Vietnam, *supra* note 24.

40 Know Your Country, Vietnam, http://www.knowyourcountry.info/vietnam.html (last visited Mar. 18, 2010).

41 Background Note: Vietnam, *supra* note 24.

42 Embassy of the United States: Hanoi, Vietnam, U.S.-Vietnam Cooperation on Economic Development, Trade and Investment Fact Sheet, http://vietnam.usembassy.gov/cooperationfactsheet.html (last visited Mar. 18, 2010) [hereinafter U.S.-Vietnam Fact Sheet].

43 U.S. Census Bureau, U.S. Imports from Vietnam from 2004 to 2008 by 5-digit End-Use Code, http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c5520.html (last visited Mar. 18, 2010) [hereinafter U.S. Imports from Vietnam].

44 Background Note: Vietnam, *supra* note 24.

45 World Bank, Gross National Income per Capita 2008, Atlas Method and PPP 1, 3 (2009), http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf [hereinafter Gross National Income].

46 Generalized System of Preferences, *supra* note 7.

$2,840.[47] All of these countries have been granted BDC status, yet Vietnam has not. As a matter of fact, Vietnam even had a lower GNI per capita in 2008 than fourteen countries[48] designated as "least developed" BDCs[49] under the U.S. GSP program.[50]

The GSP Statute stipulates that a country should be "graduated" and removed from GSP eligibility once it becomes a "high income" country (a GNI per capita level defined by the World Bank).[51] In fact, this "high income," graduation level is currently at $11,906,[52] a level that is over 1,200 percent higher than Vietnam's 2008 GNI per capita.[53]

Millions of Vietnamese have very low living standards. In 2007, an estimated 14.8 percent of the population still struggled below the poverty line,[54] and twenty-five percent of children under the age of five suffered from malnutrition.[55] Furthermore, the recent financial crisis and decline in American consumption threaten to reduce Vietnam's exports and slow economic growth. This slowdown may lead to an increase in unemployment and corporate bankruptcies, a decrease in foreign investment, and an exacerbation of poverty in Vietnam.[56]

B. Analysis of Vietnam's GSP Eligibility

The President ultimately decides which countries are eligible for GSP treatment.[57] Title V of the GSP Statute provides the guidelines for eligibility under the U.S. GSP program. The GSP Statute outlines various factors to be considered before granting a country BDC status, including several economic factors[58] and certain eligibility criteria.[59]

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[47] Gross National Income, *supra* note 45, at 1-2.

[48] Angola, Bhutan, Cape Verde, Djibouti, East Timor, Equatorial Guinea, Kiribati, Lesotho, Samoa, Sao Tome and Principe, Solomon Islands, Vanuatu, Republic of Yemen, and Zambia. *Id.* at 2-3.

[49] USTR, Information on Countries Eligible for GSP 2, http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file5_14711.pdf.

[50] Gross National Income, *supra* note 45, at 2-3.

[51] 19 U.S.C. § 2462(e).

[52] World Bank, Data & Statistics: Country Classification, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Mar. 18 2010).

[53] Gross National Income, *supra* note 45, at 3.

[54] Countries of the World, Vietnam Economy 2010, http://www.theodora.com/wfbcurrent/vietnam/vietnam_economy.html (last visited Mar. 18, 2010).

[55] UNICEF, The Children in Vietnam, http://www.unicef.org/vietnam/children.html (last visited Mar. 18, 2010).

[56] Central Intelligence Agency [CIA], World Fact Book: Vietnam, https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited Mar. 18, 2010).

[57] 19 U.S.C. § 2462(a)(1).

[58] 19 U.S.C. § 2461.

[59] 19 U.S.C. § 2462(b)-(c).

1. Economic Factors

In modifying the GSP list of eligible countries or eligible products, the President is instructed to take into account: (a) the anticipated effects on the economic development of the country; (b) the country's GSP treatment from other developed countries; (c) the likely impact on U.S. producers; and (d) the country's competitiveness with respect to eligible products.[60]

a. Effect on Economic Development of the Country

First, we consider the effect that BDC status would have on furthering the economic development of the beneficiary country through the expansion of its exports. Much of Vietnam's recent export-led growth has been dependent upon the competitiveness of Vietnamese goods in U.S. markets. In fact, the United States has become Vietnam's biggest export market.[61]

If Vietnam received U.S. GSP benefits, many of its products would be eligible for duty-free entry and would sell at even more competitive prices in U.S. markets. Eligible Vietnamese products would finally compete on a level playing field with the duty-free products from all the other countries that currently receive GSP benefits. Plus, eligible Vietnamese products would gain an advantage over products from countries outside the U.S. GSP system, like China. A competitive advantage for Vietnamese goods over certain Chinese products in U.S. markets may even help to partially offset the rising trade deficit that the U.S. has with China. Ultimately, though, GSP benefits would provide an added boost to Vietnam's exports that would help to encourage further economic development and the alleviation of poverty in Vietnam.

As a BDC, Vietnam would be entitled to GSP trade benefits on over 3,400 products in the U.S. tariff schedule.[62] Vietnamese ceramic and porcelain homewares, non-sensitive electronics (such as space heaters, loudspeakers, and audio frequency products), precious metal and imitation jewelry, sporting equipment, wooden tableware, and office supplies would all receive beneficial GSP treatment.[63] In addition, some of Vietnam's fastest growing, top exports to the United States (such as soaps, plastics and articles made of plastic, machinery, and electrical machinery) would be eligible for duty-free GSP treatment, and may experience even greater growth if Vietnam were to acquire BDC status. Vietnam's machinery and electrical machinery industries may also flourish under the U.S. GSP system, since the Vietnamese government has already been active in promoting these industries.[64]

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[60] 19 U.S.C. § 2461.

[61] U.S.-Vietnam Fact Sheet, *supra* note 42.

[62] 2009 Trade Policy Agenda*, supra* note 8, at 221.

[63] Vietnam Trade Office and Sidley Austin LLP, Frequently Asked Questions: Understanding Vietnam and GSP, http://www.usasean.org/Vietnam/GSP/FAQ.pdf (last visited Mar. 18, 2010) [hereinafter Vietnam Trade Office].

[64] Michael Martin & Vivian Jones, CRS Report for Congress: Potential Trade Effects of Adding Vietnam to the Generalized System of Preferences Program, RL34702, at CRS-1 (2008), *available at* http://assets.opencrs.com/rpts/RL34702_20081009.pdf.

Moreover, Vietnam's economy is currently fairly vulnerable to economic shocks because its exports are concentrated in a relatively few number of industries and products.[65] GSP treatment would encourage Vietnamese industry to shift into producing goods that are eligible for preferential treatment. This would help to expand and diversify Vietnam's exports, ultimately making the Vietnamese economy more resilient to economic shocks and helping Vietnam sustain its development.

b. GSP Treatment From Other Developed Countries

Next, we consider whether other major developed countries are extending GSP benefits to the country seeking U.S. GSP status. Vietnam's low level of economic development has caused the country to be granted trade benefits under a number of other GSP programs. The European Union, Canada, Japan, New Zealand, Norway, Switzerland, Australia, and even Turkey and Russia have all provided GSP benefits to Vietnam.[66] As a matter of fact, the United States stands alone as the only major developed country with a GSP program that has not extended these benefits to Vietnam.[67]

c. Impact on U.S. Producers

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

U.S. imports from Vietnam came to a total of $12.9 billion in 2008.[68] However, this is only a tiny fraction of entire U.S. imports, which totaled $2.19 trillion in 2008. Moreover, U.S imports from Vietnam are dwarfed by the U.S. GDP, which was estimated to be $14.3 trillion in 2008.[69] Thus, all U.S. imports from Vietnam count for less than 0.6 percent of total U.S imports, and all U.S. imports from Vietnam are less than 0.1 percent of the total U.S. GDP.

Furthermore, certain products are deemed "sensitive" and are excluded from GSP eligibility, including most textiles, watches, electronics, steel articles, footwear, handbags, luggage, flat goods, work gloves, glass products, and agricultural products.[70] In fact, the top U.S. imports from Vietnam (garments and textiles, furniture, footwear, and crude oil)[71] will not gain much advantage through the U.S. GSP system because they fall under these "sensitive" product

[65] U.S. Imports from Vietnam, *supra* note 43.

[66] Vietnam Trade Office, *supra* note 63.

[67] Vietnam Trade Office, *supra* note 63.

[68] Background Note: Vietnam, *supra* note 24.

[69] CIA, World Fact Book: United States, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Mar. 18, 2010).

[70] 19 U.S.C. § 2463(b)(1).

[71] U.S. Imports from Vietnam, *supra* note 43.

categories as delineated in the GSP statute.[72] Moreover, crude petroleum is only eligible for duty-free import from LDBDCs.[73] Thus, the GSP system safeguards U.S. producers from the most robust Vietnamese imports.

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

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

d. Competitiveness With Respect to Eligible Products

Last to consider is the extent of the country's competitiveness with respect to eligible products. Vietnamese products that would be eligible for GSP treatment are not very competitive with U.S. products and are not imported into the United States in large numbers.[74]

Besides, the GSP Statute establishes "competitive needs limitations" (CNLs) that would restrict the eligibility of any Vietnamese product if it manages to become too competitive. CNLs automatically suspend GSP eligibility when imports of a product from a particular country reach a certain threshold ($135 million in 2008) or when fifty percent or more of total U.S. imports of a particular product come from a single country.[75]

Moreover, if U.S. producers are negatively affected by particular GSP imports, they may petition the USTR to remove these products from GSP eligibility.[76] This occurred, for example, in June 2008, when certain gold jewelry from Turkey and gold necklaces from India were stripped of GSP eligibility because they had become overly competitive under the U.S. GSP system.[77]

2. Eligibility Criteria

The United States uses its GSP eligibility standards to encourage developing countries to embrace certain values and strengthen protections for various rights. The most problematic GSP eligibility criteria for Vietnam include (a) the prohibi-

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[72] 19 U.S.C. § 2463(b)(1).

[73] 2009 TRADE POLICY AGENDA, *supra* note 8, at 223.

[74] U.S. Imports from Vietnam, *supra* note 43.

[75] 19 U.S.C. § 2463(c)(2)(A)(i).

[76] 15 C.F.R. 2007.0(b) (2010).

[77] 2009 TRADE POLICY AGENDA, *supra* note 8, at 224.

tion on communism, (b) the required protections of intellectual property rights, and (c) the required protections of worker rights.

a. Prohibition on Communism

The mandatory eligibility criteria prohibit the President from designating any country as a GSP beneficiary if it engages in certain stipulated activities. The first prohibition in this section provides that a GSP beneficiary may not be a Communist country, unless such country receives Normal Trade Relations (NTR) treatment, is a member of the WTO and the International Monetary Fund (IMF), and is not dominated by international communism.[78]

One might debate whether or not Vietnam should be classified as a "Communist country," because it has transitioned to a market economy, it permits private enterprise, and it protects private property rights. Additionally, the Vietnamese government officially refers to itself as a "*Socialist* Republic" rather than as a "Communist country." On the other hand, Vietnam remains a one-party state run by the Communist Party of Vietnam (VCP), and the Government continues to exert a great amount of control over the economy.

However, whether or not Vietnam is classified as a "Communist country" is not crucial since Vietnam should now satisfy the requirements of the exception to the prohibition, as laid out in the statute above. Vietnam was granted NTR status by Congress in 2006, became a member of the WTO in 2007, and joined the IMF in the 1990s.[79] Finally, the requirement that a country not be "dominated by international communism" seems anachronistic, considering that the Soviet Union collapsed and the Cold War ended over fifteen years ago. Moreover, Vietnam has made effective reforms to open up its markets and has integrated into the rest of the global economy. Thus, it is unlikely that Vietnam could be considered "dominated by international communism." Ultimately, even if Vietnam is classified as a "Communist country," this should no longer prevent it from acquiring BDC status under the U.S. GSP.

b. Required Protections of Intellectual Property Rights

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

> To determine whether a country provides "adequate and effective means," the President should consider the extent of statutory protection for intellectual property (including the scope and duration of such protection), the remedies available to aggrieved parties, the willingness and ability of the government to enforce intellectual property rights on behalf of foreign nationals, the ability of foreign nationals to effectively enforce their intellectual property rights on their own behalf, and whether the

[78] 19 U.S.C. § 2462(b)(2)(A).

[79] Background Note: Vietnam, *supra* note 24.

> country's system of law imposes formalities or similar requirements that, in practice, are an obstacle to meaningful protection.[80]

The government of Vietnam has made notable progress in passing legislation to protect intellectual property rights. Since 1949, Vietnam has been a party to the Paris Convention for the Protection of Industrial Property ("Paris Convention") and the Madrid Agreement on International Registration of Marks ("Madrid Agreement"). Vietnam has also been a member of the World Intellectual Property Organization (WIPO) since 1976.[81]

When Vietnam entered into the BTA with the United States in 2001, it made important commitments to protect intellectual property and to meet the basic standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO ("TRIPS") in the ensuing two years.[82] Since then, Vietnam has become an official party to a number of major intellectual property treaties, including the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") in 2004, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Geneva Convention") in 2005, the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite ("Brussels Convention"), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol"), and the International Convention for the Protection of New Varieties of Plants ("UPOV Convention") in 2006.[83]

Finally, upon joining the WTO in 2007, Vietnam became a party to the TRIPS Agreement. Just after joining TRIPS, Vietnam also became a member to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Roma Convention") in 2007.[84]

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

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80 S. Rep. No. 98-485, at 11 (1984).

81 Working Party on the Accession of Viet Nam, *Report of the Working Party on the Accession of Vietnam*, ¶ 381, WT/ACC/VNM/48 (Oct. 27, 2006).

82 Embassy of the United States: Hanoi, Vietnam, Protecting Intellectual Property Rights - Why It Is Important for Vietnam, http://vietnam.usembassy.gov/econ6.html (last visited Mar. 18, 2010).

83 Working Party on the Accession of Viet Nam, *supra* note 81, ¶ 381.

84 Houssein Boumellassa & Hugo Valin, *Vietnam's Accession to the WTO: Ex-Post Evaluation in a Dynamic Perspective* 16 (CEPII, Working Paper No. 2008-31, 2008), *available at* http://www.cepii.fr/anglaisgraph/workpap/pdf/2008/wp2008-31.pdf.

provides administrative procedures and remedies, compensation under civil procedures, and recourse to criminal prosecution under the 1999 Criminal Code.[85]

Despite these important legislative steps, enforcement of intellectual property rights remains a problem in Vietnam. Consequently, Vietnam remains on the U.S. Trade Representative Special 301 "Watch List."[86] Trademark infringement and copyright piracy are particularly prevalent, and Internet piracy has been on the rise. In fact, according to the International Intellectual Property Alliance (IIPA), eighty-three percent of business software and ninety-five percent of records and music in Vietnam were pirated copies in 2008. Total U.S. trade losses due to copyright piracy in Vietnam were estimated to be approximately $123 million.[87] For the most part, the Vietnamese Government has not proven to be very effective at deterring these violations of intellectual property rights and the penalties remain too lenient.

Nevertheless, Vietnam's problems of enforcing intellectual property rights do not seem terribly uncommon. Actually, a number of developing countries that receive U.S. GSP benefits have significant problems enforcing intellectual property rights. Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, Egypt, Jamaica, Lebanon, Peru, the Philippines, Turkey, Ukraine, and Uzbekistan are all on the 2009 "Watch List" with Vietnam, yet they all receive U.S. GSP benefits. In fact, Algeria, Argentina, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela have all earned the dishonorable distinction of being placed on the "Priority Watch List," yet they continue to receive GSP benefits.[88] In Indonesia, for example, it was estimated that eighty-six percent of business software and ninety-five percent of records and music had been pirated. Total U.S. trade losses due to copyright piracy in Indonesia were estimated to be approximately $302 million in 2008. In an even more extreme case, Russia was estimated to have cost the United States almost $2.8 billion due to copyright piracy.[89]

Although some countries retain GSP benefits despite weak protection of intellectual property rights, GSP benefits have been refused because of prevalent trademark infringement and copyright piracy. For example, in 2001, Ukraine's GSP benefits were suspended because it had become the largest producer and exporter of pirated CDs and DVDs. Then, in 2005, Ukraine passed legislation to strengthen its licensing regime and intensify its enforcement efforts. After this legislation was passed, the government of Ukraine actively inspected plants that were licensed to manufacture CDs and DVDs, it conducted raids on distributors of pirated products, and it imposed fines against violators. As a result, the illegal manufacturing and trade of these pirated CDs and DVDs was reduced in Ukraine,

85 Working Party on the Accession of Viet Nam, *supra* note 81, ¶ 468.

86 USTR, 2009 Special 301 Report (2009), *available at* http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf [hereinafter 2009 Special 301 Report].

87 International Intellectual Property Alliance [IIPA], IIPA 2009 Special 301 Recommendations at app. A (2009), *available at* http://www.iipa.com/2009_SPEC301_TOC.htm.

88 2009 Special 301 Report, *supra* note 86, at 16, 19, 21-22.

89 IIPA, *supra* note 87, app. A.

and Ukraine's GSP benefits were reinstated in 2006.[90] Vietnam could learn from Ukraine's experience.

Ultimately, Vietnam must take a number of steps to better protect intellectual property rights. Like the Ukrainian Government, the Vietnamese Government should undertake a concerted anti-piracy campaign, and it should impose higher fines and tougher criminal sanctions against large-scale producers and distributors of pirated goods. Vietnam should also enact effective regulations, and should better utilize business license laws and the IP Code to improve its CD/DVD piracy problem. Furthermore, in order to better address Internet piracy, which has increasingly become an issue in Vietnam, the Vietnamese Government should become a party to the WIPO Copyrights Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[91]

c. Required Protections of Worker Rights

Finally, we must consider the efforts Vietnam has made to afford "internationally recognized worker rights,"[92] which includes freedom of association, collective bargaining, prohibition of forced labor or the worst forms of child labor, a minimum age for child labor, and acceptable working conditions with respect to minimum wages, hours of work, and occupational health and safety.[93]

Since the Doi Moi reforms of the mid-1980s, there have been significant advancements in worker rights in Vietnam. In 1992, Vietnam rejoined the International Labor Organization (ILO). A comprehensive Labor Code was created in 1994 with ILO assistance, and has been updated periodically. This Labor Code establishes a minimum wage, maximum working hours, maternity leave, and overtime pay, it provides workers the right to strike, and it requires that trade unions be established in all enterprises.[94] Vietnam has also ratified eighteen ILO conventions, including five of the eight core conventions of the ILO, covering compulsory labor, income inequality, discrimination, minimum age, and the worst forms of child labor.[95]

Despite these progressive reforms, a shortage of qualified staff, training, and funds make implementation and enforcement of many of these labor laws diffi-

[90] *USTR Reinstates Generalized System of Preferences Benefits for Ukraine*, Apr. 24, 2009, http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-documents-4.

[91] Submission from Michael Schlesinger, International Intellectual Property Alliance, to the GSP Subcommittee, Trade Policy Staff Committee, Office of the U.S. Trade Representative, at 5 (Aug. 4, 2008), *available at* http://www.iipa.com/pdf/IIPAVietnamGSPComments080408.pdf .

[92] 19 U.S.C. § 2462(b)(2)(G).

[93] 19 U.S.C. § 2467(4).

[94] MARK MANYIN ET AL., CRS REPORT FOR CONGRESS: VIETNAM'S LABOR RIGHTS REGIME: AN ASSESSMENT, RL30896, at CRS-1-13 (2002), *available at* https://www.policyarchive.org/bitstream/handle/10207/1173/RL30896_20020314.pdf?sequence=2.

[95] International Labor Organization [ILO], List of Ratifications of International Labour Conventions: Viet Nam, http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?ctychoice=0940&lang=EN&hdroff=1 (last visited Mar. 18, 2010).

cult.[96] More importantly, Vietnam's labor laws fall short of several key internationally recognized worker rights. In particular, (i) the right to freedom of association, (ii) the right to collective bargaining, and (iii) the right to strike must be better protected.

i. Freedom of Association

Convention 87 on the freedom of association is one of the core ILO conventions. It has been ratified by 149 countries, but not by Vietnam. This convention provides all workers and employers the right to form and join organizations of their own choosing without prior authorization. Of the 131 U.S. GSP beneficiary countries, only nineteen have not ratified this convention, including Afghanistan, Bhutan, Brazil, East Timor, Guinea-Bissau, India, Iraq, Jordan, Kenya, Lebanon, Nepal, Oman, Solomon Islands, Somalia, Thailand, Tonga, Tuvalu, and Uzbekistan.[97]

The Vietnamese Government undermines the right to freedom of association by forbidding independent labor unions. Vietnamese workers are not free to join or form unions unless they are affiliated with and have been approved by the party-controlled Vietnam General Confederation of Labor (VGCL). The freedom of association cannot exist in any meaningful way unless the workers are legally permitted to establish and affiliate with organizations that are free from government control. Despite the Government's policy, by 2004 hundreds of unaffiliated labor associations had been organized by workers who felt that they were not well represented by the official union.[98] However, these unaffiliated labor organizations are not afforded the legal protections that officially recognized unions have.[99] Indeed, according to Human Rights Watch, members of independent trade unions have been often targeted, unfairly harassed, intimidated, and arrested.[100]

ii. The Right to Collective Bargaining

ILO Convention 98 is another core ILO convention that provides the right to collective bargaining, prohibits discrimination against union members, and requires governments to set up a system for voluntary collective bargaining between employers and employees. This core ILO convention has been ratified by

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96 MANYIN ET AL., *supra* note 94, at CRS-13.

97 ILO, ILOLEX Database of International Labour Standards: Convention No. C087, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C87" hyperlink) (last visited Mar. 18, 2010).

98 U.S. Department of State, 2004 Country Reports on Human Rights Practices: Vietnam, http://www.state.gov/g/drl/rls/hrrpt/2004/41665.htm (last visited Mar. 18, 2010).

99 AM. FED'N OF LABOR & CONG. OF INDUS. ORG. [AFL-CIO], COMMENTS CONCERNING THE APPLICATION OF VIETNAM TO BE DESIGNATED AS AN ELIGIBLE BENEFICIARY DEVELOPING COUNTY UNDER THE GENERALIZED SYSTEM OF PREFERENCES (GSP) pt. B.1 (2008), *available at* http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file576_15064.pdf.

100 Sophie Richardson, *The United States and Vietnam: Examining the Bilateral Relationship – Testimony Before the Senate Foreign Relations Subcommittees on East Asia and Pacific Affairs,* HUMAN RIGHTS WATCH, Mar. 12, 2008, http://www.hrw.org/en/news/2008/03/11/united-states-and-vietnam-examining-bilateral-relationship.

159 countries, but has not been ratified by Vietnam. Of the 131 U.S. GSP beneficiary countries, only ten have not ratified this convention, including Afghanistan, Bhutan, East Timor, India, Oman, Solomon Islands, Somalia, Thailand, Tonga, and Tuvalu.[101]

Under Article 153 of the Vietnamese Labor Code, the VGCL is required to organize a union within six months of the creation of any new business. However, only eighty-five percent of state-owned enterprises, sixty percent of foreign-invested enterprises, and thirty percent of private enterprises have been unionized.[102]

Furthermore, only unions affiliated with the VGCL have the right to bargain collectively on behalf of workers. The representatives of these VGCL-affiliated unions, however, often have close ties to management or are management officials themselves. Consequently, many of these unions do not adequately represent the workers' interests and do not effectively bargain with management.[103]

iii. The Right to Strike

Vietnam's Labor Code gives VGCL-affiliated unions the right to strike under certain conditions. However, there are significant restrictions to this right, and most strikes are considered "illegal." To begin with, a strike is prohibited unless an extensive and cumbersome process of mediation and arbitration is completed beforehand.[104]

In addition, a strike is prohibited unless a very high percentage of workers approve of the strike before it is called. Under Vietnamese law, a strike is prohibited in an enterprise with less than 300 workers unless at least fifty percent of workers vote in favor of the strike beforehand. In fact, if an enterprise has 300 workers or more, a strike is prohibited unless at least seventy-five percent of workers vote in approval of the strike beforehand.[105]

Furthermore, the labor code prohibits strikes in fifty-four occupational sectors and in certain businesses that serve the public; the Government prohibits strikes in businesses it considers to be important to the national economy and defense. This is a sweeping restriction that prohibits strikes in enterprises involved in electricity production, post and telecommunications, banking, public works, the oil and gas industry, and railway, maritime, and air transportation. The prime minis-

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[101] ILO, ILOLEX Database of International Labour Standards: Convention No. C098, http://www.ilo.org/ilolex/english/convdisp1.htm (follow "C98" hyperlink) (last visited Mar. 18, 2010).

[102] U.S. Department of State, 2008 Human Rights Reports: Vietnam, http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119063.htm (last visited Mar. 18, 2010) [hereinafter 2008 Human Rights Reports: Vietnam].

[103] International Trade Union Association [ITUC], 2008 Annual Survey of Violations of Trade Union Rights: Vietnam, http://survey08.ituc-csi.org/survey.php?IDContinent=3&IDCountry=VNM&Lang=EN (last visited Mar. 18, 2010).

[104] AFL-CIO, *supra* note 99, pt. C.3, n.10.

[105] ITUC, *supra* note 103.

ter may also forbid any strike he considers to be detrimental to the national economy or public safety.[106]

Despite all of these restrictions on strikes, there were a record 762 labor strikes in 2008. Most of these strikes were "illegal" because they either were not conducted through the VGCL or did not go through the long and burdensome conciliation and arbitration procedures.[107]

In 1990, Liberia had its GSP benefits suspended because it had prohibited the right to strike. Subsequently, the Liberian Government made concerted efforts to improve worker rights. Liberia repealed the decree that prohibited strikes, and worked with the ILO to meet certain ILO obligations that it had neglected. As a result of its reforms, Liberia's benefits under the U.S. GSP program were reinstated in 2006.[108] The Vietnamese Government should take similar steps in order to qualify for GSP benefits.

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

V. Conclusion

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

Despite this recent economic progress, Vietnam remains a very poor country that could benefit considerably from preferential treatment under the U.S. GSP program. Indeed, it is poorer than many of the poorest developing countries that are currently receiving these benefits. Ultimately, the lower tariffs and more competitive prices for Vietnamese products in U.S. markets would help strengthen Vietnam's developing economy and alleviate poverty in Vietnam. At the same time, it would help U.S. consumers and U.S. businesses keep their costs down.

Nevertheless, the primary objective of having the U.S. GSP eligibility standards is to encourage developing countries to strengthen protections for impor-

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[106] 2008 Human Rights Reports: Vietnam, *supra* note 102.

[107] U.S. Department of State, 2009 Investment Climate Statement – Vietnam, http://www.state.gov/e/eeb/rls/othr/ics/2009/117739.htm (last visited Mar. 18, 2010).

[108] Press Release, U.S. Department of State, U.S. Reinstates Trade Preference Benefits for Liberia (Feb. 22, 2006), *available at* http://www.america.gov/st/washfile-english/2006/February/20060222180338IHecuoR0.9499628.html.

tant internationally recognized rights. Vietnam's compliance with several of these eligibility criteria is problematic. Specifically, Vietnam's protections for intellectual property rights and worker rights are inadequate. In order to receive U.S. GSP trade benefits, Vietnam will have to rein in trademark infringement, copyright piracy, and internet piracy. Finally, Vietnam will also have to do more to protect the freedom of association, the right to organize and bargain collectively, and the right to strike.