

THE LABOR PROVISIONS OF A FUTURE, CONSOLIDATED GENERALIZED SYSTEM OF PREFERENCES

AFL-CIO

Introduction

In 1984, labor advocates succeeded in passing legislation conditioning a country's GSP eligibility on "taking steps to afford internationally recognized worker rights."¹ These rights include: a) the right of association; b) the right to organize and bargain collectively; c) a prohibition on the use of any form of forced or compulsory labor; d) a minimum age for the employment of children; and e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.² The rationale for linking trade and labor rights was two-fold: 1) workers who are able to exercise these fundamental rights will be able to bargain collectively for better wages and working conditions, ensuring that the benefits of trade accrue not only to capital but also to labor; and 2) while developing countries should be able to attract investment based on a comparative wage advantage, it should not benefit from wages that are artificially low due to labor repression.

Economic research has also demonstrated that the adoption and enforcement of these core labor rights is essential to broad-based economic development. As the Organization for Economic Cooperation and Development (OECD) pointed out in a 2000 report, *International Trade and Core Labor Standards*, "countries which strengthen their core labor standards can increase efficiency by raising skill levels in the workforce and by creating an environment which encourages innovation and higher productivity."³ The OECD also found in a 1996 report, entitled *Trade, Employment and Labor Standards*, that "any fear on the part of developing countries that better core standards would negatively affect either their economic performance or their competitive position in world markets has no economic rationale."⁴

Today, U.S. trade preference programs contain the GSP labor clause or a minor variation thereof.⁵ However, there are significant substantive and procedural problems with these existing clauses.

¹ 19 USC 2462(b)(2)(G)

² In 2000, countries were further required to implement their commitments "to eliminate the worst forms of child labor" to remain eligible. See 19 USC 2462(b)(2)(H).

³ OECD, *International Trade and Core Labour Standards* (Oct. 2000), available online at <http://www.oecd.org/dataoecd/2/36/1917944.pdf>

⁴ See also, Aidt, Toke & Zafiris Tzannatos, *UNIONS AND COLLECTIVE BARGAINING, ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT*, World Bank (2002), available online at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/09/13/000094946_02083104140023/Rendered/PDF/multi0page.pdf

⁵ See, e.g. African Growth and Opportunities Act (AGOA), substituting "making continual progress toward establishing" in place of the "taking steps to afford" approach in GSP. The Haitian Hemispheric Opportunity through Partnership Encouragement Act (HHOPE) also contains a substantial labor monitoring program based on the ILO Cambodia monitoring project.

A. Summary of Problems with Current GSP Labor Standard and Procedures

Outdated Standard

In 1998, the member states of the International Labor Organization (ILO) agreed on a set of universal, core labor rights applicable to all members regardless of level of development. These core labor rights were enshrined in the ILO Declaration on Fundamental Principles and Rights at Work, which commits all members to respect and promote principles and rights in four categories: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation. Importantly, all members are obliged to respect and promote these principles and rights regardless whether they have ratified the relevant, underlying conventions. This touchstone has now been incorporated into all bilateral free trade agreements that were pending as of May 10, 2007.

Despite the adoption of these principles and rights over ten years ago, trade preference programs still refer to “internationally recognized worker rights” (IRWR). There are important differences between IRWR and the core labor rights. For example, IRWR do not include the prohibition on discrimination in respect of employment and occupation contained to the ILO Declaration. In addition, the preference programs currently refer to “a minimum age for the employment of children,” which is weaker than the ILO formulation, “the effective abolition of child labor.” It has also been argued that the rights collectively defined as IRWR do not refer to any external source of law and thus may be invested with any meaning given to them by the USTR, rather than the meaning conferred upon those rights by the international community through the ILO.⁶

No Minimum Level of Compliance

The current preference programs simply require a country to improve labor standards over time, but do not require a country to have achieved any basic level of compliance to be eligible. A country may therefore have horrendous labor laws and practices (2 on a scale of 10), so long as it temporarily and marginally improves them after a petition is filed (3 of 10).

Limited Petition Filing Window

Each preference program, with the exception of the CBI and AGOA, allows for third parties to submit petitions alleging the violation of eligibility criteria. The regulations implementing each program limit petitions to only once a year, though the statute

⁶ An infamous example of this is the so-called “Clatanoff Rule,” articulated by former Assistant USTR for Labor, William “Bud” Clatanoff. At a 2003 conference at the National Academy of Sciences regarding monitoring international labor standards, he stated with regard to freedom of association: “If someone tries to form a union, they can’t get shot, fired or jailed. I’m sorry. I know there are thousands of pages of ILO jurisprudence I am not going to read, but that’s my criteria – shot, fired or jailed, you’re not given freedom of association.”

imposes no such limitation. This can be a problem if a major labor rights violation occurs a month after the petition window closes – a petitioner will have to wait nearly an entire year to raise the matter through a petition process. Further, the petition windows for the various programs are not coordinated, nor are they fixed (in practice), meaning that the petition window can (and does) change from year to year.⁷ In 2003, the petition window was never opened. The U.S. government has also completely failed to regularly review the compliance of beneficiary countries and self-initiate appropriate action.

No New Information Rule

A determination that a country does not merit review should not bar subsequent petitions on the same or similar issues, as it has in the past. The so-called “no new information” rule, 15 CFR 2007.0(b)(5) and 2007.1(a)(4), has no statutory foundation and should be abolished.⁸ In general, the rule prohibits the filing of a petition on any matter that has been raised in a previous petition against the same country. Thus, a country could take minimal steps towards compliance just to avoid review and then backslide into noncompliance once suspension of benefits is no longer threatened. If a petitioner were to file a complaint on the same subject matter, the petition could be rejected if the new information were not deemed sufficiently substantial.

Exercise of Excessive Executive Discretion

1. Meritorious Petition Not Accepted for Review and No Reason Given

The only reason to reject a country practice petition for review that finds any support in the statute or regulations is that the petition fails to set forth facts that, if substantiated, would demonstrate that the beneficiary country in question has not taken steps to afford workers internationally recognized worker rights.⁹ However, numerous well-supported petitions detailing widespread and/or serious violations of worker rights have been rejected in the past without any official explanation. In our view, the government must

⁷ 15 CFR 2007.3 does provide that petition shall be conducted at least once a year according to the schedule set forth in therein. The deadline for petitions established in the regulations is June 1, unless otherwise specified by notice in the Federal Register. The petitions are rarely, if ever, due on that date. In 2009, petitions were actually due on June 24th. In 2004, petitions were due on December 14th.

⁸ 15 CFR 2007.0(b) During the annual reviews and general reviews conducted pursuant to the schedule set out in §2007.3 any person may file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in section 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)). Such requests must: (5) supply any other relevant information as requested by the GSP Subcommittee. *If the subject matter of the request has been reviewed pursuant to a previous request, the request must include substantial new information warranting further consideration of the issue.*

⁹ See, 15 CFR 2007.0(b) During the annual reviews and general reviews conducted pursuant to the schedule set out in Sec. 2007.3 any person may file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in section 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)). Such requests must (1) specify the name of the person or the group requesting the review; (2) identify the beneficiary country that would be subject to the review; (3) indicate the specific section 502(b) or 502(c) criteria which the requestor believes warrants review; (4) provide a statement of reasons why the beneficiary country's status should be reviewed along with all available supporting information; (5) supply any other relevant information as requested by the GSP Subcommittee.

accept for review a petition if the statements contained therein, if substantiated, would constitute a failure of the beneficiary country to comply with its obligations or commitments under the labor clause. If a petition is rejected, the government should provide in writing the reasons for that decision. If a defect in the submission could be remedied, the government should instruct the petitioner what is needed to make the petition acceptable for review. Further, the standards that the Trade Policy Staff Committee (TPSC) uses to accept or reject a GSP petition for review should also be made public.

2. Abuse of Continuing Review

USTR has often put countries under a “continuing review,” a probationary period during which the government waits to see whether a country is making sufficient progress necessary to retain its eligibility. We believe that using a “continuing review” as a means to provoke the improvements necessary to avoid suspension is completely legitimate. However, some reviews have continued for several years while workers’ rights continued to be routinely violated. Thailand, for example, was under review for worker rights violations for nine consecutive years while it maintained GSP eligibility. We believe that reviews should never last for more than two petition cycles without a final determination of eligibility. No country will undertake needed reforms if it believes that there is no real chance that market access could be limited, suspended or withdrawn.

3. Executive Branch Fails to Limit, Suspend or Withdraw Preferences, even in Clear Cases.

GSP does provide the President some discretion to continue to extend preferences even if the country fails to meet the worker rights eligibility criteria. Section 2462(b)(2)(G) of the GSP provides that “The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies: such country has not taken steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country.” Section 2462(b)(2) does provide, however, that subparagraphs (G) and (H)(to the extent that the work “by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children”) “shall not prevent the designation of any country as a beneficiary country under this subchapter if the president determines that such designation will be in the national economic interest of the United States and reports such determination to the congress with the reasons therefore.” (emphasis added).

Despite this limited grant of discretion, several country practice reviews over the last 25 years have been closed with no action taken (limitation, suspension or withdrawal) and with no apparent steps taken by the foreign government to afford IRWR. Given the complete lack of transparency, it is impossible to ascertain the basis for inaction and determine whether it is rooted in the clear statutory language outlining the scope of presidential discretion or whether other extra-statutory factors are considered by subordinate committees such as the TPSC, TPRG or TPC when making a

recommendation to the President.¹⁰ One must assume that extra-statutory factors have in fact been weighed by the TPSC and resulted in recommendations to maintain preferences even when the merits of the worker rights petition were not in question.

In our view, the discretion exercised by the TPSC in practice and afforded the President under the statute is so broad that it could form the basis for inaction on almost every petition. As explained below, discretion should be limited by requiring a showing of serious harm to the economy if the country preferences were limited, suspended or withdrawn.

Country v. Industry-Level Enforcement

Nothing currently prevents USTR from suspending trade preferences with regard to a specific industry or industries where rampant violations occur (rather than suspending preferences on a national basis). With very rare exceptions, such as Pakistan, where USTR suspended preferences in the 1990s for carpets, surgical instruments and soccer balls, USTR has not exercised this flexibility and has instead limited itself to a determination as to whether to suspend or withdraw trade preferences for an entire country. We believe that the targeted limitation of preferences should be used more frequently.

B. A Better Alternative

Below are proposals to reform both the labor eligibility criteria as well as the process for reviewing complaints, remediating violations and making determinations as to whether to suspend preferences in whole or in part.¹¹

¹⁰ 15 CFR 2007.2(g) and (h) regulate the process by which recommendations are made to the President. Nowhere do the regulations provide the TPSC (and superior committees) discretion to weigh considerations unrelated to the program's eligibility criteria.

(g) The TPSC shall review the work of the GSP Subcommittee and shall conduct, as necessary, further reviews of requests submitted and accepted under this part. Unless subject to additional review, the TPSC shall prepare recommendations for the President on any modifications to the GSP under this part. The Chairman of the TPSC shall report the results of the TPSC's review to the U.S. Trade Representative who may convene the Trade Policy Review Group (TPRG) or the Trade Policy Committee (TPC) for further review of recommendations and other decisions as necessary. The U.S. Trade Representative, after receiving the advice of the TPSC, TPRG or TPC, shall make recommendations to the President on any modifications to the GSP under this part, including recommendations that no modifications be made.

(h) In considering whether to recommend: (1) That additional articles be designated as eligible for the GSP; (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited; (3) that product coverage be otherwise modified; or (4) that changes be made with respect to the GSP status of eligible beneficiary countries, the GSP Subcommittee on behalf of the TPSC, TPRG, or TPC shall review the relevant information submitted in connection with or concerning a request under this part together with any other information which may be available relevant to the statutory prerequisites for Presidential action contained in Title V of the Trade Act of 1974, as amended (19 U.S.C. 2461-2465).

¹¹ Note: We believe that beneficiary countries must also meet eligibility criteria with regard to human rights, rule of law and good governance and the environment. Those criteria are not spelled out here.

1. Eligibility Standard(s)

Establishing new eligibility criteria for a broadly revamped preferences scheme requires several related choices. For example, tiers of development and levels of market access could be uniform or layered.

There are some advantages to applying a single labor eligibility criterion to all countries without distinction. In this case, such a criterion could draw on international consensus and past practice and require the adoption and maintenance of laws and regulations consistent with the ILO core labor rights and the effective enforcement of same and of laws and regulations related to acceptable conditions of work. This has some appeal given that the ILO has established the core labor rights as the minimum set of rights regardless of level of development. Acceptable conditions of work refer to existing domestic laws and therefore impose no additional burden other than enforcing those laws.

However, it would also be possible to construct a multi-tiered scheme with more stringent criteria depending on level of development or market access. This is an approach favored by the EU, which, for example, grants additional market access to “vulnerable” countries (developing countries whose exports are highly concentrated and whose total GSP exports to the EU are by value less than 1% of the value of all GSP exports to the EU) provided they ratify a broad range of treaties and conventions related to labor, human rights, environment and good government and implement them (subject to monitoring by the EU).

For purposes of this paper, we assume three baskets of trade preferences based on a combination of level of development and market access. However, should the program evolve and take another shape, these suggestions would need to be adapted. Not discussed here but elsewhere are how exactly these distinctions among nations are to be made.

Also, note that only the labor criteria are discussed here. One would expect that other criteria would be demanded relating to good governance, human rights, the environment, etc. Those criteria will be discussed elsewhere.

a. Basic GSP for Developing Countries

Assuming that some form of the basic GSP program will continue with substantially similar access to that currently provided under GSP, the following criteria could apply.

The country, to be eligible:

Standard

- must make continual progress towards adopting laws consistent with core labor rights and must have adopted laws consistent with the core labor rights within 3-5 years of the program entering into force to remain eligible

- though the obligation is to make progress during the transition period, cannot have laws that prohibit (de jure or de facto) the exercise of a core labor right (eg., bar on formation of unions or a minimum requirement of 100 members to form a union) or fail to have laws governing acceptable conditions of work with respect to minimum wage, hours, and health and safety.

Level of Enforcement

- during the transition period, must make continual progress towards effectively enforcing its laws related to the core labor rights and acceptable conditions of work; once the transition period ends, the country must effectively enforce those laws.
- though the obligation is to make continual progress during the transition period towards effective enforcement, a country, at a minimum, must have tribunals for the enforcement of such labor rights and acceptable conditions of work, which shall be fair, equitable, and transparent; provide for the possibility of remedies such as fines, penalties, or temporary work closures; and allow for the appeal or review, as appropriate, of decisions to impartial and independent tribunals.
- although a country retains the right to the reasonable exercise of discretion and to *bona fide* decisions with regard to the allocation of its resources, a country must, at a minimum, not reduce its annual budget for labor enforcement by more than the corresponding annual decline in GDP and shall increase the budget for labor enforcement by no less than the corresponding annual increase in GDP.
- cannot be on Tier 3 of US State Dept Trafficking Report (countries whose governments do not fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards and are not making significant efforts to do so).¹²

All countries would have to undergo an assessment at the end of the transition period to determine continued eligibility. Targeted trade capacity building should also be available during the transition period to help countries that need it to strengthen labor market institutions.

b. GSP-Plus

Under a GSP-Plus program, a developing country could be eligible to export more goods duty free to the United States than possible under the basic GSP. This list would include products which could be considered more sensitive. We believe that if correctly designed and implemented, a incentive based program that rewarded better labor practices could result in better labor laws and practices among a number of developing countries. If such a program is established, the following would be the appropriate eligibility criteria.

The country, to be eligible must:

¹² In 2009, this list included: Burma, Iran, North Korea, Syria, Chad, Kuwait, Papua New Guinea, Zimbabwe, Cuba, Malaysia, Saudi Arabia, Eritrea, Mauritania, Sudan, Fiji, Niger and Swaziland.

- have adopted laws and regulation consistent with the core labor rights
- must effectively enforce those laws and all other national laws governing worker rights and social protection
- maintain a functioning tripartite body that meets regularly to discuss labor laws, labor relations and social and economic policy generally, if such a structure exists, or otherwise ensure regular and meaningful social dialogue on these issues.
- ensure that no workers are excluded *de facto* or *de jure* from, and that all workers are protected equally by, national labor laws, regulations, and policies, including subcontracted workers, temporary workers, migrant workers, seasonal workers, part-time workers, project-based workers, informal sector workers, etc. Nothing in this criterion shall be construed as prohibiting positive affirmative measure to protect the rights of more vulnerable workers.

If the GSP-Plus were to apply to products that are already covered under a regional preference program that offers preferences in excess of the current GSP (ATPDEA for example), a transition period would be necessary to allow those developing countries to transition over to the new labor clause without loss of benefits. The United States should provide technical advice to any country that indicates that it wants to apply for benefits under the new benefits scheme.

c. Duty-Free / Quota Free for Least Developed Countries

LDCs could be required to meet the basic GSP requirement, which would strike a balance between the lower level of development on one hand and the substantially greater market access afforded on the other. LDCs could be given a somewhat longer transition period, and more resources should be marshaled to help LDCs meet the eligibility criteria.

2. A New Process

a. Institutions

Currently, worker rights country practice petitions are filed with the USTR and reviewed initially by the GSP Subcommittee of the TPSC, an inter-agency committee that includes USTR, Treasury, Agriculture, State, USAID, Commerce and Labor. The full TPSC includes, in addition, the Council of Economic Advisors, Council on Environmental Quality, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Interior, Department of Justice, Department of Transportation, Environmental Protection Agency, National Economic Council, National Security Council, Office of Management and Budget and the U.S. International Trade Commission (non-voting member).

It is understandable that a wide range of agencies may have an interest in a decision regarding country eligibility to receive trade preferences. However, as to whether the petition 1) on its face alleges a violation of the worker rights criteria and should therefore be accepted and 2) whether, following an investigation, those claims have been substantiated by the evidence, it appears that those decisions are wholly within the

competence of DOL, and specifically ILAB. Thus, as to the first two aforementioned questions, ILAB's findings and conclusions should be given at least substantial deference, if not be determinative. The ultimate issue, whether a country's benefits should therefore be suspended because of those violations, or what the scope of the suspension should be, could be a determination that requires input from a broader inter-agency committee – though the scope of their review should be circumscribed.

b. Procedures

1. Public Petitions

USTR should provide for the receipt of public petitions from any person at any time on labor rights matters under a new trade preference scheme. This could be accomplished either by establishing an open petition process or by maintaining a fixed annual review process, at which time petitions would be encouraged, but with the possibility of filing a petition out-of-cycle where warranted by the circumstances. Elements of a basic petition should include: name and contact information of petitioner (which should remain confidential if requested), a summary of the relevant facts, if possible the specific domestic laws or international labor rights alleged to have been violated and the relief sought. No additional information should be required at the initial stage.

Petitions should be accepted by email, mail or fax, and such contact information should be made readily available. If a petition originates in a beneficiary country and the petitioner does not have the means to transmit the petition, the U.S. Embassy in that country should accept and transmit it to USTR. If needed, the Labor Attaché or Labor Reporting Officer, or a suitable designee at the U.S. Embassy, should provide technical assistance to the worker(s) in formulating a petition.

The petition shall be accepted for review if the statements contained in the petition, if substantiated, would constitute a failure of the country to comply with the obligations or commitments under the preference program. DOL-ILAB shall communicate its determination to USTR within 30 days of the receipt of the petition. If the information provided is insufficient to make an initial determination, DOL-ILAB should notify the petitioner within 30 days of the receipt of the petition and request any information needed to make a determination. The petitioner should have 60 days from receipt of the notification to supply the requested additional information. DOL-ILAB shall have 30 days from the date the petitioner resubmits the petition in order to make its determination. If the filer does not supply the requested additional information within 60 days, or if the information is still insufficient, then the petition may be rejected.

If accepted, USTR shall publish a notice in the Federal Register that a petition to review the eligibility of a beneficiary country has been accepted for review within five days, and should send specific notice to the foreign government and petitioner(s). The notice will start a process not to exceed 120 days. DOL-ILAB shall invite the public to submit supplemental written testimony in support of or in opposition to the petition within 30 days. Thereafter, DOL-ILAB should conduct an investigation, including interviews with petitioners, government officials, employers or employer associations specifically named

or in an industry identified in the complaint, NGOs and other relevant stakeholders. DOL-ILAB should also conduct site visits as appropriate.

As part of its investigatory process, DOL-ILAB should also hold a public hearing. If feasible, the location of the hearing should be held in a neutral location in the country where the violation occurred unless Washington DC is otherwise designated. The investigatory phase should close within 120 days from the filing of the petition.

Within 60 days from the close of the investigation, DOL-ILAB shall publish a written determination as to whether a violation of the labor clause has occurred, and the facts and evidence supporting that determination.¹³

2. Levels of Review

Unlike the existing petition process (in practice), petitioners should be able to request action taken at the country and/or industry level. Indeed, almost all past petitions have raised concerns at both levels, but the only remedy available in practice has been a complete suspension of preferences to an entire country. The availability of targeted remedies may provide the USG the flexibility to address the most critical problems directly.

For example, a situation could arise in which a petitioner alleges: 1) that the government has failed to enact laws consistent with the country's preference program obligations, has failed to maintain those laws, and/or in a systematic way has failed to enforce them; 2) alleges rampant violations in a specific industry, with illustrative cases with regard to specific firms that represent the worst actors within that industry. A petitioner should be able to request (and the USG provide) action be taken at one or both levels. In cases where laws and regulations fall short of core labor standards, where there is a widespread failure in the administration of labor justice (ministry, inspectorate, courts), and/or where the government as employer is violating worker rights, the USG should consider application of country-level remedies. Where worker rights violations are especially concentrated in a particular industry (which benefits from trade preferences), the USG should consider remedies that target the products of that industry.¹⁴

3. Remediation & Suspension

a. country level

¹³ The USG should develop a methodology setting forth clear and consistent procedures for the conduct of investigations, the criteria used to determine whether a violation of the labor clause has occurred, how such factors are weighed, and how a final determination is made. The methodology should also set forth procedures for drafting and implementing a remedial work plan, if applicable, and oversight of the implementation of such a plan. This proposed methodology should be published in the federal register for public comment.

¹⁴ If the industry does not benefit from preferences, violations would have to be viewed in the context of a broader, country practice petition. However, this does not preclude the USG from developing a remediation plan that addresses concerns in that industry. The limitation would be in that benefits would have to be withdrawn for the entire country, rather than the specific industry.

If DOL-ILAB determines, based upon a petition or a biennial review (see below) that the beneficiary country is not in compliance with the labor eligibility criteria, then it shall enter into consultations with the beneficiary country, with the participation of worker and employer representatives, to develop a work plan with clear benchmarks to enable the country to comply with the criteria. Such a work plan should be no longer than one year in duration, with a mid-point review. At the time the work plan is in effect, the USG should offer technical expertise and capacity building funds (as required) to assist in the implementation of the plan.

If, after such consultations, a work plan cannot be developed, eligibility should be terminated. If such a plan is not fully implemented after the year, DOL-ILAB shall consider what progress has been made toward fulfilling the work plan. If the country has demonstrated political will and has taken substantial steps towards implementing that plan, the USG should extend the period for an additional period not to exceed one year. If, however, the country has not demonstrated the requisite will or has made insufficient progress, the preferences shall be limited or suspended.

As noted above, the TPSC is responsible for making a recommendation to the President to limit, suspend or withdraw preferences, although the matter can be addressed at the TPRG or TPC if there is no consensus at the TPSC (or subsequently at the TPRG). Although the statute only gives the President the discretion to factor in other considerations, i.e. the national economic interest, it is clear that other departments on the TPSC are factoring in additional non-labor considerations at the time the recommendation is being formulated. Further, the TPSC does not now appear to be constrained by any timeline whatsoever.

The TPSC should be constrained to make its recommendation to the President within 60 days from ILAB's recommendation. Further, TPSC may reject DOL-ILAB's determination and recommend no action be taken only on the basis of an affirmative consensus opinion based on evidence that suspending the preferences would cause serious harm to the economy or threaten the national security of the United States. If the TPSC recommends limitation, suspension or withdrawal of preferences, the President shall notify Congress of his (or her) intent to limit or suspend the country's eligibility for preferential trade treatment within 30 days, unless he (or she) independently finds that suspending preferences would cause serious harm to the economy or threatens the national security of the United States. The final decision, either in the affirmative or negative, must be in writing with the reasons supporting that decision.

b. industry-level

If a petition targets a particular industry or industries, or DOL-ILAB otherwise determines that violations described in a country practice petition are concentrated in a specific industry or in industries, it should develop a special work plan (or sub plan) with specific recommendations to address violations in the identified industry or industries. Of course, persistent worker rights violations in any industry are the responsibility of both the employers (who violate the law) and the government (which fails to enforce the

law), so a sectoral approach will necessarily have to set forth specific benchmarks in a work plan that are directed to both the government and to the employers. As with the country-level work plan, government, employers and workers should all be engaged in developing that plan.

If the country and employers have demonstrated the will and have taken substantial steps towards implementing that plan, the president should extend the review period for an additional period not to exceed one year. If, however, the country has not demonstrated the requisite will or has made insufficient progress, and the violations are especially concentrated in an industry or industries, the president shall notify congress of intent to terminate the preferential treatment for the products in the identified industries.

In many cases, a firm or group of firms may be responsible for giving the entire sector a bad reputation. If an entire sector were under review, it would be advantageous for the better actors to put pressure on the bad actors to avoid having the relevant product losing preferential treatment. However, if a firm within an industry continues to commit serious violations of worker rights while the industry is under review, the USG should seek ways, where possible, to deny benefits to that firm or firms.

4. Reinstatement of Eligibility

The President may reinstate the eligibility for preferential treatment of a country (or sector) whose eligibility has been terminated if it is determined that the qualified beneficiary country has fully implemented the work plan.

Countries seeking reinstatement should file a written request with USTR. Notice of the request shall be published in the Federal Register. Any interested party shall have 60 days to provide information in response to the notice as to whether the country has implemented its work plan and/or any new additional information post-suspension with regard to the country's compliance with the labor clause generally. A public hearing should be held within 30 days after comments are due. DOL-ILAB shall review the evidence and conduct such investigations as necessary and make a determination within 90 days whether the beneficiary country has complied with the work plan. The preferences shall remain limited or suspended unless DOL-ILAB makes a finding that the beneficiary has fully complied with the work plan (and has not engaged in subsequent violations that justify the continuation of the suspension). If so, it would make a recommendation of reinstatement to the TPSC. If not, preferences shall remain suspended until such time that the beneficiary country can demonstrate full compliance through the process described above.

There may be some cases where a country seeks reinstatement of eligibility after several years out of the program, at which point the work plan would not longer be relevant. In such cases, and new assessment would need to be undertaken to ascertain whether the country meets the relevant eligibility criteria.

5. Regular Biennial Monitoring

In conjunction with civil society partners with demonstrated expertise in labor rights matters and together with other relevant international organizations, USTR, DOL and State shall work together to assess compliance by beneficiary countries with core labor rights and acceptable conditions of work, in law and practice. Such assessments shall be based on information available from the annual IRWR reports required under 19 USC § 2464,¹⁵ the International Labor Organization, other interested parties, country and worksite visits that include confidential worker and worker representative interviews, meetings with management, visits to workplaces, collection and review of relevant documents. The idea is not to require the USG to develop yet another report but rather to survey information already in hand or readily available, and any additional information provided by civil society organizations and collected in the course of ongoing information gathering from the labor attachés and labor reporting officers.

In recognition of the limited resources, the USG should be allowed to exercise discretion and self-initiate reviews of those countries that present the worst cases of non-compliance.

6. Capacity Building

There is little doubt that substantial funding will be required to make this program reach its desired goal. We will need to be creative in pursuing a consistent stream of funding. Also, as mentioned in the next section, coordinating labor capacity building efforts among the other GSP-granting nations would be tremendously helpful.

It is important, too, that we undertake a serious assessment of the efficacy of past USG labor capacity building programs. While some were well tailored to address properly diagnosed problems, others were not designed to address the most critical problems. Coordination among the several agencies at times seemed poor, with multiple projects receiving funds to do largely the same work. In other cases, organizations that received funding to carry out labor capacity building programs have had little expertise in labor relations and/or are unfamiliar with the region. In some cases the local partners designated by US-based organizations are unknown to or do not have the complete trust of labor organizations. Finally, there appears to be little accountability, particularly with regard to government institutions, that continue to receive funds for workshops, training and equipment year after year despite showing little will to actually improve the quality of their work.

7. Coordination with Other GSP Granting Nations

There appears to be little coordination among GSP granting nations on trade preference policy generally or, in the case of the EU, further coordination on labor issues specifically. Where possible, the US and EU should coordinate, sharing for example best practices in labor capacity building, and, more importantly, to coordinate on remediation when a beneficiary country is under scrutiny by both the US and EU. The US and EU

¹⁵ This section would of course need to be amended to refer to the core labor rights assuming our recommendations herein are adopted.

should also work to encourage other GSP granting nations to incorporate labor rights criteria into their preference programs. Currently, Australia, Canada, New Zealand, Norway and Japan, among others, do not condition eligibility on any labor rights criteria. This encouragement is good both from a point of a consistent message and policy, but it also would mean more countries contributing technical expertise and funds to develop labor capacity among beneficiary countries (for which there is substantial overlap).

8. Migrant Labor

There have been many reported cases in GSP beneficiary countries in which foreign investors, after receiving substantial tax incentives (on top of the tariff incentives), imported a substantial amount of the workforce from a third country to produce the exportable goods. In such cases, the beneficiary government gains little (no taxes are collected nor knowledge and skills transferred), the local workers are not employed (losing income and skills transfers) and the foreign employer gains by receiving subsidies and employing a foreign and highly exploitable workforce. The development impact of the preference scheme is therefore nullified.

There are several potential ways to discourage international investors from hiring third-country workers, which are almost always brought into the country for the express purpose of labor exploitation. In addition to not appearing on Tier 3 of the Trafficking in Persons list, a country with a history of labor trafficking could also be required to adopt labor recruitment regulations, provide information to migrant workers about their rights, establish a special office within the labor ministry on migrant labor issues, provide additional training for inspectors to detect labor violations unique to migrant workers, etc.

A more blunt approach would be to establish a requirement that at least a given percentage of workers employed in an industry must be from the beneficiary country, or at least from the immediate region, in order to enjoy preference benefits.