

# COMMERCE

## Free trade needs revamp of GSP

EVERY YEAR FOR THE PAST several years, sometime between Memorial Day and the World Series, a new Congressional "rite of passage" has emerged: the expiration of the Generalized System of Preferences (GSP) and the failure of Congress to renew it in a timely fashion.

In a move that typifies the prevailing schizophrenic view of GSP, this year, on the same day that the President signed a proclamation modifying the GSP program (June 30), Congress again allowed GSP to expire.

Although the lapse of GSP has become an annual occurrence, and it is normally renewed with retroactive application, the confusion resulting from its expiration does not come without a cost.

By way of background, GSP was instituted on Jan. 1, 1976, and was authorized under the Trade Act of 1974 for a 10-year period. It was renewed through July 4, 1993, by the Trade and Tariff Act of 1984. Since July 4, 1993, the program has been renewed on roughly an annual basis. Nonetheless, on various occasions (as demonstrated by the current status of the program), Congress has allowed GSP to expire before legislating its renewal with retroactive application.

### On-and-off treatment is destructive to trade

The issue here is not in the changes made by the President's recent proclamation, since changes are made regularly. Nor is the issue a political one concerning the GSP program itself and the preferential treatment it affords.

The real nub of the problem is the regularity with which Congress allows the GSP program to lapse on what has become an annual basis, and the repercussions that result.

By design, the GSP program provides preferential duty-free entry to thousands of products from over a hundred designated countries and territories throughout the world.

The primary objective of GSP is to promote the industrialization of underdeveloped countries by increasing their level of exports, thus resulting in economic growth.

For an imported article to qualify for duty-free treatment under GSP, it must be the "growth, product or

manufacture of a beneficiary developing country."

Practically speaking, the article must be included in the list of GSP eligible products; be from a designated "beneficiary developing country" (BDC); be imported from a BDC that is eligible



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STEVEN WEISER  
&  
ARI KAPLAN

for GSP treatment for that particular product; be imported directly into the United States from the BDC; must have GSP treatment requested by the importer; and must meet certain value-added requirements.

The value-added requirements from GSP mandate that at least 35% of the value of the article in question must be added in a single BDC. If the product includes foreign components, they may be included in the 35% value-added requirement so long as they are substantially transformed into new and different materials of which the article is composed.

The U.S. government conducts an annual review of the articles and countries eligible for duty-free treatment.

There are certain articles, however, which are prohibited from this preferential treatment. Such items include certain textile articles, watches, footwear, handbags, luggage, flat goods, work gloves and other leather wearing apparel. In addition, certain import sensitive articles (e.g., steel, glass and electronic articles) are ineligible for GSP treatment.

Similarly, certain products from a particular country may be ineligible for GSP treatment. For example, the country may fail to meet the value-added requirement discussed above, to supply complete documentation or meet other U.S. Customs requirements. A country may also be ineligible due to graduation (i.e., the removal of GSP eligibility in certain circumstances) or if the product and the country exceed competitive need limitations (i.e., a ceiling on GSP benefits).

While GSP is somewhat complex and features a host of substantive restrictions, one of the most significant disadvantages of the program has become procedural; i.e., the annual debate which occurs concerning its expiration and subsequent renewal.

Generally, the loss of continuity which results from the lapse of the program

creates administrative burdens, as well as out-of-pocket expenses borne solely by importers of GSP eligible merchandise.

Each year, when GSP expires, Customs is charged with promulgating and enforcing administrative procedures to ensure that duty is paid on normally GSP-eligible goods, and that records are kept as to the payment of such duties to ensure that Customs issues proper refunds upon renewal of the GSP program.

### Customs required to calculate in two ways

This forces Customs not only to spend significant time and effort on implementing procedures in collecting duties which are normally not owed, but also forces the agency to continue monitoring entries of GSP eligible merchandise throughout its period of expiration.

The ultimate party harmed here is the importer, as he is the one forced to pay duties that he likely planned would be unnecessary at the time of purchasing of the goods. This problem can also result in issues which Congress, Customs, the importer or any other party involved could have foreseen.

A classic example of the detriment resulting from allowing GSP to expire, later renewing it and providing for retroactive application can be found in the renewal of GSP for the 1998-1999 period.

Last year, on June 30, 1998, GSP expired. On October 21, 1998, Congress passed legislation renewing GSP and providing for retroactive application back to July 1, 1998. This renewal legislation has become standard format and is essentially a "rubber stamp."

Last year, however, on the same day that GSP expired, the Office of the United States Trade Representative (USTR) issued a notice reinstating GSP eligibility for certain products from Thailand (notably certain gold jewelry, a fairly substantial amount of which had been imported). Probably because of a standard waiting period the agency uses, the USTR did not make its action effective until July 15, 1998.

On its face, the issue appears simple. Congress made GSP retroactive from July 1, 1998, through Oct. 20, 1998. As the instant Thai jewelry was GSP eligible on July 15, 1998, presumably, all entries of such merchandise between July 15, 1998, through Oct. 20, 1998 would be eligible for duty-free treatment under the program.

Customs initially made such a determination and issued refunds upon the renewal of GSP to all entries of qualifying

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merchandise made during the stated period.

Nonetheless, Customs later determined that such entries were actually ineligible for GSP treatment because, according to the legislation renewing GSP, only those entries which were eligible for GSP on July 1, 1998, qualified for duty-free treatment.

Customs apparently concluded (as a result of rather slavishly literal statutory interpretation) that as the Thai jewelry entries were not eligible for GSP until July 15, 1998, they did not qualify for retroactive application under the law, and bills for repayment of the refunds it had previously made were rendered. To date, this issue has not been resolved administratively.

This example clearly demonstrates that the lapse in GSP has a potentially sweeping effects: it could force Customs to alter its established practices; it may call into question the actions of the USTR; and it forces possible interpretation of legislative intent.

### Congressional inaction thwarts program's intent

Ultimately, however, Congress' failure to renew GSP on a timely basis thwarts the original goal of the program, i.e., to provide BDCs with the certainty that they will receive trade benefits to enhance their economies.

If importers are not confident that GSP benefits are secure, they may hesitate to commit resources to an import program with a BDC to the degree and for the duration they had in the past. Moreover, in terms of production, the periodic threat of loss of GSP dilutes many of the benefits which are received.

Consequently, in the current environment, no reasonable businessman can safely assume that reinstatement of GSP is simply pro forma.

To address this issue, Congress must pass a GSP renewal statute which covers an extended period of time, as it did in 1984. Continuing the current pattern of instability will result in the diminution of the policy for which GSP was legislated.

The annual revisiting of GSP renewal tends to erode the quality of the program with each passing year. As businessmen cannot live with the uncertainty which has been created, this current Congressional practice is inimical to continued free trade with some of our most "preferred" (and worthy) trading partners.

*Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, New York, and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, NY 10048.*