# Time to Restrict GSP Benefits to Fight Trade Mercantilism

BY NIGEL CORY AND ROBERT D. ATKINSON | AUGUST 2018

*Duty-free access to U.S. markets represents a major benefit for many trading partners that clearly do not provide fair and reasonable market access or treatment of U.S. firms and their goods and services.*

At the heart of the United States' Generalized System of Preferences (GSP) lies a recognition that free trade supports economic growth in developing countries, and such trade can be mutually beneficial. However, with their duty-free access to U.S. markets comes the responsibility of abiding by free and fair trade practices. Yet, a number of the developing countries that benefit from the GSP—most notably Brazil, India, Indonesia, and Thailand—have enacted a broad range of trade barriers and other market distortions that hurt U.S. firms and workers, and contravene the GSP's requirement that they provide reasonable and fair market access to U.S. firms and their goods and services. It is time for the U.S. government to remove the GSP benefits enjoyed by nations that utilize mercantilist trade policies, including those that enact modern barriers to trade, such as data localization.

Recent U.S. trade policy debates have focused on what trade enforcement tools the United States can use to pursue legitimate trade concerns while abiding by international and domestic trade laws, such as in the context of responding to Chinese innovation mercantilism.[1] Denying certain nations GSP status should clearly be one of these. While the GSP only applies to a subset of developing countries, its duty-free access to U.S. markets represents a major benefit to many trading partners that clearly do not provide fair and reasonable market access or treatment of U.S. firms and their goods and services. Through this leverage, the United States should force these countries to roll back trade barriers and other distortions. In doing so, the goal is not the punitive removal of these benefits for developing countries, but to fully enact the rules already clearly set out as part of this program, which the beneficiary countries have long been aware of, as they have enjoyed the corresponding benefits without fulfilling their accompanying obligations.

To its credit, the Trump administration has already taken several steps in this direction, including GSP reviews of India, Indonesia, and Kazakhstan. In October 2017, United States Trade Representative (USTR) Robert Lighthizer announced his agency would step up GSP enforcement:

> Countries receiving U.S. trade benefits must meet the eligibility criteria established by Congress.… By creating a more proactive process to assess beneficiary countries' eligibility, the United States can ensure that countries that are not playing by the rules do not receive U.S. trade preferences. This sets the correct balance for a system that helps incentivize economic reform in developing countries and achieve[s] a level playing field for American businesses.[2]

This report provides background on the GSP, its trade-related criteria, and GSP recipients engaged in systemic mercantilism. It makes the following recommendations:

- The United States should more directly link and be willing to use the trade issues raised in USTR reporting, especially the National Trade Estimates of Foreign Trade Barriers (NTE) report and the "Special 301" Report on intellectual property, to self-initiate reviews of whether GSP beneficiaries are breaching the program's trade, market access, or intellectual property criteria.

- USTR should continue to expand the types of market-access issues it assesses to include technology and digital when evaluating whether a country provides fair and reasonable market access and working conditions to U.S. firms and their goods and services. This should include situations wherein countries require U.S. firms to only store data locally (i.e., data localization policies), such as in India and Indonesia.

- If USTR's efforts to use GSP reviews to encourage trading partners to address trade issues within a reasonably short time period are unsuccessful, USTR should partially or fully suspend or withdraw that country's access to GSP benefits—as this has clearly dragged on for far too long for many GSP beneficiaries. For instance, since 2009, Argentina, India, Indonesia, and Thailand have all been on USTR's annual Special 301 Report's Priority Watch List of countries with an especially poor record of protecting and enforcing intellectual property rights. Similarly, Brazil has regularly appeared on the second-tier Watch List, while Ukraine has been on the Priority Watch List more often than not.

- USTR should more strictly enforce the GSP's "graduation" criteria (based on income status and trade competitiveness and development), starting with revoking Turkey's access to the program.

## THE GSP'S ROLE IN U.S. TRADE POLICY

The GSP is a U.S. trade preference program that provides nonreciprocal, duty-free tariff treatment to certain products imported from developing countries in order to help grow their economies.[3] While the focus of this report is on a select few GSP beneficiaries, the underlying mercantilist policies raised in these cases also relate to the broader list of 120 developing countries that are currently GSP beneficiaries. Over 3,500 products from these countries receive duty-free entry into the United States under the GSP, with duty-free access provided to an additional 1,500 products from 44 GSP beneficiaries designated as "least-developed beneficiary developing countries." The statutory goals of the U.S. GSP program are to promote the economic growth in developing countries; promote trade, rather than provide aid, as a more efficient way of promoting economic development; stimulate U.S. exports in developing-country markets; and promote trade liberalization in developing countries. The GSP's trade criteria are the mechanism the United States should use more forcibly to ensure countries do not undermine these goals by pursuing mercantilist economic development policies at home while enjoying the benefits of trade liberalization on the part of the United States.

*The United States should use the GSP's trade criteria more forcibly to ensure countries do not pursue mercantilist economic development policies at home while enjoying the benefits of trade liberalization.*

The GSP already has all the legal standing and connections to other U.S. trade policy tools to work as part of a broader policy toolbox to improve the treatment of U.S. firms' goods, services, and intellectual property in foreign markets. The GSP was created by the Trade Act of 1974. A number of other countries, including those in Europe, created GSPs around this same time.[4] Shortly thereafter, the Trade and Tariff Act of 1984 linked intellectual property rights enforcement and trade by making them actionable under Section 301 of the 1974 Trade Act, which meant the U.S. government could unilaterally raise tariffs against trading partners that maintain "unjustifiable or unreasonable" restrictions against U.S. trade. More recently, the Trade Facilitation and Trade Enforcement Act of 2015 required USTR to come up with an action plan and set of benchmarks for countries with the most serious intellectual property rights deficiencies on the Section 301 Priority Watch List. A year after an action plan is developed, USTR can report to the U.S. president that a country has not substantially complied with the benchmarks and recommend appropriate action be taken.

The GSP is a nonreciprocal program, but it does allow the president to withdraw, suspend, or limit GSP treatment for any beneficiary country based on a range of criteria.

For one, a country can graduate from the GSP. A country is (or should be) mandatorily graduated when it is considered a "high-income country" by the World Bank, or as the result of a review into its economic development and trade competitiveness. Most recently, Russia, the Seychelles, Uruguay, and Venezuela graduated from the GSP, while Argentina was reinstated as being GSP-eligible on December 22, 2017. The most recent renewal of GSP eligibility in the U.S. Congress saw considerable debate about whether Brazil and India should remain GSP-eligible for this reason.

On this basis, USTR should simply revoke Turkey's GSP eligibility (USTR recently launched a review into Turkey's eligibility based on tariffs it recently enacted on U.S. products).[5] Either way, USTR reporting reveals Turkey's GSP eligibility should have been reevaluated some time ago given its growing list of intellectual-property and digital-trade barriers (including forced data localization and encryption key disclosure). Beyond Turkey's gross national income per capita (the metric used by the World Bank to categorize countries) having been barely below the mandatory graduation threshold in recent years, it clearly has a competitive and sophisticated economy that no longer needs GSP preferences. From 2013 to 2018, Turkey moved up 16 spots to be the 50th most innovative economy in the world.[6] In 2017–18, Turkey was ranked 53rd in the Global Competitiveness Report published by the World Economic Forum, having risen as far as 43rd (in 2013).[7] Similarly, the European Union does not provide preferential access to its market under its own GSP.[8]

Beyond this, the U.S. president can refer to the GSP's nontrade criteria (such as whether countries have taken or are taking steps to grant internationally recognized worker rights, or have eliminated the worst forms of child labor) and trade-related criteria in reviewing a country's GSP status relates to how that country treats U.S. firms' goods, services, and investment. Specifically, the criteria states GSP beneficiaries:

- have not nationalized or expropriated the property of U.S. citizens;
- are committed to providing reasonable and equitable access to its market and basic commodity resources;
- provide adequate protection of intellectual property rights; and
- have taken action to reduce trade-distorting investment policies and practices, and reduce or eliminate barriers to trade in services.

USTR (as the central agency overseeing the GSP) has the necessary rules and tools in place to turn the GSP into an effective mechanism to confront the mercantilist trade policies of many beneficiaries. To his credit, USTR Lighthizer has taken a step in this direction in asking USTR officials to conduct a broad triennial review of the GSP, starting with members in Asia (the administration has already initiated reviews of India, Indonesia, and Thailand). The second- and third-year reviews will consider members from other parts of the world. Outside of this triennial review, each year, USTR chairs a body that reviews whether countries are abiding by the criteria previously outlined and whether to add or remove certain products from among those allowed to be imported under the GSP. During both review processes, U.S. and foreign firms, and foreign governments, can petition the Trade Policy Staff Committee (the interagency committee chaired by USTR that manages the GSP review) about whether certain goods and countries should be eligible for GSP benefits.

At the end of the review process, the GSP subcommittee provides advice to the U.S. president, who has the discretion to act accordingly. The key question is whether USTR uses the triennial review to reboot the GSP's role in addressing mercantilist trade policies. In addition to USTR's own reporting (which provides all the evidence it should need), Information Technology and Innovation Foundation (ITIF) has catalogued and analyzed many of these mercantilist policies in reports such as "The Global Mercantilist Index: A New Approach to Ranking Nations' Trade Policies" and the annual "Worst Mercantilist Innovation" reports.[9] Indicative of the case for stricter GSP enforcement is its largest beneficiaries being ranked as either "moderate" or "high" on ITIF's global mercantilist index (see Table 1). Stricter enforcement should mean any country that ranks above "moderate" on this (or any similar) index should have its GSP access reviewed, and if applicable, partially suspended or fully withdrawn if corrective action is not taken within a reasonable timeframe. Ultimately, USTR needs to avoid its past practice of ad hoc GSP enforcement, as this is not effective in encouraging countries to address current trade barriers. Furthermore, it does not send the much-needed signal that, in the future, participants will only be able reap the rewards if they truly live up to the program's free-trade principles and provide fair and reasonable market access and treatment to U.S. firms and their goods, services, and intellectual property.

*The GSP's duty-free access provides critical leverage for the United States in its engagement with a range of countries where USTR has reported a plethora of trade and market-access issues.*

### The GSP's Duty-Free Access Provides USTR With Considerable Negotiating Leverage

The GSP's duty-free access provides critical leverage for the United States in its engagement with a range of countries where USTR has reported a plethora of trade and market-access issues. The size, significance, and growth of the GSP's duty-free access is considerable for several major trading partners. In 2000, products valued at $12.7 billion entered the United States duty-free under the program. In 2006, this figure peaked (before the global financial crisis) at $28.4 billion, after which it fell to $17.8 billion in 2009, before gradually increasing to $21.2 billion in 2017.[10]

In terms of overall value, the GSP is most critical to India, Thailand, Brazil, and Indonesia (see Table 1). The value of the goods exported duty-free to the United States by these countries more than doubled between 2000 and 2017. In many cases, it has grown much more, such as from India (494 percent). Furthermore, these duty-free imports account for a sizable portion of these countries' overall exports of goods to the United States. GSP imports comprised 11.6 percent of India's, 13.3 percent of Thailand's, 8.4 percent of Brazil's, and 9.6 percent of Indonesia's total exports to the United States in 2017.[11]

Reverting to normal tariff levels (formally known as the Most Favored Nation, or MFN, duty rate) would represent a considerable change for many key exports from these countries. For example, for Indonesia, its top-three exports under the GSP (car tires, vehicle ignition wiring, and gold necklaces and chains)—worth a collective $311 million in imports in 2017—would face tariffs of 4 to 5 percent. Of India's top-10 exports (worth just under $1.4 billion in exports in 2017) under the GSP, three products would face 6.5 percent tariffs, another would face a 5.6 percent tariff, while others would face tariffs of 2 to 2.5 percent.

Table 1: Imports of GSP-Eligible Goods (U.S. $) and ITIF Worst Mercantilist Index Rankings[12]

| Country | 2017 | Growth from 2000–2017 | GSP Rank | U.S. General Imports | GSP as % of Total Imports | ITIF Worst Mercantilist Index Ranking (2014) |
|---|---|---|---|---|---|---|
| **India** | 5,634,622 | 494.9% | 1 | 48,631,286 | 11.6% | High |
| **Thailand** | 4,150,601 | 188.3% | 2 | 31,189,766 | 13.3% | Moderate-Low |
| **Brazil** | 2,473,159 | 118.6% | 3 | 29,427,317 | 8.4% | Moderate-High |
| **Indonesia** | 1,947,068 | 142.3% | 4 | 20,208,860 | 9.6% | Moderate-Low |

*To its credit, USTR has started to consider a broader range of market-access issues in its latest GSP review of India, Indonesia, and Thailand.*

### USTR Should Be More Willing to Use the GSP to Address Trade Concerns

Thus far, USTR has only withdrawn GSP benefits in a very limited number of instances based on intellectual property and workers' rights issues (even though the GSP's criteria are broader than these two explicitly listed criteria). For example, Argentina, Lebanon, Russia, and Ukraine have been cited and denied GSP benefits due to intellectual property issues. Workers' rights were the most prominent issue in the most recent GSP annual review, with six countries cited (based on petitions from the AFL-CIO, the International Labor Rights Forum (ILRF), and USTR itself). Intellectual property concerns were the second-most prominent category, with the International Intellectual Property Alliance (IIPA) citing concerns with Indonesia, Ukraine, and Uzbekistan.[13] Most recently, USTR initiated a review of GSP compliance by India, Indonesia, Kazakhstan, and Thailand as part of its broad triennial review.

To its credit, USTR has not only taken steps to enact a more stringent review, it has also started to consider a broader range of market-access issues in India, Indonesia, and Thailand. For example, the Advanced Medical Technology Association (AMTA) filed a petition to withdraw India's GSP eligibility because of price controls the country implemented—cutting prices by 85 percent for certain medical devices—that act as a barrier to market access. These price controls effectively forced medical device makers to sell in India at a loss. In its petition, AMTA cited the fact that India has solely focused on price controls for medical devices, without any attempt to address the broader issues and inefficiencies that contribute to costs in its health care system.[14]

Argentina, India, Indonesia, and Thailand highlight why USTR should make clear to all countries that feature on the Special 301 Priority Watch List that it will partially or fully withdraw access after a reasonable period of engagement—e.g., 6 to 12 months—if they fail to address these issues or make clear concrete steps toward doing so. These countries reap the benefits of GSP access despite consistently being identified in USTR reporting year after year for serious intellectual-property and other trade and market issues. Many of these countries continue to add new mercantilist policies to the list of trade barriers that led to them being initially cited in USTR reports. Given this, USTR needs to be more willing to develop and use the credible threat that it will suspend or withdraw a country's GSP eligibility unless barriers are removed in a timely manner.

GSP criteria provide USTR with the broad purview to address a range of barriers that are critical to innovative U.S. sectors, be they life sciences, content creators, software, or other advanced technologies. Regarding the intellectual property criteria, USTR should conduct a more stringent assessment of whether a trade partner provides adequate protection for U.S. intellectual property (including whether nonexistent or ineffective administrative processes and enforcement essentially denies protection) and be more aggressive suspending or withdrawing GSP benefits when this protection is found to be sorely lacking. Furthermore, USTR should use the extensive purview of the GSP to consider a broader range of market-access issues, including those relating to digital services, data flows, and modern intellectual property. ITIF reports have outlined how digital protectionism is growing around the world, such as more countries forcing foreign firms to store data locally and enacting other trade-distorting and discriminatory barriers to foreign tech firms.[15] The latter include denying reasonable market access to cloud services and other digital economy sectors; forcing firms to set up a local office, use local services, or disclose source code as a condition of market entry; and applying local content requirements for online services.

*GSP criteria provide USTR with the broad purview to address a range of barriers that are critical to innovative U.S. sectors, be they life sciences, content creators, software, or other advanced technologies.*

## COUNTRY CASE STUDIES

There are several countries that benefit substantially from the GSP program yet fail to provide either reasonable and equitable access to their markets or adequate protection for intellectual property, and have trade-distorting-investment and services-market policies in place. Most of the following issues that have been raised are taken directly from USTR reporting—either the Special 301 Report assessing the global state of intellectual property rights protection and enforcement, or the 2018 National Trade Estimate Report (an annual report documenting foreign trade and investment barriers facing American exporters around the world). Within the NTE, USTR has also started highlighting key barriers to digital trade, such as to data flows and Internet-based services.[16] Many of the following countries have been on the Special 301 Report's Priority Watch List for over a decade. These cases highlight how expanded and proactive enforcement of GSP criteria could be used to help address barriers to modern trade in a number of significant emerging markets.

### Argentina

Argentina's access to the GSP should be partially or fully suspended given its persisting intellectual property issues. Argentinean government officials continuing to engage in the GSP review process and pressing for access to the GSP show how valuable it is to them, which USTR should use as leverage to get Argentina to address trade barriers faced by U.S. firms. USTR should hold Argentina to its recent commitments to address relevant issues within a reasonable time frame. If USTR does not see substantive progress soon, it should recommend Argentina's partial readmission to the GSP be revoked.

No doubt, Argentina's trade policy turned a corner with the election of President Mauricio Macri in 2015. His predecessor, Christina Kirchner, had enacted a range of tariffs, taxes, and restrictions on the information and communication technology (ICT) and related sectors.[17] For example, in January 2017, Argentina's Ministry of Production officially announced that, as of April 2017, the import tariff on personal computers, notebooks, and tablets would be eliminated—which officials expected would cause the prices of these products to drop by as much as 50 percent. However, successive NTE and Special 301 Reports show a range of issues that still affect U.S. firms and fall within GSP eligibility criteria.

Argentina has an extensive track record regarding the GSP. In 2012, the United States suspended its GSP eligibility as the country had failed to pay two awards owed to U.S. companies as a result of international investor-state disputes.[18] In January 2018, Argentina was partially reinstated to the GSP after the resolution of this investor dispute and commitments from the Argentinean government to provide reasonable and fair market access to U.S. agricultural goods and improve intellectual property protection and enforcement. As part of its recent GSP review, Argentinean government officials attended a public hearing and made the case that Argentina provides reasonable access to its market for U.S. firms and detailed a number of new laws and regulations intended to improve intellectual property protections, including issues involving trademarks, intellectual property enforcement, quicker patent application assessments, and the appointment of a federal prosecutor for intellectual property laws.[19] The United States and Argentina also implemented a Trade and Investment Framework Agreement, signed in 2016, under which both sides have since discussed intellectual property issues.

### Intellectual Property

As USTR stated in Argentina's (partial) readmission to the GSP at the end of 2017, Argentina still has a range of intellectual property issues to resolve before full GSP benefits are restored.[20] U.S. intellectual property-intensive industries, especially in the life sciences and digital sectors, continue to face a number of substantive challenges in Argentina.

Key excerpts from the 2018 Special 301 Report for Argentina include:

> A key deficiency in the legal framework for patents is the unduly broad limitations on patent eligible subject matter…. Argentina summarily rejects patent applications for categories of pharmaceutical inventions that are eligible for patentability in other jurisdictions, including in the United States…. Stakeholders assert that Resolution 283/2015, introduced in September 2015, also limits the ability to patent biotechnological innovations based on living matter and natural substances.… Another ongoing challenge to the innovative agricultural chemical and pharmaceutical sectors is inadequate protection against the unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical or agricultural chemical products.

> Enforcement of IP rights in Argentina continues to be a challenge and stakeholders report widespread unfair competition from sellers of counterfeit and pirated goods and services…. While optical disc copyright piracy is widespread, online piracy continues to be a growing concern, and criminal enforcement for online piracy is nearly nonexistent. As a result, IP enforcement online in Argentina consists mainly of right holders trying to convince cooperative Argentine ISPs to agree to take down specific infringing works, as well as attempting to seek injunctions in civil cases. Right holders also cite widespread use of unlicensed software by Argentine private enterprises and the government.[21]

### Brazil

USTR should consider partially or fully suspending Brazil's GSP eligibility. USTR holds considerable leverage to encourage Brazil to address a broad range of trade issues, as Brazil is the third-largest beneficiary of benefits under the GSP. In 2017, $2.4 billion in Brazilian exports to the United States received duty-free access, accounting for 8.4 percent of Brazil's total exports. Yet Brazil has enacted a broad range of barriers to U.S. firms involved in pharmaceuticals, ICTs, and digital trade, using discriminatory taxes, subsidies, procurement standards, and standards testing for ICTs, in part to force firms to localize production operations in Brazil. The Brazilian government and central bank are both considering proposals to enact different forms of data localization. Despite this, the Brazilian government has engaged in the GSP review process to ask that certain Brazilian exports be added to the list of products permitted to enter the United States duty-free under the GSP.[22]

*Brazil has been on the USTR Special 301 Report Watch List for over a decade, yet it has maintained access to the GSP.*

Despite this, Brazil has been on the Special 301's "watch list" for over a decade. Brazil is an increasingly important market for intellectual property-intensive industries. The country's administrative and enforcement challenges continue, however, including high levels of counterfeiting and piracy in its online and physical markets. While Brazilian laws and regulations provide for protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for veterinary and agricultural chemical products, they do not provide similar protection for pharmaceutical products.

Key excerpts from the 2018 NTE for Brazil:

- Brazil provides tax deductions and exemptions on many domestically produced ICT and digital goods that qualify for status under the Basic Production Process (Processo Produtivo Básico, or PPB).[23]

- Brazil's Special Regime for the Information Technology Exportation Platform (REPES) suspends Social Integration Program (PIS) and Contribution to Social Security Financing (COFINS) taxes on goods imported and information technology services provided by companies that commit to exporting software and information technology services—to the extent those exports account for more than 50 percent of a company's annual gross income.[24]

- Brazil gives procurement preference to firms that produce in Brazil and that fulfill certain economic stimulus requirements, such as generating employment or contributing to technological development, even if their bids are up to 25 percent more expensive than those submitted by foreign firms outside Brazil. The country's laws allow for "strategic" ICT goods and services procurements to be restricted to those with indigenously developed technology. In 2012, Brazil's Ministry of Science, Technology and Innovation issued its Bigger IT Plan, which establishes a process for the government to evaluate and certify that software products are locally developed in order to qualify for price preferences.[25]

Brazil is also considering a range of proposals that would act as barriers to cross-border data flows:

- In December 2017, the Institutional Security Cabinet of the Republic Presidency of Brazil created an interministerial working group to revise regulations regarding information security for cloud computing of the Federal Public Administration. The members of this group were reportedly willing to impose data localization requirements so cloud computing service providers would have to at least keep copies of all information of the Federal Public Administration in Brazil, and make it available to the Brazilian Government to access whenever they want.

- In September 2017, the Central Bank of Brazil released a proposal (57/2017) on cybersecurity policy and requirements for contracting processing, data storage, and cloud computing services for financial institutions and other institutions authorized to operate by the Central Bank of Brazil that would force firms to store their data locally (article 11).[26] However, there remain concerns with its requirement for firms to indicate where the actual data centers are located (article 12:1) and for cloud companies to provide the Brazilian Central Bank with physical access to the data centers (article 12:7). As ITIF outlined in a submission to the Central Bank of Brazil, the proposal raised a number of major concerns for Brazil's (and the broader global) financial sector, not to mention its potential to develop into a leading data-driven economy.[27]

### India

USTR should consider partially or fully suspending India's GSP eligibility as the country continues to enact a range of nontariff barriers and intellectual property policies that seriously affect market access for U.S. firms and their goods and services. Quite rightly, USTR is currently reviewing India's GSP eligibility based on two petitions: one from the National Milk Producers Federation and the U.S. Dairy Export Council, and the other from the Advanced Medical Technology Association. In addition, the USTR-led GSP subcommittee has also raised its own concerns that India is not providing fair market access, directly citing issues raised in the 2018 National Trade Estimate Report.

There are a broad range of issues that should be examined in USTR's review of India's eligibility for duty-free access under the GSP, which is especially critical to a range of

Indian exports to the United States. India is the number-one beneficiary of the GSP's duty-free access, with $5.6 billion in exports of GSP-eligible goods in 2017, representing 11.6 percent of India's total exports to the United States. This provides considerable leverage for USTR to push India to address these issues. Failing noticeable improvement, USTR should suspend or permanently withdraw India's access to GSP benefits.

### Intellectual Property

India has been on the Special 301 Report's Priority Watch List for over a decade because of weak protection and enforcement of intellectual property rights, as well as its vocal encouragement and propagation of initiatives that promote the erosion of intellectual property rights around the world at multilateral and other forums.[28] As the 2018 NTE report notes, India has carried out high-level initiatives involving intellectual property under Prime Minister Modi's administration, but has failed to draw a direct link to the many intellectual property reforms needed to ensure India achieves its innovation and economic development goals.

*India is the number one beneficiary of the GSP's duty free access. This provides considerable leverage for USTR in getting India to address a range of issues relating to intellectual property and digital trade.*

Key excerpts from the Special 301 Report for India:

> Companies across different sectors remain concerned about narrow patentability standards, the potential threat of compulsory licensing and patent revocations, as well as overly broad criteria for issuing such licenses and revocations under the India Patents Act.… In the pharmaceutical and agricultural chemical sectors, India continues to lack an effective system for protecting against the unfair commercial use, as well as the unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for such products.[29]

> Right holders continue to report high levels of piracy and counterfeit sales, including on the Internet, in physical markets (for recent examples, refer to the 2017 Notorious Markets List), and through commercial broadcasts. In specific sectors, certain stakeholder reports are especially troubling. For example, counterfeit pesticides may account for 30 percent of sales by volume; the rate of unlicensed software use stands at around 58 percent; stakeholders have identified specific incidents of camcording that originate in Indian cinemas; and Indian products bear the mark of forged accreditation certificates. Recent court cases also raise concerns that a broad range of published works will not be afforded meaningful copyright protection. Furthermore, illegal practices that contribute to high piracy rates include the underreporting of cable subscriptions, widespread use of ISDs, and circumvention of TPMs.[30]

As further evidence, USTR's Notorious Markets Report highlights the local and global distribution of counterfeit goods, including by online marketplaces in India:

> IndiaMart is an online marketplace based in India with 1.5 million suppliers and more than 10 million buyers. Among its legitimate listings, IndiaMart allegedly facilitates global trade in counterfeit and illegal pharmaceuticals. The marketplace disclaims all liability, delays responses, and does not facilitate right holder attempts

to remove listings. In contrast, other online marketplaces have instituted good practices such as robust screening systems to limit listings for counterfeit or illegal pharmaceuticals, and providing a straightforward process for removing infringing listings. The domain name registrar that services IndiaMart, Hosting Concepts B.V., has a general Top Level Domain market share of 304,131 domains, of which 2,530 are allegedly rogue Internet pharmacies.[31]

### Issues Affecting the Life Sciences, ICT, and Other High-Tech Sectors

Beyond the intellectual property issues previously highlighted, U.S. firms in innovative sectors face pressure to localize the development and manufacture of their products in India, including under provisions of the Drug Price Control Order and due to high customs duties directed to IP-intensive products, such as medical devices, pharmaceuticals, ICT products, solar energy equipment, and capital goods.[32]

With regard to ICT goods, India also uses nontariff barriers to discriminate against U.S. firms and their goods. India has enacted an unnecessary, trade-distorting, and discriminatory in-country security testing regime for ICT goods. The United States, European Union, Japan, and others have raised concerns about India's various policies both bilaterally and at the World Trade Organization (WTO).[33] For example, with regard to security testing, India has refused to accept internationally accepted approaches to security certifications, such as those from accredited foreign conformity assessment bodies, and instead wants onerous, costly, and inefficient in-country testing from unproven testing facilities.[34] Past drafts of India's policy regarding security testing also included firms having to disclose source code and other intellectual property. Furthermore, India's Preferential Market Access (PMA) is a major trade distorting policy. The PMA enacts local content requirements for public procurement of electronics and ICT products (starting at 25 percent of the value of the product in 2014, rising to 45 percent in 2015, and to 80 percent by 2020).[35] As an extension of this, India is considering giving preferences to local cybersecurity firms in public procurement.[36]

### Data Localization

India has also considered or enacted data localization policies that affect many U.S. firms. India continues to expand the potential application of data localization requirements to more sectors, most recently for payment services data.

For example:

- While it has not yet been implemented, India's 2015 National Telecom M2M ("machine to machine") Roadmap would require all M2M gateways and application servers for customers in India to be located within India.[37]
- The 2012 National Data Sharing and Accessibility Policy, issued by the Ministry of Science & Technology, requires all data collected using public funds to be stored within the borders of India.[38]

- In 2015, India's Department of Electronics and Information Technology issued guidelines that cloud providers seeking accreditation for government contracts would have to store all data in India.
- In 2018, the Reserve Bank of India announced a proposal that would compel all payment system operators to store all their data within India.[39]

### Indonesia

USTR should suspend or completely withdraw Indonesia's access to GSP benefits. Despite years of engagement with USTR on a range of trade issues, Indonesia has failed to substantively address the many barriers facing U.S. firms, and in many instances, has been adding to the list of trade barriers, especially in the digital economy. This is why the Trump administration (to its credit) cited Indonesia as part of its GSP review given concerns about market access, including issues related to services and investment.[40] USTR cited many of these concerns in its 2018 National Trade Estimate Report, including on its list of countries erecting key barriers to digital trade.[41] The GSP matters greatly to Indonesia. In 2017, Indonesia exported $1.9 billion in goods to the United States that received preferential duty-free treatment under the GSP program, representing 9.6 percent of Indonesia's total exports to the United States.

*Despite years of engagement with USTR on a range of trade issues, Indonesia has failed to substantively address many barriers facing U.S. firms, and in many instances, it has been adding to the list of trade issues.*

Indonesia is a case that highlights why USTR should be more willing to partially or fully withdraw a country's benefits in the event it fails to address relevant trade barriers within a reasonable period of time. Indonesia has been on the Special 301 Report's Priority Watch List since 2009, yet it has maintained access to the GSP throughout this period. Indonesian officials have been willing to meet with U.S. officials in an effort to address these issues, albeit under the bilateral Trade and Investment Framework Agreement. Most recently, in May 2018, Indonesian and U.S. officials met to adopt a work plan to address issues identified in the Special 301 Report.[42] However, despite this willingness to engage and address some of the intellectual property issues on USTR's list, Indonesia not only still falls short in taking the necessary steps to improve its treatment of intellectual property, it continues to add further trade barriers in other areas. USTR is reviewing Indonesia's GSP eligibility based on three criteria: sufficient protection of intellectual property; providing equitable and reasonable access to its market; and reducing or eliminating trade-distorting investment practices and barriers to trade in services. USTR should set a deadline for substantive action on each of these areas, under the proviso it will partially or fully withdraw GSP action should Indonesia fail.

#### Intellectual Property

The International Intellectual Property Alliance's (IIPA) 2011 petition to USTR to review Indonesia's GSP eligibility sought action to address a range of barriers to trade in U.S. creative products in Indonesia, especially the lack of adequate and effective intellectual property rights protection and enforcement, and a lack of equitable and reasonable access to the Indonesian market. Since this review, Indonesia has made a number of improvements, such as updating its copyright law in 2015 and enacting digital-infringement regulations that led to the blocking of access to 85 large-scale piracy websites in 2015 and 2016. For instance, Indonesia blocked access to the illegal streaming and downloading site Stafaband (stafaband.info), after the Recording Industry Association of America (RIAA) identified it as a notorious market in the fall of 2015, as part of the USTR Special 301 investigation for infringing sound recording files.[43] In May 2016, Indonesia removed film and recording studios from its negative investment list, thereby enabling 100 percent foreign ownership in film and sound recording production and distribution.[44] However, Indonesia has yet to issue clear implementing regulations to bring this into effect.

Nevertheless, high levels of piracy persist, and further improvements are needed to ensure adequate and effective intellectual property protection and enforcement. IIPA stated in a 2017 hearing that, at the time, 18 million pirated copies of movies, music, and software were circulating in the Indonesian market each month.[45] In 2016, Indonesia's Recording Industry Association estimated there were over 2.8 billion illegal song downloads annually in Indonesia.[46] Local and foreign creative sectors suffer from a range of piracy, including video-linking and streaming sites, direct-download sites, and the proliferation of illicit streaming devices. While any Indonesian website-blocking activity is encouraging, IIPA has highlighted the country's lack of enforcement actions, fewer prosecutions, and ongoing legal issues for right holders seeking to enforce their intellectual property. In terms of market access, Indonesia could make further improvements by fulfilling its promise to also remove radio and television broadcasting services from its negative investment list of sectors blocked from foreign investment, remove restrictions in Indonesia's film law that preclude foreign involvement, eliminate discriminatory customs duties on the importation of foreign films, and repeal the regulation requiring local replication of all theatrical prints and home video titles released in Indonesia.

Indonesia was also cited for issues related to inadequate and ineffective protection of pharmaceutical intellectual property. For example, recent amendments to Indonesia's Patent Law contain regulations that impose severe restrictions on the criteria necessary to receive chemical patents, and a potentially broad approach to issuing compulsory licenses.[47] Revisions to Indonesia's Patent Law in July 2016 have raised further concerns, including with respect to the patentability criteria for incremental innovations and computer-implemented inventions; local manufacturing and use requirements; the grounds and procedures for issuing compulsory licenses; disclosure requirements for inventions related to traditional knowledge and genetic resources; and requirements to disclose the details of private licensing agreements.[48]

### Life Sciences and Medical Device Sector Issues

Indonesia continues to enact tariff and nontariff barriers on U.S. pharmaceutical firms and their goods, such as by denying fair market access to U.S. firms by enacting forced localization requirements and limits on foreign investment in the pharmaceutical sector. Indonesia's negative investment list restricts foreign ownership to 85 percent in the pharmaceutical sector.[49] Furthermore, foreign investment in the manufacture and distribution of medical devices is now capped at 33 percent and 49 percent, respectively—which previously were not included in the negative investment list.

The U.S. pharmaceutical industry has also raised concerns regarding the transparency of, and opportunity for, meaningful stakeholder engagement within the Indonesian pricing and reimbursement system (including on the issue and setting of price caps). U.S. medical devices face unclear and challenging market conditions on a number of fronts, including uncertain progress on whether (and if so, how) Indonesia will implement the ASEAN Medical Device Directive by the proposed 2020 date; the lack of a separate, legal definition of "medical device" preventing pharmaceutical requirements (such as the local manufacturing restrictions) from potentially also being applied to medical devices; and challenges in obtaining product approvals for the e-catalog system used for public procurements.

A notable excerpt from the 2018 NTE report for Indonesia:

> Ministry of Health (MOH) Decree 1010/2008 requires foreign pharmaceutical companies either to manufacture locally or to entrust another company that is already registered as a manufacturer in Indonesia to obtain drug approvals on its behalf. Among its requirements, Decree 1010/2008 mandates local manufacturing in Indonesia of all pharmaceutical products that are five years past patent expiration, and also contains a technology transfer requirement. A subsequent pair of regulations, Regulation 1799/2010 and an updated regulation on drug registration from BPOM (Indonesia's National Agency of Drug and Food Control), most recently revised in Regulation 16/2015, provide additional information about the application of the local manufacturing requirements and applicable exceptions.[50]

### ICT and Digital-Related Issues

Indonesia continues to enact a range of tariff and nontariff barriers on U.S. firms and their goods and services in the ICT and digital economy sectors as part of a misguided state-directed and protectionist import-substitution program that targets certain high-tech sectors.[51] Indonesia's average MFN-applied tariff rate is 6.9 percent according to the WTO. Indonesia periodically changes its applied rates, and over the last five years has increased its applied tariff rates for a range of goods that compete with locally manufactured products, including electronic products, electrical and nonelectrical milling machines, chemicals, cosmetics, and medicines.[52]

Key excerpts from the 2018 NTE for Indonesia:

> Indonesia has issued a number of measures that make it more difficult to import cellular and Wi-Fi equipped products. In late 2012, Indonesia issued Ministry of Trade (MOT) Regulation 82, last amended by MOT Regulation 41/2016, which requires an importer of cellular devices, handheld computers, and tablets to

become a "registered importer," and then to seek "import approval" for different products."

In 2015, Ministry of Communications and Information Technology (MCIT) issued Regulation 27/2015, which required all 4G LTE enabled devices to contain 30 percent local content, and all 4G LTE base stations to contain 40 percent local content by January 2017. In July 2017, Ministry of Industry (MOI) issued regulation 29/2017, which set forth new formulas for the calculation of local content in 4G LTE devices. MOI 29/2017 broadens the scope of local content to include local manufacturing, development, and software applications (apps), and provides details on how investment commitments can satisfy the local content requirement.

MCIT Regulations 7/2009 and 19/2011 require that equipment used in certain wireless broadband services contain local content of at least 30 percent for subscriber stations and 40 percent for base stations, and that all wireless equipment contains 50 percent local content. Indonesian telecommunication operators are also required, pursuant to Regulation 41/2009, to expend a minimum of 50 percent of their total capital expenditures for network development on locally sourced components or services.[53]

In particular, Indonesia continues to push ahead with trade-distorting and discriminatory regulations that target Internet-based services—often called over-the-top services (OTTs)—for how they use broadband networks to compete with traditional telecommunication providers. U.S. firms are industry leaders in many types of OTT services that are increasingly popular with consumers around the world, in part due to the growing use of smartphones and other devices. However, Indonesia and a growing number of other countries are using a range of trade-distorting, unnecessary, and excessive "localization" measures (for data and personnel; related to finances, accounting, content, and taxation issues) to discriminate against U.S. tech firms and their services.

On October 15, 2017, Indonesia enacted regulations for OTT Internet services that expanded the range of burdensome and discriminatory policies considered in 2016.[54] These policies were misleadingly framed as necessary to "level the playing field" between traditional telecommunications operators and new Internet-based services.[55]

There are many vague and potentially troubling parts of these revised provisions.[56] For example:

- The provisions will introduce a burdensome regulatory regime over a potentially vast section of the Internet that defines OTT providers as falling into one of two broad categories: providers of Internet-based application services, and those of Internet-based content services. This presumably covers both free and subscription- or fee-based services, and means it would apply to Google, Gmail, PayPal, Skype, Amazon Web Services, and Facebook.

- The regulation then adds the impractical goal of trying to force foreign firms within this vast range of sectors to set up a permanent physical presence in Indonesia, including a local office and employees, as a condition of market entry.
- The regulation effectively tries to install the Indonesian government as a gatekeeper of the Internet by including the requirement that foreign OTT firms apply for a license to offer services in Indonesia.
- The regulation intervenes in how OTT firms operate by forcing them to use Indonesia's national payment "gateway" for processing electronic payments (such as ATMs, credit cards, and electronic money), which includes only using a "switching agency" that is at least 80 percent Indonesian-owned.
- OTT firms that do not comply will be blocked by Indonesian telecommunications companies.

#### Data Localization

Indonesia has also enacted a growing range of data localization policies that discriminate and disadvantage U.S. technology firms.

Key excerpts from the 2018 NTE Report for Indonesia:

> Article 17 of Government Regulation (GR) 82/2012 requires providers of a "public service" to establish local data centers and disaster recovery centers in Indonesia. Indonesian officials have indicated that "public service" means any activity that provides a service by a "public service provider," consistent with the definition in the implementing regulations to the 2009 Public Service Law.
>
> Pursuant to GR 82/2012, the MCIT issued Regulation 20/2016 on personal data protection, which requires electronic system providers to process protected private data only in data centers and disaster recovery centers located in Indonesia.
>
> BI (Bank of Indonesia) and OJK (Indonesia's Financial Services Authority) are putting forward regulations for certain financial services sectors that require data centers and disaster recovery centers to be located in Indonesia. OJK's Regulation 69/POJK.05/2016 mandates all insurers and reinsurers in Indonesia to have established data centers and disaster recovery centers in Indonesia by October 2017.[57]

### Thailand

USTR should consider partially or fully withdrawing Thailand's GSP eligibility. While Thailand has made some noticeable improvements in how it protects and enforces intellectual property, it has also moved ahead with new proposals that unfairly target U.S. tech firms and their services, including efforts to regulate OTTs. Recent policy developments in Thailand highlight why USTR should broaden the range of issues it generally considers as part of Thailand's GSP eligibility review, which is ongoing as of July 2018. USTR has considerable leverage in reviewing Thailand's GSP eligibility, given

Thailand is the second-largest beneficiary of the program's duty-free access. In 2017, Thailand exported $4.1 billion in goods that received duty-free access under the GSP, representing 13.3 percent of its total exports to the United States that year.

### Intellectual Property

Thailand's somewhat improved—but still problematic—level of intellectual property protection and enforcement is reflected in its being dropped to the Special 301's Watch List (down from the Priority Watch List) in 2017. Engagement on IP protection and enforcement as part of the bilateral U.S.-Thailand Trade and Investment Agreement yielded progress toward addressing U.S. IP concerns across a range of issues, including enforcement, patents and pharmaceuticals, trademarks, and copyrights. For example, Thailand established an interagency National Committee on Intellectual Property Policy and a subcommittee on enforcement against IP infringement, led by the prime minister and a deputy prime minister, respectively. This strong interest from the highest levels of the government led to improved coordination among government entities, as well as enhanced and sustained enforcement efforts to combat counterfeit and pirated goods throughout the country. However, Thailand still needs to make a number of substantive improvements to be removed from Special 301 reports (where it had been on the Priority Watch List since 2007).

*Thai regulators are considering a range of burdensome, trade-restrictive proposals that would discriminate against U.S. over-the-top content providers.*

Key excerpts from the Special 301 Report on Thailand:

> Concerns remain regarding the availability of counterfeit and pirated goods, both in physical markets and online.… In particular, the 2014 Copyright Act amendments failed to address a number of concerns expressed by the United States and other foreign governments and stakeholders, including on ISP liability, TPMs, rights management information, and procedural obstacles to enforcement against unauthorized camcording.
>
> Other U.S. concerns include a backlog in pending patent applications, widespread use of unlicensed software in both the public and private sectors, unauthorized collective management organizations, lengthy civil IP enforcement proceedings and low civil damages, and extensive cable and satellite signal theft.[58]

### Digital Economy Restrictions

Thai government regulators are considering a range of burdensome, trade-restrictive proposals that would discriminate against U.S. OTT content providers. These measures, introduced by the National Broadcasting and Telecommunications Commission (NBTC), are being pursued in part to protect traditional telecommunication operators that are struggling to compete with OTT services. While the proposals are still being developed (including such key points as how to define and categorize OTT services), it is clear NBTC's initial ideas would undermine a growing part of Thailand's digital economy and discriminate against and restrict market access for U.S. technology firms.

Thai companies in traditional telecommunication and broadcasting services have called for government regulation to "level the playing field," claiming Internet-based services have an unfair regulatory advantage.[59] As in other nations pursuing similar regulations, NBTC is trying to regulate OTTs under the outdated view that they are the same as traditional telecommunications and content delivery providers.[60] In April 2017, NBTC indicated in a draft proposal that OTT video services should be categorized like traditional broadcast businesses, registered with the government, required to set up a local office as a condition of market entry, and required to pay a bandwidth fee on the consumption of OTT services. Subsequently, NBTC tried to pressure both local and foreign OTT service providers, such as Facebook, Netflix, YouTube, and others, to register with the government by July 22, 2017 (which none of them did), with the threat that failure to do so would lead the agency to undermine, and presumably block, their services in Thailand.[61] Similarly, in May 2017, NBTC released a proposal whereby the agency considered setting up a "control list" of the top 100 content creators for OTT platforms. The head of NBTC's broadcasting committee, Colonel Natee Sukonrat, stated the rule was needed as, "The top 100 most popular content providers or users on social media who influence public opinion will have to be reined in (such as on Netflix, YouTube, and Facebook)."[62]

*Ukraine is a key regional exporter of pirated material into Europe.*

However, in July 2017, NBTC decided to delay these changes after receiving criticism from foreign firms and business groups, such as the U.S.-ASEAN Business Council, that the policy would undermine Thailand's digital economy and the drafting process did not allow enough time for feedback.[63] While the Thai government and NBTC have not made any final decisions, they have also not ruled out the possibility of the final policy including any parts of these initial proposals.[64] Thailand's approach to policymaking has raised a number of issues about regulation in Thailand's digital economy. For U.S. firms to be able to enter and compete in it, Thailand needs to avoid these types of burdensome, vague, and potentially arbitrary and discriminatory approaches to rules for the digital economy.

### Ukraine

USTR should fully withdraw Ukraine's GSP access. Ukraine's dismal track record on intellectual property protection and enforcement has made it a regular target for GSP reviews. While Ukraine may not take advantage of GSP benefits or be a large market for U.S. firms and intellectual property, it should remain a target for USTR, in part, because it is a key regional exporter of pirated material into Europe. The first petition to remove Ukraine's GSP benefits was filed in 1999 (involving factories producing pirated CDs and DVDs). For political reasons, Ukraine's place on the Priority Watch List was suspended in 2014, but was subsequently re-added in 2015, before GSP benefits were partially withdrawn at the end of 2017 due to inaction on a range of intellectual property issues.

IIPA initially filed a petition for Ukraine's GSP eligibility to be reviewed in 2011. And at GSP-related hearings in 2017, it reported little had changed on intellectual property protections in the country since then. Ukraine was designated a Priority Watch List country in the 2018 Special 301 Report on three grounds:

1. The unfair, nontransparent administration of the system for collective management organizations (CMOs), which are responsible for collecting and distributing royalties

to U.S. and other right holders. Ukraine has a chaotic and ineffective situation with 18 competing collecting societies, some of which are rogue, illegitimate CMOs that have operated freely in Ukraine for years, collecting royalties, but not distributing those royalties to legitimate right holders.

2. The widespread use of unlicensed software by Ukrainian government agencies.

3. The failure to implement an effective means to combat the widespread online infringement of copyright in Ukraine. While some notorious websites hosted in Ukraine have been taken down, it remains home to a number of others. Furthermore, there have been few prosecutions for those sites that were taken down.[65]

## RESPONDING TO COUNTERARGUMENTS AGAINST LIMITING GSP ACCESS

Stricter enforcement of GSP's criteria will spur opposition, both domestic and foreign. GSP recipients and their allies will object, claiming they are being treated unfairly, these countries can only grow through exports and import substitution approaches, and developed countries should not be telling developing countries how to act in any case. Indeed, many developing countries misguidedly see mercantilist trade policies as a shortcut to greater levels of economic growth. Policymakers in many of these countries believe the nontariff barriers that make up a modern mercantilist's toolbox replace the role of tariffs in the already tried-and-failed state-directed development models of the 20th century, which largely focused on important substitution and export-dependent growth. As was the case with traditional mercantilism, its modern form values short-term outcomes over the long term, while ignoring more effective economic policies. For example, while intellectual property theft can be good for a country's workers and consumers in the short run, over the long run, it stifles incentives for innovation and discourages foreign direct investment, thus ultimately hurting the countries' workers and consumers (i.e., taxpayers).[66]

*Blocking, limiting, or favoring national champions in new digital services and general-purpose technologies hurts consumers and business customers while having at best mixed benefits for local producers.*

This demonstrates how blocking, limiting, or favoring national champions (as many of these mercantilist policies aim to do) in new digital services and general-purpose technologies (notably ICT) hurts consumers and business customers over the short- and long run—while having at best mixed benefits for local producers. Although mercantilist policies appear to benefit the countries that institute them, in reality, they actually harm these economies. First, these barriers (whether tariff or nontariff) tend to raise the cost of key capital goods, such as information and communications technologies, which damages capital goods-using sectors and lowers innovation, productivity, and economic growth. Second, mercantilist policies cause reputational harm to a country that damages its attractiveness as a location for foreign direct investment, including damaging countries' participation in global value chains for the production of high-technology products.[67]

Domestically, some will argue that because trade is almost always an unalloyed good, even if our trading partners engage in mercantilist practices, limiting imports by eliminating the GSP would hurt the U.S. economy. But opponents of stricter enforcement fail to recognize the longer-term damage that mercantilist trade policies inflict not only on the U.S. economy and firms and workers, but also on the global economy.

For example, weak or discriminatory intellectual property protection and enforcement, along with fragmented global markets and production networks, undermines crucial contributors to U.S. innovation and competitiveness. Countries stealing intellectual property hurts U.S. firms and consumers, lowering the overall rate of innovation, giving consumers fewer choices, and ultimately leading to higher prices (because if other nations didn't steal, companies would not have to charge other consumers more to cover lost revenues).

Relatedly, allowing mercantilist policies to proliferate undermines the ability of U.S. firms to reap the rewards of their innovation, which is essential for them to obtain the resources necessary to pursue the next generation of innovation. The nontariff barriers that restrict or keep out U.S. tech firms reduce their competitiveness, discourage their innovation, and thwart their ability to achieve economies of scale. These barriers also lead to excess competition, which allows weak firms to artificially remain in the market.

Finally, some U.S. importers of GSP-covered goods will argue that restricting GSP access will hurt both their competitiveness and U.S. consumers. But the purpose of the GSP is to support economic development and integration in developing countries that genuinely embrace free-trade principles, not to reduce the import costs for certain U.S. firms who happen to use goods exported by GSP-eligible countries. This is especially the case if these countries are engaged in broader innovation mercantilism—through weak or nonexistent intellectual property protection and enforcement and other nontariff barriers—which will inevitably impose a broader economic cost on the U.S. economy and many other U.S. firms involved in global trade in these sectors that are targeted by these measures.

## CONCLUSION

Besides negotiating new (and enforceable) rules that address modern barriers to trade, the United States needs to ramp up its use of existing trade enforcement tools—including GSP eligibility—to contest growing foreign innovation mercantilism. Unfortunately, WTO members have proven incapable of coming together to put in place the rules and enforcement mechanisms that would make this unnecessary—often because many of these countries are themselves complicit in the use of mercantilist practices. At best, it is uncertain whether current trade rules under the WTO can be used to challenge some of these modern barriers to trade, although the United States and others should definitely be willing to initiate trade disputes at the WTO to test them. But the lack of trade disputes that tackle many modern trade issues is due in part to many countries recognizing that current trade rules are woefully out of date, thus creating considerable uncertainty about the outcome of any such case. This leads to a corresponding reluctance to initiate a case, which feeds back into the loop of unproven and uncertain rules. Given this context, the United States should use the tools it has to address the many barriers to modern trade that now exist.

*While more proactive enforcement of the GSP's trade criteria would only cover a subset of U.S. trading partners, it would still help a great deal in addressing some emerging trade issues in some key markets.*

The GSP's duty-free access provides USTR with significant leverage that should be applied more forcefully to push trading partners—especially Brazil, India, Indonesia, and Thailand—to address various policies they have implemented that deny U.S. firms fair and reasonable access to their markets. In weighing the issues it considers part of GSP reviews, USTR should place greater emphasis on the policies that affect firms in innovation-intensive sectors, such as the digital economy and life sciences sectors. While more proactive and forceful enforcement of the GSP's trade criteria would only cover a subset of U.S. trading partners, it would still help a great deal in addressing some emerging trade issues (especially as it relates to data flows and intellectual property online and in the life sciences sector) in some key markets. In doing so, it would also send a message to other GSP countries that if they want to continue enjoying the benefits of the program, they should not follow the lead of countries using innovation mercantilist policies and enacting unwarranted barriers to trade. Finally, it is important to reiterate that these recommendations are not intended to "punish" developing countries, but rather are intended to leverage GSP privileges to prevail upon these countries that abandoning the mercantilist-oriented practices documented here will actually produce stronger economic growth outcomes for these countries over the long term, which, after all, is the core goal of the GSP program anyway.

## ENDNOTES


1. Robert Atkinson, Nigel Cory, and Stephen Ezell, "Stopping China's Mercantilism: A Doctrine of Constructive, Alliance-Backed Confrontation" (Information Technology and Innovation Foundation, March 2017), https://itif.org/publications/2017/03/16/stopping-chinas-mercantilism-doctrine-constructive-alliance-backed.
2. Jack Caporal, "USTR announces new, beefed-up GSP enforcement scheme," *Inside U.S. Trade,* June 11, 2018, https://insidetrade.com/daily-news/ustr-announces-new-beefed-gsp-enforcement-scheme.
3. United States Trade Representative, *U.S. Trade Preference Programs: Reducing Poverty and Hunger in Developing Nations Through Economic Growth* (Washington, DC: USTR, June 2016), https://ustr.gov/sites/default/files/TPEA-Preferences-Report.pdf.
4. "Preferential Market Access and the Generalized System of Preferences," United Nations Conference on Trade and Development website, accessed August 13, 2018, http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx.
5. "USTR threatens to revoke Turkey's GSP eligibility," *Inside U.S. Trade,* August 9, 2018, https://insidetrade.com/inside-us-trade/ustr-threatens-revoke-turkeys-gsp-eligibility.
6. Cornell University, INSEAD, and the World Intellectual Property, "Global Innovation Index 2018", (global ranking report), https://www.globalinnovationindex.org/analysis-indicator.
7. "Turkey Competitiveness Rank," Trading Economics website, accessed August 13, 2018, https://tradingeconomics.com/turkey/competitiveness-rank.
8. United Nations Conference on Trade and Development (UNCTAD), "Generalized System of Preferences: handbook on the Scheme of the European Union" (Geneva: UNCTAD, 2015), http://unctad.org/en/PublicationsLibrary/itcdtsbmisc25rev4_en.pdf.
9. Michelle Wein, Stephen Ezell, and Robert Atkinson, "The Global Mercantilist Index: A New Approach to Ranking Nations Trade Policies" (The Information Technology and Innovation Foundation, October, 2014), https://itif.org/publications/2014/10/08/global-mercantilist-index-new-approach-ranking-nations-trade-policies; Nigel Cory, "The Worst Innovation Mercantilist Policies of 2017" (Information Technology and Innovation Foundation, January 22, 2018), https://itif.org/publications/2018/01/22/worst-innovation-mercantilist-policies-201.
10. U.S. International Trade Commission Interactive Trade DataWeb (USITC DataWeb), using data retrieved from the U.S. Bureau of the Census, accessed June 4, 2018, https://dataweb.usitc.gov/.
11. Ibid.
12. U.S. International Trade Commission Interactive Trade DataWeb (USITC DataWeb), using data retrieved from the U.S. Bureau of the Census, accessed June 4, 2018, https://dataweb.usitc.gov/; Michelle Wein, Stephen Ezell, and Robert Atkinson, "The Global Mercantilist Index: A New Approach to Ranking Nations Trade Policies" (The Information Technology and Innovation Foundation, October, 2014), https://itif.org/publications/2014/10/08/global-mercantilist-index-new-approach-ranking-nations-trade-policies;
13. "Public Hearings: Initiation of the 2017 Annual Generalized System of Preferences Product and Country Practices Review; Deadlines for Filing Petitions," Regulations.gov, accessed June 11, 2018, https://www.regulations.gov/document?D=USTR-2017-0014-0001; and "Active and Recently Completed GSP Eligibility and Country Practices Reviews," United States Trade Representative website, accessed June 111, 2018, https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp/current-review-0.
14. "Medical device association petitions USTR to remove India from GSP," *Inside U.S. Trade,* October 19, 2017, https://insidetrade.com/inside-us-trade/medical-device-association-petitions-ustr-remove-india-gsp.
15. Nigel Cory, "Testimony Before the United States International Trade Commission on Global Digital Trade" (Information Technology and Innovation Foundation, March 18, 2018),

https://itif.org/publications/2018/03/29/testimony-united-states-international-trade-commission-global-digital-trade; Nigel Cory, "The Worst Innovation Mercantilist Policies of 2017" (Information Technology and Innovation Foundation, January 22, 2018), https://itif.org/publications/2018/01/22/worst-innovation-mercantilist-policies-2017; Nigel Cory, "Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?" (Information Technology and Innovation Foundation, May 1, 2017), https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost.

16. Office of the United States Trade Representative (USTR), "2018 Fact Sheet: Key Barriers to Digital Trade," (Washington, DC: USTR), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/2018-fact-sheet-key-barriers-digital.
17. "Argentina: Economic and Political Outline," Santander, accessed January 30, 2017, https://en.portal.santandertrade.com/analyse-markets/argentina/economic-political-outline.
18. "Obama Suspends Argentina's GSP Preferences Over Investment Awards," *Inside U.S. Trade,* March 30, 2012, https://insidetrade.com/inside-us-trade/obama-suspends-argentinas-gsp-preferences-over-investment-awards.
19. "GSP Country Practice Hearing Sept 27 2017," Regulations.gov, website accessed June 12, 2018, https://www.regulations.gov/document?D=USTR-2013-0011-0013.
20. "Trump partially suspends Ukraine from GSP, reinstates Argentina," *Inside U.S. Trade,* January 4, 2018, https://insidetrade.com/inside-us-trade/trump-partially-suspends-ukraine-gsp-reinstates-argentina.
21. Office of the United States Trade Representative (USTR), *2018 Special 301 Report* (Washington, DC: USTR), https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf.
22. "Government of Brazil Submission," Regulations.gov website, accessed June 12, 2018, https://www.regulations.gov/document?D=USTR-2017-0014-0010.
23. USTR, *2018 National Trade Estimate Report on Foreign Trade Barriers.*
24. Ibid.
25. Ibid.
26. Ibid.
27. Nigel Cory and Robert Atkinson, "ITIF Filing to the Central Bank of Brazil on Cybersecurity and Data Processing Requirements" (Information Technology and Innovation Foundation, November, 2017), https://itif.org/publications/2017/11/14/itif-filing-central-bank-brazil-cybersecurity-and-data-processing.
28. Office of the United States Trade Representative (USTR), *2018 National Trade Estimate Report on Foreign Trade Barriers* (Washington, DC: USTR), https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf.
29. Ibid.
30. Ibid.
31. Office of the United States Trade Representative (USTR), *2017 Out-of-Cycle Review of Notorious Markets* (Washington, DC: USTR), https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf
32. USTR, *2018 Special 301 Report.*
33. World Trade Organization Committee on Technical Barriers to Trade, *G/TBT/M/73 Minutes of the Meeting of 8-9 November 2017* (Geneva: World Trade Organization, March 6, 2018), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M73.pdf.

34. World Trade Organization Committee on Technical Barriers to Trade, *G/TBT/M/70 Minutes of the Meeting of 10-11 November 2016* (Geneva: World Trade Organization, February 17, 2017), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/M70.pdf.
35. Stephen Ezell, "Why India's PMA Will Harm the Indian and Global Economies" (The Information Technology and Innovation Foundation, March 2014), https://itif.org/publications/2014/03/17/why-india%E2%80%99s-pma-will-harm-indian-and-global-economies.
36. "Good news for local cyber security product makers: Modi government to prefer domestic firms," *Financial Express,* July 15, 2018, https://www.financialexpress.com/industry/good-news-for-local-cyber-security-product-makers-modi-government-to-prefer-domestic-firms-2/1245472/.
37. Ibid.
38. Ibid.
39. Harsh Walia, Supratim Chakraborty , Shweta Dwivedi, and Shobhit Chandra, "RBI mandates data localization for payment systems," Lexology website, April 17, 2018, https://www.lexology.com/library/detail.aspx?g=6d56cc56-b687-4089-8d47-032674926bbc.
40. Office of the United States Trade Representative (USTR), "USTR Announces New GSP Eligibility Reviews of India, Indonesia, and Kazakhstan," USTR website, accessed June 12, 2018, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-announces-new-gsp-eligibility.
41. "Initiation of Country Practice Reviews of India, Indonesia, and Kazakhstan," Federal Register website, accessed June 12, 2018, https://www.federalregister.gov/documents/2018/04/27/2018-08868/initiation-of-country-practice-reviews-of-india-indonesia-and-kazakhstan.
42. "U.S., Indonesia discuss trade, intellectual property, GSP," *Inside U.S. Trade,* May 17, 2018, https://insidetrade.com/inside-us-trade/us-indonesia-discuss-trade-intellectual-property-gsp.
43. "IIPA Indonesia GSP Request to Appear and Pre-Hearing Brief," Regulations.gov website, accessed June 12, 2018, https://www.regulations.gov/document?D=USTR-2013-0011-0009.
44. *Meeting of 8-9*
45. "GSP Country Practice Hearing Sept 27 2017," Regulations.gov.
46. "Rampant piracy paralyzes Indonesian music industry," *The Jakarta Post,* November 30, 2016, http://www.thejakartapost.com/news/2016/11/30/rampant-piracy-paralyzes-indonesian-music-industry.html.
47. "PhRMA Comments Regarding Indonesia's Eligibility for GSP Benefits," Regulation.gov website, accessed June 12, 2018, https://www.regulations.gov/document?D=USTR-2013-0011-0010 and https://itif.org/publications/2017/01/09/worst-innovation-mercantilist-policies-2016.
48. Ibid.
49. Ibid.
50. Ibid.
51. Nigel Cory, "Indonesia's E-Commerce Needs Better Tech Support," *Jakarta Globe,* February 7, 2016, https://www.amcham.or.id/fe/5181-indonesia-s-e-commerce-needs-better-tech-support.
52. Ibid.
53. Ibid.
54. "Government Regulation No. 82 of 2012 on Electronic Transactions and Systems Operators (GR 82)," website accessed December 14, 2017, https://chambermaster.blob.core.windows.net/userfiles/UserFiles/chambers/9078/File/ICT/2017/OTT_Public_Hearing/ApplicationandContentServiceMinisterRegulationDraftFinal002.pdf; Nigel Cory, "Worst Innovation Mercantilist Policies of 2016."

55. Nigel Cory, "Worst Innovation Mercantilist Policies of 2016."
56. "Government Regulation No. 82 of 2012 on Electronic Transactions and Systems Operators (GR 82)."
57. Ibid.
58. Ibid.
59. Komsan Tortermvasana, "NBTC mulls bandwidth fees, licensing for OTT," *Bangkok Post,* April 4, 2017, https://www.bangkokpost.com/tech/local-news/1226600/nbtc-mulls-bandwidth-fees-licensing-for-ott.
60. Ibid.
61. "Facebook, Netflix get OTT ultimatum," *Bangkok Post,* June 23, 2017, https://www.bangkokpost.com/archive/facebook-netflix-get-ott-ultimatum/1273743.
62. Komsan Tortermvasana, "NBTC considers OTT control options."
63. "NBTC makes volte-face on OTT plan," *Bangkok Post, July 6, 2017,* https://www.bangkokpost.com/archive/nbtc-makes-volte-face-on-ott-plan/1281779; Alexander Feldman, "Letter: OTT regulations in Thailand" (letter from the President and CEO of the U.S-ASEAN Business Countil to the Thai Deputy Prime Minister and the Chairman of the National Broadcasting and Telecommunications Commission, June 12, 2017), https://chambermaster.blob.core.windows.net/userfiles/UserFiles/chambers/9078/File/Thailand-OTT-letter---6.12.17.pdf; Alexander Feldman, "September 2017 update" (U.S.-ASEAN Business Council, September update), https://www.usasean.org/presidents-newsletter/2017/09.
64. Alexander Feldman, "September 2017 update"
65. "GSP Country Practice Hearing Sept 27 2017," Regulations.gov.
66. Gene Grossman and Elhanan Helpman, *Innovation and Growth in the Global Economy* (Cambridge, Massachusetts: The MIT Press, 1991).
67. Stephen Ezell, Robert Atkinson, and Michelle Wein, "Localization Barriers to Trade: Threat to the Global Innovation Economy" (The Information Technology and Innovation Foundation, September 2013), http://www2.itif.org/2013-localization-barriers-to-trade.pdf.

## ACKNOWLEDGMENTS

The authors wish to thank Stephen Ezell for providing input to this report. Any errors or omissions are the authors' alone.

## ABOUT THE AUTHORS

Nigel Cory is a senior trade policy analyst with the Information Technology and Innovation Foundation. He previously worked as a researcher at the Sumitro Chair for Southeast Asia Studies at the Center for Strategic and International Studies. Prior to that, he worked for eight years in Australia's Department of Foreign Affairs and Trade, which included positions working on G20 global economic and trade issues and the Doha Development Round. Cory also had diplomatic postings to Malaysia, where he worked on bilateral and regional trade, economic, and security issues; and Afghanistan, where he was the deputy director of a joint U.S./Australia provincial reconstruction team. Cory holds a master's in public policy from Georgetown University and a bachelor's in international business and a bachelor's in commerce from Griffith University in Brisbane, Australia.

Robert D. Atkinson is the founder and president of the Information Technology and Innovation Foundation. He is also the coauthor of the book *Innovation Economics: The Race for Global Advantage* (Yale, 2012). Atkinson received his Ph.D. in city and regional planning from the University of North Carolina at Chapel Hill in 1989.

## ABOUT ITIF

The Information Technology and Innovation Foundation (ITIF) is a nonprofit, nonpartisan research and educational institute focusing on the intersection of technological innovation and public policy. Recognized as the world's leading science and technology think tank, ITIF's mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

**FOR MORE INFORMATION, VISIT US AT WWW.ITIF.ORG.**