The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?

Part II

by

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Membership, Art. XI:2,LT/UR/A/2 (April 4, 1994), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

12. The list is reviewed every three years by the United Nations Economic and Social Council (ECOSOC). The criteria underlying the current list of LDCs are (1) a low-income criterion, as measured by the gross national income (GNI) per capita; (2) weak human resources, as measured by a composite index called the Augmented Physical Quality of Life Index that is based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrolment, and adult literacy; and (3) a low level of economic diversification, as measured by a composite index called the Economic Diversification Index that is based on the share of manufacturing in GNI, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index. "Different thresholds are used for [inclusion in,] and graduation from, the LDC list. A country qualifies to be added to the list if it meets inclusion thresholds on all three criteria, and if its population does not exceed 75 million.

A country qualifies for graduation from LDC status if it meets graduation thresholds under at least two of the three criteria in at least two consecutive triennial reviews of the list." *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, THE LEAST DEVELOPED COUNTRIES REPORT 2004: LINKING INTERNATIONAL TRADE WITH POVERTY REDUCTION at xiv, U.N. Doc. UNCTAD/LDC/2004, U.N. Sales No. E.04.11.D.27 (2004) [hereinafter UNCTAD LDC REPORT 2004]. At the time of ECOSOC's 2003 review of the LDC list, the low-income threshold for inclusion on the list was GNI per capita of $750, and the threshold for graduation was GNI per capita of $900. *See id.*

13. Those 32 WTO members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Togo, Uganda, United Republic of Tanzania, and Zambia. *See* Understanding the WTO: The Organization, Least-developed countries, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited July 11, 2004).

14. *See* Understanding the WTO: The Organization, Members and Observers *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 11, 2004).

15. See id.

16. The 35 SSA LDC's are Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Saõ Tomé & Principe, Somalia, Sudan, Togo, Uganda, United Republic of Tanzania, and Zambia. The other 13 SSA countries are Botswana, Cameroon, Côte d'Ivoire, Gabon, Ghana, Kenya, Mauritius, Namibia, Nigeria, Seychelles, South Africa, Swaziland, and Zimbabwe. The remainder that are not designated as LDCs are all developing countries. *See id.*

17. The nine SSA LDCs that are not WTO members are Cape Verde, Equatorial Guinea, Ethiopia, Saõ Tomé & Principe, Sudan, Comoros, Eritrea, Liberia, and Somalia. *See id.*

18. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 323. With regard to the percentage of GDP attributable to agriculture for Mali, *see* THE ECONOMIST, WORLD IN FIGURES 44 (2003).

No information was available for the Republic of the Congo.

19. *Id.* at 44.
20. *See* John Baffes, *Cotton: Market Setting, Trade Policies, and Issues* v (World Bank Policy Research Working Paper 3218 2004), *available at* http://econ.worldbank.org/files/33109_wps3218.pdf.
21. *See* U.S. Dep't of Agriculture, Economic Research Service, *Cotton*, *at* http://www.ers.usda.gov/Briefing/Cotton/ (last visited July 27, 2004); Baffes, *supra* note 20, at 29.
22. *See* Baffes, *supra* note 20, at vi, 1. During the 40-year period 1960-2000, demand for cotton grew at the same rate as population growth, so that per capita consumption of cotton remained flat. During that same period, per capita consumption of chemical fibers increased about 3 percent. *See id.* at vii.
23. *See* U.S. Dep't of Agriculture, Economic Research Service, *Cotton*, *supra* note 21; Baffes, *supra* note 20, at 29.
24. *See* U.S. Dep't of Agriculture, Economic Research Service, *Cotton*, *supra* note 21.
25. *See* U.S. Dep't of Agriculture, Foreign Agricultural Service, *Cotton: World Markets and Trade* 16-17 (Circular Series FC 07-04 July 2004), *available at* http://www.fas.usda.gov/cotton/circular/2004/07/CottonWMT.pdf. Where exports exceeded production for Australia, the discrepancy is explained by the presence of stocks at the start of the reporting period.
26. *See id.* Where exports exceeded production for Benin, Côte d'Ivoire, Chad, and Sudan, the discrepancy is explained by the presence of stocks at the start of the reporting period.
27. *See id.* at 12-13.
28. See id.
29. *See* Joint Proposal, *supra* note 9, at 2, para. 9; Ousmane Badiane, Dhaneshwar Ghura, Louis Goreux, & Paul Masson, *Cotton Sector Strategies in West and Central Africa* 5 (World Bank Policy Research Working Paper 2867 2002).
30. *See* Joint Proposal, *supra* note 9, at 2, para. 9.
31. *See id* at 2, para. 10.
32. *See id.* Depending on the year, China, India, and Pakistan are either small exporters or net importers. *See id.*
33. *See* Baffes at vi, 4; Joint Proposal, *supra* note 9, at 2, para. 10.
34. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 227.
35. *See id.* at 224.
36. In 2002 cotton prices in nominal terms were their lowest in 30 years. *See* WTO, INTERNATIONAL TRADE STATISTICS 10, 210 (2003) *available at* http://www.wto.org/english/res_e/statis_e/its2003_e/its03_toc_e.htm; UNCTAD LDC REPORT 2004, *supra* note 12, at 126 ("Declining commodity prices have affected some of the most important commodity exports of least developed countries. In the first half of 2003, the price of . . . cotton was 33 percent [of its 1980 value]").
37. At least ten countries provide direct support to cotton production: the United States, China, India, Greece, Spain, Turkey, Brazil, Mexico, Uzbekistan, and Egypt. *See* Baffes, *supra* note 20, at 11-12, 13-16.
38. For the ten-year period 1991-2000, cotton ranked eighth in terms of average annual output for all agricultural commodities produced by LDCs. LDCs' percentage share of average annual cotton production relative to that of OECD countries was 18.9 percent during that same period.

See UNCTAD LDC REPORT 2004, *supra* note 12, at 226.

39. *See United States – Subsidies on Upland Cotton, supra* note 5, ¶¶ 7.1308, 7.1312 (finding price suppressing effects of U.S. cotton subsidies on world cotton prices).
40. *See* Kevin Watkins & Jung-ui Sul, *Cultivating Poverty: The Impact of U.S. Cotton Subsidies on Africa* 6 (Oxfam Briefing Paper 30 2002) [hereinafter Oxfam Cotton Study].
41. *See* Joint Proposal, *supra* note 9, at 3, para. 17.
42. *See* U.S. Dep't of Agriculture, *supra* note 25, at 19, table 8.
43. See id.
44. *See* Oxfam Cotton Study, *supra* note 40, at 28, annex 2.
45. *See* Joint Proposal, *supra* note 9, at 4, para. 23.
46. *See id.* Between 1997 and 2001, cotton prices fell by 39 percent. Cotton yields were 50 percent higher in 2000 than in 1980, but real returns per hectare were 5 percent lower for LDC cotton producers in 2000 than in 1980. *See* U.N, Conference on Trade And Development, THE LEAST DEVELOPED COUNTRIES REPORT 2002, ESCAPING THE POVERTY TRAP at 6, 144-45 U.N. Doc. UNCTAD/LDC/2002, U.N. Sales No. E.02.11.D.13 (2002).
47. *See* Joint Proposal, *supra* note 9, at 3, para 12.
48. *See id.* at 2, para. 11.
49. *See id.* at 2-3, para. 11. For example, it has been shown that rotating cotton and corn results in a better diet than simply growing cowpea plants. *See id.*
50. *See id.* at 3, para. 11.
51. *See* Goreux & Masson, *supra* note 29.
52. *Id.* at 9.
53. *See id.* Although yields average about 400 pounds per acre in WCA – compared with yields of 1,000 pounds per acre in Brazil and China and 700 pounds per acre in the United States – in terms of costs, WCA growers are among the world's lowest cost producers. They are able to operate profitably at prices that are unsustainable for rival exporters in the absence of subsidies. *See* Oxfam Cotton Study, *supra* note 40, at 20.
54. *See* Oxfam Cotton Study, *supra* note 40, at 19-20.
55. *See* Goreux & Masson, *supra* note 29, at 12. U.S. cotton farmers' total operating costs per acre in 2002 were $278; total allocated overhead was $251.02. Total costs thus equaled $529.02. The value per acre of U.S. cotton in 2002 was $307.83, for a net loss per acre before government payments of $221.19. The source for these figures is the National Cotton Council, *at* http://risk.cotton.org/CotBudgets/us.htm (last visited Aug. 16, 2004).
56. Goreux & Masson, *supra* note 29, at 12.
57. *See id.* at 13.
58. *See* Nora L. Brooks, *Characteristics and Production Costs of U.S. Cotton Farms*, U.S. Dep't of Agriculture, Statistical Bulletin 974-2, Oct. 2001, at 3, *available at* http://www.ers.usda.gov/publications/sb974-2/sb974-2.pdf.
59. *See* U.N. Conference on Trade and Development, *Economic Development in Africa: Trade Performance and Commodity Dependence* 8, U.N. Doc. UNCTAD/GDS/AFRICA/2003/1, U.N. Sales No. E.03.II.D.34 (2003) ("according to the estimates of the International Cotton Advisory Committee (ICAC), the cost of producing a pound of cotton in Burkina Faso is 21 US cents compared to 73 US cents in the United States. Estimates by the ICAC indicate that market prices could have been about 70 per cent higher in the absence of government support for the cotton industry in 2001–2002"); Oxfam Cotton Study, *supra* note 40, at 11; and Joint

Proposal, *supra* note 9, at 3, para. 14 ("Cotton producers in the region are among the most competitive in the world. In the United States, the cost of producing 1 kg. of cotton is 50 per cent higher than in the WCA countries " [footnote omitted]).

60. *See* United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶ 7.1294-7.1295, 7.1308, 7.1312. For further analysis of cotton subsidies and their effect on West and Central African cotton producers, *see Economic Development in Africa: Trade Performance and Commodity Dependence*, *supra* note 59, at 63-68.

61. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered sections of 7, 15, 16, & 21 U.S.C.) [hereinafter 2002 Farm Act]. *See* Geoffrey S. Becker, Congressional Research Service Report for Congress, Farm Commodity Programs: A Short Primer (2002) *available at* http://www.boozman.house.gov/UploadedFiles/AG%20-%20Farm%20Commodity%20Programs%20A%20Primer%20(CRS%20Report).pdf; Paul C. Westcott, C. Edwin Young & J. Michael Price, *The 2002 Farm Act: Provisions and Implications for Commodity Markets* 4 (U.S. Dep't of Agriculture, Economic Research Service 2002, Bulletin No. 778), *available at* http://www.ers.usda.gov/publications/aib778/ [hereinafter *The 2002 Farm Act: Provisions and Implications*]; Harrison M. Pittman, Direct Payments and Counter-Cyclical Payments Under the 2002 Farm Bill: An Overview (Agricultural Law Research Note May 2003), *available at* http://www.NationalAgLawCenter.org . The 2002 Farm Act has a term of six years, i.e., through 2007, a date possibly coinciding with the conclusion of the Doha Round negotiations.

62. *See* United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶7.218-7.222. For example, the direct payment for upland cotton producers is equal to the direct payment rate (6.67 cents per pound for cotton) multiplied by the producer's payment yield times the producer's payment acres (85 percent of the producer's base acres). *See id.*

63. *See* Section 1105(a)(1) of the 2002 Farm Act, *supra* note 61, (current version at 7 U.S.C.S. § 7915 (2004)).

64. *See* United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶ 7.388, 7.713 (The WTO panel found that direct payments failed to satisfy paragraph 6(b) of Annex 2 of the Agreement on Agriculture on decoupled income support). See WTO, Agreement on Agriculture, Annex 2, para. 6(b), LT/UR/A-1A/2 (April 15, 2004) (Annex 2 lists criteria for support being categorized as "green box," including "decoupled income support." Paragraph 6(b) provides in part that "[t]he amount of such payments . . . shall not be related to, or based on, the type or volume of production . . . ."). For more on green box subsidies, *see* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 1199-1200 (1998).

65. *See* United States – Subsidies on Upland Cotton, *supra* note 5, ¶ 7.553.

66. *See* The 2002 Farm Act: Provisions and Implications for Commodity Markets, *supra* note 61, at 5. Upland cotton is the major cotton crop in the United States, followed by extra-long staple cotton.

67. *See* Baffes, *supra* note 20, at ix.

68. *See* The National Cotton Council of America, 2004 CCC Cotton Loan Information, *available at* http://risk.cotton.org/loan/grades.htm (last visited Aug. 16, 2004).

69. *See* Section 1104(e) of the 2002 Farm Act (codified as amended at 7 U.S.C. § 7914(e) (2004)), *supra* note 61. The CCP target price ceases to be paid when the farm price rises about 65.73

cents per pound. Nevertheless, because direct payments make up the difference to 72.4 cents per pound, the guaranteed level of support to producers with upland cotton base acres remains 72.4 cents per pound, calculated with respect to base acres and yields. *See United States – Subsidies on Upland Cotton*, *supra* note 5, ¶ 7.603. As explained by the WTO panel:

7.225. CCP payments depend on the current prices of commodities. They are provided to producers with base acres and yields for a covered commodity for each of the 2002 through 2007 crop years whenever the effective price falls below the target price, which is fixed by the Act at 72.4 cents per pound for upland cotton. The effective price for a commodity is the sum of the DP [direct payment] payment rate . . . plus the higher of the national average farm price for the marketing year or the loan rate . . . . The difference between the effective price and the target price is the CCP payment rate. Consequently, the CCP payment rate, DP payment rate and, where applicable, the loan rate, are equal to the difference between the market price and 72.4 cents per pound.

> 7.226 CCP payments are made on 85 percent of the base acreage for each commodity multiplied by the corresponding payment rate multiplied by the applicable payment yield.

United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶ 7.225-7.226 (footnotes omitted).

70. *See The 2002 Farm Act: Provisions and Implications for Commodity Markets*, *supra* note 61, at 10. The CCP and loan rate payments are subject to the annual $19.1 billion cap established for the United States under the WTO Agriculture Agreement's so-called "amber box" for domestic subsidies. For more on amber box subsidies and the aggregate measurement of support, *see* BHALA & KENNEDY, *supra* note 64, at 1197-98, 1200-01.
71. *See* Section 1207(a) of the 2002 Farm Act, *supra* note 61 (codified at 7 U.S.C. § 7937 (2004)).
72. *See* Oxfam Cotton Study, *supra* note 40, at 15.
73. *See* Section 1207(a) of the 2002 Farm Act, *supra* note 61 (codified at 7 U.S.C. § 7937 (2004)). Step 2 payments are issued following a consecutive four-week period when the lowest price quotation for U.S. cotton delivered to Northern Europe exceeded the Northern Europe price quotation by any amount and the adjusted world price did not exceed 134 percent of the marketing loan rate. Payments are made at a rate per pound equal to the difference between the two price quotations during the fourth week of the period, with no reduction for the threshold. *See id.*
74. *See* Oxfam Cotton Study, *supra* note 40, at 15.
75. In connection with export subsidies, any export subsidy listed in Article 9.1(a) of the *Agreement on Agriculture* in respect of upland cotton (or any other unscheduled product) is therefore prohibited. The United States has no "scheduled" commitment with respect to upland cotton "If a particular product within the coverage of the Agreement is not the subject of a scheduled commitment, then, pursuant to Article 10.1 of the *Agreement on Agriculture*, export subsidies shall not be applied in respect of that product in a manner which results in, or which threatens to lead to, circumvention of a Member's commitment under Article 3.3 not to provide listed export subsidies in respect of such an unscheduled product." *See* United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶ 7.666-7.667. In the view of the WTO panel, insofar as Step 2 payments are made to exporters, such payments are thus prohibited subsidies:

[T]he measure specifically and explicitly targets eligible exporters – persons who are "regularly engaged" in exporting upland cotton – as a defined class of recipient for a defined, discrete, segment of the payments for a single eligible product. No one else is eligible to receive such payments. The only way to receive such payments is to be an eligible exporter exporting eligible (i.e. domestically produced) upland cotton. This United States upland cotton must be exported outside the United States, traversing the United States border. The measure at issue is, therefore contingent, or conditional upon, exportation.

> We therefore find that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters constitutes a subsidy "contingent on export performance" within the meaning of Article 9.1(a) of the *Agreement on Agriculture.*

Id. at ¶¶ 7.736, 7.748 (emphasis in original). In connection with subsidies to domestic users of cotton, the WTO panel also found the Step 2 program to be a prohibited import substitution subsidy. *See id.* at ¶ 7.1088. Other features of the U.S. farm program that assist cotton producers include crop insurance, cottonseed payments, and export credit guarantee measures. *See United States – Subsidies on Upland Cotton, supra* note 5, at ¶¶ 7.227-7.249.

76. *See* U.S. Dep't of Agriculture, Economic Research Service, Farm Policy, Title III – Trade, *at* http://www.ers.usda.gov/Features/farmbill/titles/titleIIItrade.htm (last visited August 12, 2004).
77. *See* United States – Subsidies on Upland Cotton, *supra* note 5, at ¶ 7.869.
78. *See* Baffes, *supra* note 20, at 37, Table 2. The WTP panel in *United States – Subsidies on Upland Cotton,* found domestic subsidies to cotton (i.e., excluding export subsidies) to equal $3.4 billion for the 1999 marketing year, $2.43 billion for the 2000 marketing year, $4.14 billion for the 2001 marketing year, and $3.14 billion for the 2002 marketing year. *See United States – Subsidies on Upland Cotton, supra* note 5, ¶ 7.596, Table 2.
79. *See* Oxfam Cotton Study, *supra* note 40, at 12; Baffes, *supra* note 20, at 13. As noted by the WTO panel:

> [W]e find credible evidence on the record concerning the divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997. This supports the proposition that United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue and that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs . . . .
>
> We believe that the existence of this gap between upland cotton producers' total production costs and market revenue, on the one hand, and the effect of the subsidies, on the other hand, was to sustain a higher level of output than would have occurred in the absence of the United States subsidies at issue.

United States – Subsidies on Upland Cotton, *supra* note 5, ¶¶ 7.1353-7.1354 (footnotes omitted).

80. Baffes, *supra* note 20, at 13. The United States is not the sole free market "sinner" in this regard. China, the EU, and Uzbekistan also subsidize their cotton producers. *See id.* at 13-16.
81. Oxfam Cotton Study, *supra* note 40, at 23, 33.
82. *See id.* at 12 ("Historically, the cotton sector has received proportionally more support than most other commodities"). The same is true in the EU, where the amount of cotton subsidies are three to four times greater than those bestowed on corn on a per hectare basis, and seven to eight times greater than cereals subsidies. *See* Cotton Sector Strategies in West and Central Africa, *supra* note 29, at 5. Nevertheless, the impact of EU subsidies on global markets is muted by its low production volume. *See id. See also* Tables 2 & 4, *supra.*
83. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 321, Annex, Table 1.
84. *See* Oxfam Cotton Study, *supra* note 40, at 17, 31. Oxfam estimates that trade losses have amounted to 1.4 percent of GDP for Benin, 1.7 percent for Mali, and 1 percent for Burkina Faso. *See id.* at 17.
85. *See* Joint Proposal, *supra* note 9, at 3-4, paras. 17-19.
86. *See id.* at 4, para. 20.
87. *See* Cotton Sector Strategies in West and Central Africa, *supra* note 29, at 13.
88. *See* Joint Proposal, *supra* note 9, at 4, para. 24.
89. *Id.*
90. *Id.* Other studies show that the removal of production and export subsidies by the United States and the EU would result in cotton prices 10.7 to 12.7 percent higher than in 2001/02, with the biggest beneficiaries being African cotton producers. *See* Baffes, *supra* note 20, at 19.
91. *See* Cotton Sector Strategies in West and Central Africa, *supra* note 29, at 13. An Oxfam study estimates that African producers lost foreign exchange earnings of $302 million. Oxfam estimates forgone foreign exchange earnings for the following SSA countries: Benin, $33 million; Burkina Faso, $28 million; Chad, $16 million; the Central African Republic, $2 million; Ethiopia, $5 million; Guinea, $3 million; Madagascar, $3 million; Malawi, $2 million; Mali, $43 million; Mozambique, $6 million; Somalia, $1 million; Sudan, $17 million; Togo, $16 million; Uganda, $5 million; Tanzania, $21 million; and Zambia, $8 million. *See* Oxfam Cotton Study, *supra* note 40, at 31.
92. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 224. Some estimates show that over the next 10 years "cotton prices would increase by an average of 12.7 per cent. World cotton trade would increase by 5.8 per cent, while Africa's cotton exports would increase by 12.6 per cent. *See id.*
93. *See* WTO, Ministerial Conference, Fourth Session, Ministerial Declaration Adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Ministerial Declaration] (deliberately avoiding the word "Round" in order to disassociate it at least verbally from the seemingly interminable, eight-year Uruguay Round).
94. Doha Ministerial Declaration, *supra* note 93, at 3, para. 13.
95. The trade ministers made the following commitment regarding progress on negotiations on trade in agriculture:

> Modalities for the further commitments, including provisions for special and

> differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

Id. at 3, para. 14.

96. *See* Joint Proposal, *supra* note 9.

97. *See* WTO, Agriculture Negotiations: Backgrounder, The Issues, and where we are now, at 69 (2004), *at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd20_cotton_e.htm (last visited August 15, 2004). See also, WTO, ANNUAL REPORT 2004 10-14 (2004), *available at* http://www.wto.org/english/res_e/reser_e/annual_report_e.htm. The Cotton Initiative received support from an unlikely ally, the International Rayon and Synthetic Fibres Committee. It is reported that the Director General of that Committee complained in July 2003 that cotton subsidies have depressed demand for substitute synthetic fibers, resulting in underutilization of capacity and frustrating legitimate expectations that man-made fibers would enjoy competitive advantages over cotton. *See* Baffes, *supra* note 20, at viii.

98. *See* Joint Proposal, *supra* note 9, at 1, paras. 2-3. For more on the internal reform initiatives undertaken by West and Central African nations, *see* Baffes, *supra* note 20, at 25-28.

99. *See* Joint Proposal, *supra* note 9, at 1, para. 4. *See also* INT'L COTTON ADVISORY COMMITTEE, REPORTS ON INJURY DUE TO LOW COTTON PRICES 2 (2002)(" The level of injury caused to [cotton] producers and export dependent countries by the collapse of cotton prices is severe.... [T]he dominant cause of current low prices seems to be government measures affecting cotton production and trade. The most recent report by the Secretariat, *Production and Trade Policies Affecting the Cotton Industry*, suggests that a removal of direct subsidies worldwide would have a net positive effect of 31 cents per pound of lint on average cotton prices in 2001/02.").

100. *See* Joint Proposal, *supra* note 9, at 2, para. 8. As they further observed in this connection:

> The elimination of subsidies for cotton production and export is the only specific interest of WCA cotton-producing countries in the Doha Round. Any outcome of the negotiations that does not help to ensure respect for the principles of free trade and competition in global trade in cotton will be seen by the WCA countries as unbalanced, unfair and contrary to the objectives approved by all the Member countries at Doha. *Id.*

101. *Id.* at 2, para. 6.

102. *Id.* at 2, para. 7 (emphasis in original).

103. *See id.* at 7, para. 38 ("the form of financial compensation for cotton-producing LDCs [shall be in an amount sufficient] to offset the injury caused by support for production and export. Such financial compensation should be calculated in proportion to the subsidies granted by countries which support their cotton production. It will decrease (terminate) as and when these subsidies are reduced (abolished)."). The Joint Proposal offered the following specifics on calculating the amount of compensation, including compensation for the indirect harm caused to persons

dependent upon cotton but who are not themselves cotton growers (e.g., the transportation sector and ginning operations):

> • When defining the total amount of compensation, the direct and indirect effects of support for cotton production on the economies of LDCs should be taken into account.
> • The compensation should be sufficiently high to constitute an additional incentive to decrease or phase out subsidies as soon as possible.
> • The unit amount and the total amount of subsidies should be taken into account when dividing the compensation among countries which subsidize production.

Id. at 7, para. 39. The specific modalities for implementing the elimination of cotton subsidies and transitional compensation were proposed in a later document. *See* WTO, Ministerial Conference, Fifth Session, *Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, Proposal on Implementation Modalities,* TN/AG/GEN/6 (Aug. 4, 2003). Subsidies would be eliminated in equal annual reductions over a three-year period. Compensation would be paid in an amount equal to the losses suffered; assessed on the basis of subsidizing countries' respective shares in the total amount of subsidies granted to cotton worldwide, as published in the annual statistics of the International Cotton Advisory Committee (ICAC); and allocated to each beneficiary LDC on the basis of its respective share in total cotton production by that group of countries, as published in the ICAC annual statistics. *See id.* at 2, 3, paras. 7, 17.

104. The Joint Proposal explains why these traditional forms of WTO compensation are inappropriate under the circumstances,

> In principle, compensation in the WTO is through two instruments. First of all, supplementary concessions are offered for other products. This mechanism cannot apply to cotton-producing LDCs because they only have a few other export products and, in most cases, these already receive preferential access. Secondly, customs tariffs are increased on imports. The signatory countries are not in favour of this solution because it rights a wrong through another wrong. In addition, this solution has a greater impact on countries which impose such customs tariffs inasmuch as the majority of their imports are essential for development and poverty reduction. These two instruments are therefore counterproductive for cotton-producing LDCs.

Joint Proposal, *supra* note 9, at 7, para. 37.

105. *See* WTO, Ministerial Conference, Fifth Session, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, WT/MIN(03)/W/2 (Aug. 15, 2003).

106. *See* Agriculture Negotiations: Backgrounder, Cotton Initiative, *supra* note 97.

107. See id.

108. Paragraph 27 of the Draft Cancún Ministerial Text (also known as the "Derbez Text" after the

chair of the Fifth Ministerial Conference) provides:

We recognise the importance of cotton for the development of a number of developing countries and understand the need for urgent action to address trade distortions in these markets. Accordingly, we instruct the Chairman of the Trade Negotiations Committee to consult with the Chairpersons of the Negotiating Groups on Agriculture, Non-Agricultural Market Access and Rules to address the impact of the distortions that exist in the trade of cotton, man-made fibres, textiles and clothing to ensure comprehensive consideration of the entirety of the sector. The Director-General is instructed to consult with the relevant international organizations including the Bretton Woods Institutions, the Food and Agriculture Organization and the International Trade Centre to effectively direct existing programmes and resources toward diversification of the economies where cotton accounts for the major share of their GDP. Members pledge to refrain from utilizing their discretion within Annex A, paragraph 1 to avoid making reductions in domestic support for cotton.

World Trade Organization, Draft Cancún Ministerial Text, para. 27 (2d rev., Sept. 13, 2003), *available at* http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm (last visited August 15, 2004).

109. *See generally* Cancún Ministerial Collapses Over Singapore Issues, INSIDE U.S. TRADE (Sept. 15, 2003).

110. *See* WTO African Regional Workshop on Cotton, Cotonou, Republic of Benin—23-24 March 2004, *Summary Conclusions,* WT/L/564 (March 31, 2004).

111. *See id.* at 3, paras. 7-11.

112. *See id.* at 3, para. 11.

113. *See id.* at 5.

114. *See id.* at 4-5.

115. *See, e.g., WTO Members Make No Progress on Agriculture Ahead of Ministers Meeting*, INSIDE U.S. TRADE (July 26, 2004); *WTO Ag Draft May Have to be Further Weakened to Achieve Deal,* INSIDE U.S. TRADE (July 23, 2004); *Food Importers Offer Little, But Are Unlikely to Block WTO Farm Deal,* INSIDE U.S. TRADE (July 9, 2004). The United States and the EU squared off with their most contentious rivals, the G20 group of developing countries. Some minor grousing also was directed at them by the G10 group of net food importers. See id. The G-20, led by Brazil and India, consists of Argentina, Bolivia, Brazil, Chile, China, Costa Rica, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand, Tanzania, Venezuela, and Zimbabwe. The G10 consists of Bulgaria, Iceland, Israel, Japan, Liechtenstein, Mauritius, Norway, South Korea, Switzerland, and Taiwan.

116. *See Overall WTO Framework Delayed as Fears Grow Over G90 Objections*, INSIDE U.S. TRADE (July 9, 2004)("The four West African countries, Benin, Chad, Mali and Burkina Faso, are all G90 members, and last week none of the four signaled explicitly that they could accept cotton being discussed in the context of agriculture.").

117. *See* WTOACP Ministerial Declaration on the Doha Work Programme, *Communication from Trinidad and Tobago,* WT/L/578, at 6, para. 17 (July 26, 2004) ("Cotton continues to be a vital issue for ACP [African, Caribbean, and Pacific] States and requires an urgent solution. In this regard, the ACP States underscore that it should be treated as a stand-alone issue and not as a part of the overall negotiations on agriculture."); *G90 Maintains Tough Line on Cotton,*

Otherwise Signals Flexibility, INSIDE U.S. TRADE (July 16, 2004). The G90 consists of members of the African Union, the African, Caribbean and Pacific (ACP) group of countries, and the WTO's least developed countries. *See generally G90 Takes Hard Public Line on Doha Talks, But Observers Predict Flexibility*, INSIDE U.S. TRADE (June 25, 2004).

118. *See generally G90 Maintains Tough Line on Cotton, Otherwise Signals Flexibility*, INSIDE U.S. TRADE (July 16, 2004)("A developed country delegation source acknowledged cotton would appear to be the most difficult of the G90's demands to address considering U.S. opposition to considering cotton on its own.").

119. *See generally G90 Takes Hard Public Line on Doha Talks, But Observers Predict Flexibility*, INSIDE U.S. TRADE (June 25, 2004)("The U.S., EU and most other WTO members, as well as WTO Director General Supachai Panitchpakdi, have called on African countries to agree to negotiate cotton within the context of the agriculture negotiations, and have worked to prevent cotton from contributing to a failure in July similar to last year's Cancun ministerial.").

120. *See id.* ("A Geneva delegation source outside the G90 said African countries do not want to be seen as blocking a framework agreement over the issue of cotton, particularly since a WTO panel ruled this spring in favor of Brazil's challenge of U.S. cotton subsidies . . . ").

121. *See* Decision Adopted by the General Council on 1 August 2004, *supra* note 4.

122. *See id.* at A-1, Annex A, Framework for Establishing Modalities in Agriculture.

123. *See id.* at 1, para. 1(b).

124. *See NCC Has Concerns with WTO Framework Text*, *available at* http://www.cotton.org/news/2004/WTORESPONSE.cfm (last visited August 16, 2004)("NCC President and CEO Mark Lange added that 'singling out cotton as a separate issue is both unfair and inappropriate. Unfortunately, this initiative has been influenced by poor economic analysis. Particular emphasis on U.S. cotton is unjustified and unwarranted - the world cotton market is much more than the United States. The U.S. has not increased cotton production, but we have seen a surge in foreign production, particularly in China and Brazil.'"); *U.S., African Deal on Cotton Included in WTO Framework Package*, INSIDE U.S. TRADE (Aug. 6, 2004)("The National Cotton Council criticized the agreement in an Aug. 2 statement as singling out cotton for special treatment . . . "); *U.S., African Countries Strike Deal on Cotton Language*, INSIDE U.S. TRADE (July 30, 2004); *Thomas Calls on U.S. to Reject Demands for Cotton Concessions*, INSIDE U.S. TRADE (July 30, 2004). Interestingly, a provision was included in the Morocco-U.S. Free Trade Agreement that exempts 1,067,257 kilograms of SSA cotton annually from the normal "fiber-forward" rule of origin that is applied to cotton textiles and clothing from Morocco (i.e., in order to be of Moroccan origin the fiber from which cotton yarn or thread is produced normally must also be from cotton grown in Morocco or the United States). *See* Final Text of United States-Morocco Free Trade Agreement, art. 4.3, ¶ 15, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_text/asset_upload_file837_3828.pdf. (last visited Sept. 4, 2004). Such cotton must originate in an SSA LDC that is an AGOA beneficiary country and the cotton must be carded or combed. The U.S. cotton industry did not object to this modest exemption. *See Morocco FTA Seeks to Boost Cotton Exports from Sub-Saharan Africa*, INSIDE U.S. TRADE (April 9, 2004). This exemption guarantees neither a Moroccan market nor huge profits.

125. *See U.S., African Deal on Cotton Included in WTO Framework Package,* INSIDE U.S. TRADE (Aug. 6, 2004)("The agreement also does not commit the U.S. to any additional commitments on cotton above what it will do for other crops, [Chief U.S. Agriculture Negotiator Allen]

Johnson said."). The cotton sub-committee was formally established on Novermber 19, 2004. *See WTO Establishes Cotton Subcommittee for Agriculture Talks*, WTO NEWS: 2004 News Items, Nov. 19, 2004.

126. *See* Decision Adopted by the General Council on 1 August 2004, *supra* note 4, at 4, para. 3. Indeed, the next Ministerial Conference (the occasion for "inking" the deal, if any, or at least wrapping up the negotiations) is not scheduled until December 2005 in Hong Kong. *See id.*; *Jara Highlights Possible Goals, Hurdles for Hong Kong Ministerial*, INSIDE U.S. TRADE (Oct. 22, 2004).

127. *See* WTO Reaches Framework Deal, Sets New Ministerial Past Original Doha Deadline, INSIDE U.S. TRADE (Aug. 1, 2004).

128. William R. Cline, The Future of World Trade in Textiles and Clothing 145 (1987).

129. *Id.* at 146.

130. *See* BHALA & KENNEDY, *supra* note 64, at 1217.

131. *See id.*

132. See id.

133. Arrangement Regarding International Trade in Cotton Textiles, July 21, 1961, 12 U.S.T. 1675.

134. Long-Term Arrangement Regarding International Trade in Cotton Textiles, Feb. 9, 1962, 13 U.S.T. 2673; extended by Protocol, May 1, 1967, 18 U.S.T. 1337; extended by Protocol, June 15, 1970, 21 U.S.T. 1970.

135. Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001. For a history of trade in textiles and clothing in the 20th century, *see* GENERAL AGREEMENT ON TARIFFS AND TRADE, TEXTILES AND CLOTHING IN THE WORLD ECONOMY 5, 62-65 (1984).

136. The Multifiber Arrangement (MFA) was renewed with modifications for four years in 1977, *see* Protocol Extending the Arrangement Regarding International Trade in Textiles, Dec. 14, 1977, 29 U.S.T. 2287; for four and a half years in 1981, *see* Protocol Extending the Arrangement Regarding International Trade in Textiles, Dec. 22, 1981, 33 U.S.T. 4516; and for an additional five years in 1986, *see* Protocol Extending the Arrangement Regarding International Trade in Textiles, BISD, 33d Supp. 7 (1986). During the Uruguay Round negotiations, the MFA was extended for 17 months until December 31, 1992, to coincide with the expected date for the completion of the Uruguay Round negotiations. When that target date was missed, the MFA was extended twice, each time for one year, until December 31, 1994. Although the MFA itself expired with the entry into force of the Uruguay Round Agreement on Textiles and Clothing on January 1, 1995, the bilateral agreements negotiated pursuant to the MFA remain in force during the ten-year phaseout of MFA quotas. For other analyses of the MFA, *see* CLINE, *supra* note 128, at 148-68; VINOD K. AGGARWAL, LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE (1985); Gary P. Sampson, Market Disturbances and the Multifibre Arrangement, in ISSUES IN WORLD TRADE POLICY: GATT AT THE CROSSROADS 61 (R.H. Snape ed. 1986); Brenda A. Jacobs, *Renewal and Expansion of the Multifiber Arrangement*, 19 L. & POL'Y INT'L BUS. 7 (1987); Craig R. Giesse & Martin J. Lewin, *The Mulitfiber Arrangement: "Temporary" Protection Run Amuck*, 19 L. & POL'Y INT'L BUS. 51 (1987); U.S. INT'L TRADE COMM'N, THE HISTORY AND CURRENT STATUS OF THE MULTIFIBER ARRANGEMENT (USITC Pub. 850 1978); Bhagirath L. Das, *The GATT Multi-Fiber Arrangement*, 17 J. WORLD TRADE L. 95 (1983); Henry R. Zheng, *The Fourth Multifibre Arrangement and the New Legal Regime for International Trade in Textiles*, 25 COLUM. J. TRANSNAT'L L. 301 (1987). For a table describing the similarities and differences

among the Short Term Arrangement, the Long Term Arrangement, and MFA I-IV, *see* Vincent Cable, *Textiles and Clothing, in* WORLD BANK, THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 180, 182 (J. Michael Finger & Andrzej Olechowski eds. 1987).

137. *See* BHALA & KENNEDY, *supra* note 64, at 1218.
138. See id.
139. *See id.* at 1219.
140. See id.
141. *See id* at 1218.
142. *See id* at 1219.
143. *See* Phillip Evans & James Walsh, The EIU Guide to the New GATT 25 (1994).
144. *See* Robert C. Cassidy, Jr. & Stuart M. Weiser, *Uruguay Round Textiles and Clothing, in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 223 (Terence P. Stewart ed. 1996); Jennifer Hillman, *Trade Activities Involving Textiles and Clothing, in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 879 (Harvey M. Applebaum & Lyn M. Schlitt eds. 1995); Sanjoy Bagchi, *The Integration of the Textile Trade into GATT*, 28 J. WORLD TRADE 31 (1994); Maarten Smeets, *Main Features of the Uruguay Round Agreement on Textiles and Clothing, and Implications for the Trading System*, 29 J. WORLD TRADE 97 (1995); Kitty G. Dickerson, *Textile Trade: The GATT Exception*, 11 ST. JOHN'S J. LEGAL COMMENT. 393 (1996).
145. Agreement on Textiles and Clothing (ATC) art. 1.
146. *Id.* art. 2.6.
147. *Id.* art. 2.8(a).
148. *Id.* art. 2.8(b).
149. *Id.* art. 2.8(c).
150. *Id.* art. 9.
151. It is estimated that the average duty on clothing imports to the United States is 17.5 percent *ad valorem*. *See* Baffes, *supra* note 20, at 18.
152. *See* ATC, *supra* note 145, at art. 2.5.
153. *Id.* art. 2.13.
154. *Id.* art. 2.14(a).
155. *Id.* art. 2.14(b). To illustrate this "growth on growth" quota growth rate, if the MFA annual quota growth rate was six percent annually, then for Stage 1 the annual quota growth rate was 6.96 percent (.06 + (.06 x .016)). For Stage 2, the annual quota growth rate would be 8.7 percent (.0696 + (.0696 x .25)); and for Stage 3, the annual quota growth rate would be 11.049 percent (.087 + (.087 x .27)).
156. *Id.* art. 4.2.
157. *See* Agreement on Safeguards, Apr. 15, 2004, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm (last visited Sept. 10, 2004).
158. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, 61 Stat. A-11.
159. See WTO DG consults members on possible emergency meeting to discuss textiles and clothing adjustment challenges, WTO Press Release/384 (Aug. 4, 2004), available at

http://www.wto.org/english/news_e/pres04_e/pr384_e.htm (last visited Sept. 4, 2004).

160. *See, e.g.*, Hildegunn Kyvik Nordås, The Global Textile and Clothing Industry post the Agreement on Textiles and Clothing 14 (WTO 2004)("a number of restricted members complain that quota increases have not significantly improved market access so far").

161. *See U.S. Textile Groups Begin Campaign to Extend Textile Quotas in WTO, China Update*, INSIDE U.S. TRADE (March 12, 2004); *Senate, House Members Support Extension of Textile Quotas Past 2004, China Update*, INSIDE U.S. TRADE (June 11, 2004).

162. *See* U.S. Int'l Trade Comm'n, Textiles and Apparel: Assessment of the Competitiveness of Certain Foreign Suppliers to the U.S. Market, Inv. No. 332-448 (Pub. 3671 Jan. 2004). The World Trade Organization conducted a parallel study which it reported in 2004. *See* The Global Textile and Clothing Industry post the Agreement on Textiles and Clothing, *supra* note 158, at 34 ("Most analyses of the impact of the phasing out of the ATC conclude that China and India will come to dominate world trade in textiles and clothing, with post-ATC market shares for China alone estimated at 50 percent or more. This study replicates those predictions . . .").

163. The 2004 WTO study on the impact of the implementation of the ATC in the EU and the combined Canada/United States market corroborates the ITC's conclusion:

> Both India and China will almost double their market share [in the EU], and China will be the single largest exporter . . . while Africa, the United States/Canada, Turkey, Central and Eastern European countries and richer Asian countries and territories such as Republic of Korea and Chinese Taipei will lose market share. . . .
>
> Following the elimination of quotas, China increases its market share [of textile exports to the United States and Canada] by about 50 percent. The list of the 10 largest exporters remains the same, but the ranking has changed. We also notice that the combined market share of smaller exporters has increased. . . . Other countries losing market shares are African countries that have had preferential access to the market before the phasing out of quotas and Latin American countries. . . .
>
> [In the case of clothing] the impact is much more dramatic. China and India combined take 65 percent of the [U.S./Canada] export market – China triples its market share while India's market share is quadrupled. All others lose market share and the largest losses are incurred by African countries and Mexico, whose market shares decline by close to 70 percent.

Global Textile and Clothing Industry post the Agreement on Textiles and Clothing, *supra* note 158, at 28, 29, 30.

164. *See* ITC TEXTILES AND APPAREL REPORT, *supra* note 162, at xi.

165. See id.

166. See id.

167. 19 U.S.C. §§ 2701-06.

168. *See* ITC TEXTILES AND APPAREL REPORT, *supra* note 162, at xi.

169. *See id.*; Global Textile and Clothing Industry post the Agreement on Textiles and Clothing, *supra* note 158, at 23.
170. *See* ITC TEXTILES AND APPAREL REPORT, *supra* note 162, at xi.
171. *See* ITC TEXTILES & APPAREL REPORT, *supra* note 162, at xii.
172. Turkey and Colombia also are considered capable suppliers for quick turnaround business. *See id.*
173. The International Cotton Advisory Committee is an association of 43 governments of cotton producing and consuming countries. Its broad-based membership includes Brazil, Burkina Faso, Chad, Japan, Mali, and the United Kingdom, and the United States. The Secretariat of the Committee publishes information related to world cotton production, supply, demand and prices, and provides technical information on cotton production technology. Additional information on the Committee is available at http://www.icac.org/icac/general/facts/english.html.
174. *See International Cotton Advisory Committee, Prices Declining*, ICAC Press Release, May 3, 2004, *available at* http://www.icac.org/icac/cotton_info/publications/Press/2004/pr_may_04.pdf.
175. *See* Baffes, *supra* note 20, at 18.
176. Pub. L. No. 200, 106th Cong., 2d Sess., 114 Stat. 251 (2000). *See* H.R. Conf. Rep. No. 606, 106th Cong., 2d Sess. (2000), *reprinted in* 2000 U.S.C.C.A.N. 323. For an analysis and critique of AGOA, *see* J.M. Migai Akech, *The African Growth and Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U.J. INT'L L. & POL. 651, 663-85 (2001); Rebecca Trent, *Implications for Foreign Direct Investment in Sub-Saharan Africa under the African Growth Opportunity Act*, 23 NW. J. INT'L L. & BUS. 213 (2002).
177. Pub. L. No. 210, 107th Cong., 2d Sess., 116 Stat. 1038 (2002).
178. Pub. L. No. 274, 108th Cong., 2d Sess., 118 Stat. 823 (2004).
179. *See* Pub. L. No. 200, 106th Cong., 2d Sess., 114 Stat. 252, §103 (2000).
180. 19 U.S.C. §§ 2461-65. For more on the GSP program, *see* BHALA & KENNEDY, *supra* note 64, at 444-69.
181. The U.S. International Trade Commission and the Office of the U.S. Trade Representative both publish an annual report on U.S. trade and investment with sub-Saharan Africa. *See, e.g.,* U.S. Int'l Trade Comm'n, *U.S. Trade and Investment with Sub-Saharan Africa, Fourth Annual Report*, Inv. No. 332-415 (Pub. 3650 Dec. 2003); Office of the U.S. Trade Representative, *2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act* (May 2004). AGOA mandates annual reports to Congress through 2008 on U.S. trade and investment policy in Africa and implementation of the Act. *See* 19 U.S.C. § 3705. The U.S. Government maintains a website on the African Growth and Opportunity Act (AGOA), *available at* www.agoa.gov.
182. *See* 19 U.S.C. § 2466a(b)(1). The 48 eligible countries are listed in 19 U.S.C. § 3706.
183. *See* World Trade Organization, Committee on Trade and Development, *Generalized System of Preferences, Notification by the United States*, WT/COMTD/N/1/Add.3 (March 1, 2001).
184. *See* H.R. Rep. No. 501, 108th Cong., 2d Sess. 9 (2004), *reprinted in* 2004 U.S.C.C.A.N. 758.
185. *See id.*; World Trade Organization, Committee on Trade and Development, *Generalized System of Preferences, Notification by the United States*, WT/COMTD/N/1/Add.3 (March 1, 2001).
186. *See* 19 U.S.C. § 2463(c)(2)(A), (D).

187. The eligible countries are Angola, Benin, Botswana, Cameroon, Cape Verde, Chad, Republic of the Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. *See* Presidential Proclamation *See also* White House, Office of the Press Secretary, Statement by the Deputy Press Secretary (Dec. 30, 2003). In 2003 the President removed the Central African Republic and Eritrea from the list of eligible countries. AGOA requires the President to determine annually whether sub-Saharan African countries are, or remain, eligible for benefits based on their progress in meeting criteria set out in the Act. These criteria include establishment of a market-based economy, the rule of law, the elimination of barriers to U.S. trade and investment, implementation of economic policies to reduce poverty, the protection of internationally recognized worker rights, and establishment of a system to combat corruption. Additionally, countries cannot engage in: i) violations of internationally recognized human rights, ii) support for acts of international terrorism, or iii) activities that undermine U.S. national security or foreign policy interests. *See* 19 U.S.C. § 3703.The other 11 SSA countries that are currently not designated as AGOA beneficiary countries are Burkina Faso, Burundi, Central African Republic, Comoros, Equatorial Guinea, Eritrea, Liberia, Somalia, Sudan, Togo, and Zimbabwe.
188. *See* Trade Act of 2002, Pub. L. No. 210, 107th Cong., 2d Sess., § 3108, 116 Stat. 1038 (2002).
189. *See* 19 U.S.C. §§ 2466b, 3721(b)(3)(A)(i).
190. *See* 19 U.S.C. § 3721(b)(3)(B)(i).
191. *See* U.S. Dep't of Commerce, Int'l Trade Admin., *U.S.-African Trade Profile* 3 (April 2004).
192. See id.
193. *See* U.S. Department of Commerce, National Trade Data, *available at* http://ese.export.gov/SCRIPTS/hsrun.exe/Distributed/ITA2003_NATIONAL/StateId/CQ379lbI iDuXY9XDcugMT0lrZn33G-48JR/HAHTpage/HS_Page4Chart.
194. See id.
195. *See* U.S.-African Trade Profile, *supra* note 191, at 1-2.
196. *See* U.S. Trade and Investment with Sub-Saharan Africa, supra note 181, at 6-14, 6-79.
197. *See id.* at 1-2, 111.
198. *See* World Trade Organization, *Background Statistical Sheet with Respect to Trade in Textiles and Clothing*, G/L/692, 77-80 (Sept. 20, 2004). The World Trade Organization has rank ordered countries that export clothing to the United States and to other countries. In 2003, the top three clothing exporters to the United States were China, Mexico, and Hong Kong, in that order. The following table lists the top 12 SSA countries that exported clothing to the United States in 2003, their overall rank in terms of share of total U.S. clothing imports, and their percentage share of total U.S. clothing imports:

Country	Rank	Percent Share
Lesotho	27	.59
Mauritius	31	.40
South Africa	35	.35
Madagascar	39	.30

Kenya	40	.28
Swaziland	45	.21
Namibia	57	.06
Malawi	64	.03
Botswana	79	.01
Zimbabwe	83	.01
Ghana	84	.01

See id. Fifteen other SSA countries (Mozambique, Uganda, Tanzania, Sierra Leone, Côte d'Ivoire, Nigeria, Cameroon, Mali, Mauritania, Senegal, Togo, Guinea, Gambia, Burkina Faso, and Niger) exported very small amounts of clothing to the United States in 2003, with individual percentage shares of such imports being less than .01 percent. *See id.* South Africa is the only SSA nation that exported more than a de minimis amount of textiles to the United States in 2003. It ranked 26th overall, with a .20 percent share of total U.S. textile imports. *See id.* at 27-31.

199. The rule of origin for non-textile and clothing imports is 35-percent SSA value. In addition, 15 percent of the value of the imported product can be attributed to inputs originating in the United. The AGOA rule of origin provides:

> The duty-free treatment provided under paragraph (1) shall apply to any article described in that paragraph that meets the requirements of [19 U.S.C.] section 2463(a)(2) of this title, except that--
> (A) if the cost or value of materials produced in the customs territory of the United States is included with respect to that article, an amount not to exceed 15 percent of the appraised value of the article at the time it is entered that is attributed to such United States cost or value may be applied toward determining the percentage referred to in subparagraph (A) of [19 U.S.C.] section 2463(a)(2) of this title; and
> (B) the cost or value of the materials included with respect to that article that are produced in one or more beneficiary sub-Saharan African countries or former beneficiary sub-Saharan African countries shall be applied in determining such percentage.

19 U.S.C. § 2466a(b)(2) (2004).

200. It is estimated that the average duty on clothing imports to the United States is 17.5 percent *ad valorem*. *See* Baffes, *supra* note 20, at 18. However, U.S. duty rates on imported clothing made of cotton tend to be one-half or less than the duty rates for clothing made of man-made fibers. For example, the duty rate for a women's cotton blazer is 9.4 percent *ad valorem*. *See* HTS 6204.32.20. That same item made of artificial fibers carries a duty rate of 27.3 percent *ad valorem*. *See* HTS 6204.39.30. The duty rate for a women's cotton dress is 8.4 percent *ad valorem*. *See* HTS 6204.42.30. That same item made of artificial fibers carries a duty rate of 16 percent *ad valorem*. *See* HTS 6204.44.40.

201. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, supra note 181, at 123,

Annex A.The 24 countries eligible for textile and clothing benefits are Benin, Botswana, Cameroon, Cape Verde, Côte d'Ivoire, Ethiopia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. In order to qualify for the textile and clothing benefits, beneficiary countries must first establish that they have effective visa systems to prevent illegal transshipment and use of counterfeit documentation and that they have instituted required enforcement and verification procedures. *See* 19 U.S.C. § 3722 (2004).

202. *See* 19 U.S.C. § 3721(b) (2004).

203. There are four steps involved in processing natural fibers and making them into a finished item. First, the fiber is harvested. Second, the fiber is spun into yarn. Third, the yarn is woven or knit into fabric. Fourth, the fabric is cut and sewn into clothing (e.g., shirts and blouses) and other made-up textile articles (e.g., bedsheets and towels). *See* ITC TEXTILE & APPAREL REPORT, *supra* note 162, at 1-2.

204. *See* H.R. REP. NO. 108-501, *supra* note 184, at 9.

205. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, supra note 181, at 5-6.

206. *See id.* at 5.

207. The AGOA III limitations of benefits provision provides:

> (i) In general
> Preferential treatment under this paragraph shall be extended in the 1-year period beginning October 1, 2003, and in each of the 11 succeeding 1-year periods, to imports of clothing articles in an amount not to exceed the applicable percentage of the aggregate square meter equivalents of all clothing articles imported into the United States in the preceding 12-month period for which data are available.
> (ii) Applicable percentage
> For purposes of this subparagraph, the term "applicable percentage" means--
>> (I) 4.747 percent for the 1-year period beginning October 1, 2003, increased in each of the 5 succeeding 1-year periods by equal increments, so that for the 1-year period beginning October 1, 2007, the applicable percentage does not exceed 7 percent; and
>> (II) for each succeeding 1-year period until September 30, 2015, not to exceed 7 percent.

19 U.S.C. § 3721(b)(3)(A) (2004).

208. AGOA defines the term "lesser developed beneficiary sub-Saharan African country" as

> (I) a beneficiary sub-Saharan African country that had a per capita gross national product of less than $1,500 in 1998, as measured by the International Bank for Reconstruction and Development;
> (II) Botswana; and
> (III) Namibia.

Id. § 3721(b)(3)(B)(iii)(I)-(III).

209. AGOA III provides the following "Special Rule" for lesser-developed SSA countries:

> (i) In general
> Preferential treatment under this paragraph shall be extended though September 30, 2007, for clothing articles wholly assembled, or knit-to-shape and wholly assembled, or both, in one or more lesser developed beneficiary sub-Saharan African countries, regardless of the country of origin of the fabric or the yarn used to make such articles, in an amount not to exceed the applicable percentage of the aggregate square meter equivalents of all clothing articles imported into the United States in the preceding 12-month period for which data are available.

Id. § 3721(b)(3)(B)(i).

210. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 5.

211. AGOA provides that "the term 'lesser developed beneficiary sub-Saharan African country' means a beneficiary sub-Saharan African country that had a per capita gross national product of less than $1,500 a year in 1998, as measured by the International Bank for Reconstruction and Development." 19 U.S.C. § 3721(b)(3)(B)(iii)(I)-(III) (2004).

212. The AGOA III Special Rule percentages are as follows:

> (I) 2.3571 percent for the 1-year period beginning October 1, 2003;
> (II) 2.6428 percent for the 1-year period beginning October 1, 2004;
> (III) 2.9285 percent for the 1-year period beginning October 1, 2005; and
> (IV) 1.6071 percent for the 1-year period beginning October 1, 2006.

Id. § 3721(b)(3)(B)(ii)(I)-(IV).

213. *See* H.R. REP. NO. 108-501, *supra* note 184,, at 10.

214. Under the Act, the President is authorized to proclaim duty-free and quota-free benefits for clothing that is both cut (or knit-to-shape) and sewn or otherwise assembled in beneficiary countries from fabric or yarns not formed in the United States or a beneficiary country, if the President has determined that such yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner and has extended such treatment. The Committee for the Implementation of Textile Agreements (CITA) has the authority to implement certain provisions of the Act's textile and clothing benefits. *See* 19 U.S.C. § 3721(b)(3)(C) (2004). These provisions include the determination of the annual cap on imports of clothing that is assembled in beneficiary countries from fabric formed in beneficiary countries from yarn originating either in the United States or in beneficiary countries. In Executive Order 13191, the President delegated to CITA authority to determine whether yarn or fabric cannot be supplied by the domestic industry in commercial quantities in a timely manner and to extend preferential treatment to clothing articles from such yarn or fabric. *See* Exec. Order No. 13,191, 66 Fed. Reg. 7,271 (Jan. 17, 2001). As of April 2004, seven commercial availability petitions had been approved, five denied, and two were under consideration. The types of products that receive duty-free treatment under AGOA are available at http://otexa.ita.doc.gov. CITA also is

authorized to impose a "tariff snapback" in the event that a surge in imports of eligible articles causes serious damage or threat thereof to domestic industry. As of mid-2004, there were no requests for such relief. *See* H.R. REP. NO. 108-501,*supra* note 184, at 10. CITA also is authorized to determine whether exporters have engaged in illegal transshipment and to deny benefits to such exporters for a period of five years. *See* Exec. Order No. 13,191, *supra* this note; 19 U.S.C. § 3721(b)(3)(C) (2004).

215. *See* U.S. Trade and Investment with Sub-Saharan Africa, Fourth Annual Report, *supra* note 181, at 2-3.

216. A bill was passed in the House in October 2004 that would grant Mauritius a one-year designation as a lesser-developed country for purposes of AGOA's third-country fabric provision. *See House Passes Miscellaneous Tariff Bill With Prospective Repeal of 1916 AD Act*, Inside U.S. Trade (Oct. 9, 2004). As of December 2003, the textile and clothing trade benefits were available to the 37 countries that the President designated as AGOA beneficiary countries, provided that these countries satisfy certain customs-related requirements, including adoption of procedures to prevent unlawful transshipments and the use of counterfeit documents. As of December 2003, 20 countries had met these requirements: Angola, Kenya, Mauritius, Botswana, Ethiopia, Lesotho, Madagascar, Malawi, Rwanda, South Africa, Swaziland, Uganda, Namibia, Zambia, Tanzania, Cameroon, Mozambique, Ghana, Senegal, and Cape Verde. *See U.S. Trade and Investment with Sub-Saharan Africa*, *supra* note 181, at 5-34.

217. AGOA III added ethnic printed fabrics to Category 9. *See* 19 U.S.C. § 3721(b)(6)(B) (2004).

218. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 6.

219. *See id.*

220. *See* 19 U.S.C. § 3702(8) (2004).

221. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 59-60.

222. *See* 19 U.S.C. § 3735(b)(1)-(2) (2004).

223. *See id.* § 3735(c).

224. *See id.* § 3740.

225. *See id.* § 3737(b)(3). For other U.S. AID activities in sub-Saharan Africa, see 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 37-40.

226. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 56-58.

227. *See* 19 U.S.C. § 3723 (2004).

228. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, supra note 181, at 61. The parties intend to conclude negotiations by December 2004. See Office of the U.S. Trade Representative, Free Trade with Southern Africa: Building on the Success of AGOA (June 30, 2003), *available at* http://www.ustr.gov/Document_Library/Fact_Sheets/2003/Free_Trade_with_Southern_Africa_Building_on_the_Success_of_AGOA.html.

229. *See* 19 U.S.C. § 3724 (2004).

230. *See id.* § 3731.

231. *See* INT'L MONETARY FUND & INT'L DEVELOPMENT ASS'N, HEAVILY INDEBTED POOR COUNTRIES (HIPC) INITIATIVE -- STATUS OF IMPLEMENTATION (Sept. 2003), *available at* http://www.imf.org/external/np/hipc/2003/status/091203.pdf (last visited Aug. 27, 2004); UNCTAD LDC REPORT 2004, *supra* note 12, at 19.

232. *See id.*

233. *See* Heavily Indebted Poor Countries (HIPC) Initiative -- Status of Implementation, *supra* note 231, at 8.

234. *See* Eric J. Boos, *Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and Its Effects on the Least Developed Countries of Sub-Saharan Africa*, 11 TUL. J. INT'L & COMP. L. 181, 211 (2003).

235. 19 U.S.C. § 3732 (2004).

236. *See id.* § 3733(b)(3)-(4). OPIC is currently providing $1.2 billion in financing and political risk insurance to 42 projects in the region. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 50-51.

237. *See* 19 U.S.C. § 3734(a). The Ex-Im Bank can finance the purchase by SSA buyers of U.S. textile manufacturing equipment; U.S. fabric, yarn, and thread for production of clothing; and U.S. raw materials for the production of non-textile and clothing goods. In FY 2003 the Ex-Im Bank supported 152 transactions in 20 SSA countries for $643 million. *See 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act*, *supra* note 181, at 52-53.

238. *See* U.S.-African Trade Profile, *supra* note 191, at 6-7.

239. *See* 19 U.S.C. § 3738 (2004).

240. *See id.* § 3739. In 2003 President Bush announced a five-year, $15 billion initiative for AIDS, tuberculosis, and malaria relief, the bulk of which is directed to the hardest hit countries of sub-Saharan Africa. *See 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act*, *supra* note 181, at 48-49.

241. *See Canada Moves Forward with Compulsory Licensing Drugs Bill*, INSIDE U.S. TRADE (May 7, 2004).

242. WTO Ministerial Conference, Fourth Session, Declaration on the TRIPS Agreement and Public Health, adopted Nov. 14, 2001, WT/MIN(01)/DEC/2, para. 5 (Nov. 21, 2001).

243. WTO General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, WT/L/540 (Sept. 2, 2003).

244. 19 U.S.C. § 3741(b)(1)-(4) (2004).

245. *See* 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, *supra* note 181, at 42-47.

246. *See* S. REP. No. 108-55 (2003).

247. *See* G.A. Res. 2, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/2 (Sept. 18, 2000).

248. *See id.*

249. *See Millennium Challenge Account Is Launched*, Fact Sheet (Feb. 3, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/28848.htm (last visited Sept. 20, 2004). Future budgets

are expected to increase to $5 billion starting in fiscal year 2006. *See* H.R. REP. NO. 108-205, at 35 (2003)("The bill would authorize the appropriation of $1.3 billion in 2004, $3 billion in 2005, and $5 billion in 2006 to fund the corporation."); The Millennium Challenge Account, *available at* http://www.mca.gov/about_us/overview/index.shtml (last visited Sept. 23, 2004). The United States spends approximately $14 billion annually in foreign development assistance. *See* Nancy Birdsall, Isaac Shapiro & Brian Deese, *How Significant are the Administration's Proposed Increases in Foreign Development Aid?* 9, Table 3 (Center for Global Development/Center on Budget and Policy Priorities May 20, 2003), *available at* http://www.cgdev.org/docs/CGD-CBPP_aid_analysis.pdf (last visited Sept. 20, 2004).

250. *See* 22 U.S.C. § 7705(a). The Board of Directors of the Millennium Challenge Corporation identified 70 candidate countries as eligible to compete for funding for FY 2005. *See* Millennium Challenge Corporation, *Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in FY 2005 and Countries That Would be Candidates But For Legal Prohibitions* (2004), *available at* http://www.mca.gov/countries/candidate/FY05_candidate_report.pdf (last visited Sept. 20, 2004). Of those 70 countries, 33 are sub-Saharan African nations, including Benin, Burkina Faso, Chad, and Mali.

251. *See* 22 U.S.C. §§ 7705, 7709(a) (2004).

252. *See id.* §§ 7706, 7709(b). The Act provides the following criteria for a candidate country to be selected as an eligible country:

> (b) CRITERIA.--A candidate country should be considered to be an eligible country for purposes of this section if the Board determines that the country has demonstrated a commitment to—
>
> (1) just and democratic governance, including a demonstrated commitment to—promote political pluralism, equality, and the rule of law; respect human and civil rights, including the rights of people with disabilities; protect private property rights; encourage transparency and accountability of government; and combat corruption; economic freedom, including a demonstrated commitment to economic policies that—
>
> A) encourage citizens and firms to participate in global trade and international capital markets;
>
> (B) promote private sector growth and the sustainable management of natural resources;
>
> (C) strengthen market forces in the economy; and
>
> (D) respect worker rights, including the right to form labor unions; and investments in the people of such country, particularly women and children, including programs that—
>
> (A) promote broad-based primary education; and
>
> (B) strengthen and build capacity to provide quality public health and reduce child mortality.

Id. at § 7706(b).

253. *See id.* at §§ 7706(c), 7707, 7709(d).

254. The elements of an MCA Compact are set forth in Section 609(b) of the Act:

(b) ELEMENTS.—
IN GENERAL.--The Compact should take into account the national development strategy of the eligible country and shall contain—
(A) the specific objectives that the country and the United States expect to achieve during the term of the Compact;
(B) the responsibilities of the country and the United States in the achievement of such objectives;
(C) regular benchmarks to measure, where appropriate, progress toward achieving such objectives;
(D) an identification of the intended beneficiaries, disaggregated by income level, gender, and age, to the maximum extent practicable;
(E) a multi-year financial plan, including the estimated amount of contributions by the Corporation and the country and proposed mechanisms to implement the plan and provide oversight, that describes how the requirements of subparagraphs (A) through (D) will be met, including identifying the role of civil society in the achievement of such requirements;
(F) where appropriate, a description of the current and potential participation of other donors in the achievement of such objectives;
(G) a plan to ensure appropriate fiscal accountability for the use of assistance provided under section 605;
(H) where appropriate, a process or processes for consideration of solicited proposals under the Compact as well as a process for consideration of unsolicited proposals by the Corporation and national, regional, or local units of government;
(I) a requirement that open, fair, and competitive procedures are used in a transparent manner in the administration of grants or cooperative agreements or the procurement of goods and services for the accomplishment of objectives under the Compact;
(J) the strategy of the eligible country to sustain progress made toward achieving such objectives after expiration of the Compact; and
(K) a description of the role of the United States Agency for International Development in any design, implementation, and monitoring of programs and activities funded under the Compact.

Id. § 7708(b). The duration of a Compact is not to exceed 5 years. *See id.* § 7708(j).

255. *See* S. REP. NO. 108-55, *supra* note 246, at 6.
256. *See* 22 U.S.C. § 7704(b)-(c) (2004).
257. *See Millennium Challenge Account Is Launched*, Fact Sheet (Feb. 3, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/28848.htm (last visited Sept. 20, 2004).
258. *See* Millennium Challenge Corp., *Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY 2004* (2004), *available at* http://www.mca.gov/countries/selection/methodology_report.pdf (last visited Sept. 20, 2004); Millennium Challenge Corp., *Report on the Criteria and Methodology*

for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY 2005, 69 Fed. Reg. 53,090 (Aug. 31, 2004). The following table lists the criteria used by the MCC Board when making its eligibility determination:

Ruling Justly	**Encouraging Economic Freedom**	**Investing in People**
1. Civil Liberties 2. Political Rights 3. Voice and Accountability 4. Government Effectiveness 5. Rule of Law 6. Control of Corruption	1. Country Credit Rating 2. 1-year Consumer Price Inflation 3. Fiscal Policy 4. Trade Policy 5. Regulatory Quality 6. Days to Start a Business	1. Public Expenditures on Health as Percent of GDP 2. Immunization Rates: DPT3 and Measles 3. Public Primary Education Spending as Percent of GDP 4. Primary Education Completion Rate

See Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY 2004, supra this note, at 2.

259. *See* Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in FY 2005, *supra* note 250.

260. *See* Millennium Challenge Corp., Report on the Selection of MCA Eligible Countries for FY 2004 (May 6, 2004), *available at* http://www.mca.gov/countries/eligible/Report_Selection_FY04.pdf (last visited Sept. 20, 2004).

261. For a critique of the eligible-country selection process, *see* Sarah Lucas & Steve Radelet, *An MCA Scorecard: Who Qualified, Who Did Not, and the MCC Board's Use of Discretion* (Center for Global Development May 2004), *available at* http://www.cgdev.org/docs/MCAScorecard_0528.pdf (last visited Sept. 20, 2004).

262. An eligible country may enter into and have in effect only one Compact at any given time. An eligible country may enter into one or more subsequent Compacts after the expiration of an existing Compact. *See* 22 U.S.C. § 7708(k) (2004).

263. *See* Birdsall, Shapiro & Deese, *supra* note 250, at 4. The Bush Administration has been unable to fully fund the MCA. *See Clean Slate*, THE ECONOMIST, Oct. 2, 2004, at 73. *See also Foreign Aid with a Carrot*, CHRIS. SCI. MONITOR, Dec. 27, 2004, at 8. ("No [MCA] funds have been released . . . . For the '05 budget just passed by lawmakers, the administration asked for $2.5 billion, and got about half of that.").

264. *See* ITC TEXTILES & APPAREL REPORT, *supra* note 162, at K-3.

265. *See id.*

266. *See id.*

267. *See id.*

268. *Id.*

269. *Id.* Its principal markets include the European Union, the United States, and other African countries. Other countries with textile capacity include Madagascar, which has a fully

integrated supply chain for producing trousers from heavyweight fabrics, and Zambia, which exports cotton yarn to other SSA countries. *See id.*

270. *Id.*
271. *Id.*
272. *See id.*
273. *Id.* at K-4. Data presented in this appendix on U.S. imports of textiles and clothing from SSA countries are official statistics of the U.S. Department of Commerce (the data are available on the website of its Office of Textiles and Clothing (OTEXA), *available at* http://otexa.ita.doc.gov/catss.htm).
274. *See id.* at K-4.
275. *See id.* at K-3.
276. *See id.*
277. *See id* .at K-4.
278. *See id.*
279. *See id.* at K-3.
280. The South African textile sector is protected by duties ranging from 7.5 percent to 30 percent ad valorem. A major concern expressed by this industry is that South African tariffs of 22 percent on cotton textiles would not be adequate to protect the sector from a surge in Chinese exports following the phaseout of ATC quotas in 2005. *See* ITC TEXTILE & APPAREL REPORT, *supra* note 162, at K-3, K-4.
281. *See id.* at K-4.
282. *See id.*
283. *See id.* at K-5.
284. *See id.*
285. *See id.* The remaining AGOA clothing imports consisted of knit-to-shape clothing and clothing of fabrics not available in commercial quantities in the United States.
286. *See id.* at K-5.
287. *Id.* at 2-11.
288. *Id.*
289. *See id.* at 2-12.
290. *Id.* at 2-12.
291. *Id.*
292. *Id.*
293. *See id.* at 2-12.
294. *See id.* at 3-39.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at 3-40.
303. *Id.*

304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *See id.* Specifically, one buyer in Mauritius noted that it can take 43 days to ship clothing to the U.S. market. *See id.*
309. *See id.* Shipping is shorter in terms of time, and more frequent in occurrence, from southern Africa (about 21-30 days). *See id.* at 3-41.
310. *See id.* at 3-41.
311. *See id.* Other logistical problems also confront SSA. For example, one integrated manufacturing firm indicated that the entire cost base in Mauritius is high; buildings, electricity, fabrics, and labor are cheaper in China. The same firm noted that although wages were cheaper in Madagascar, other costs were more expensive, including electricity and transportation. In Lesotho, utility costs, including water and electricity, are higher than in competitor countries, and outages occur. One company operating in Mozambique indicated that operating a textile factory in that country would be extremely difficult owing to a lack of electricity and constant outages. *See id.*
312. *See id.* at 3-43.
313. *See id.* at 3-41 to 3-42.
314. *See id.* at 3-42.
315. *Id.*
316. *Id.*
317. *See id.* For example, one company estimated that the cost of a standard cotton chino fabric imported into Lesotho from China was 58 cents per square yard, compared with $1.57 per square yard for an identical fabric produced in South Africa. Some of this cost differential may be due to the appreciation of the rand against the U.S. dollar in 2002. *See id.*
318. *See id.*
319. *See id.* In particular, SSA has a deficit in the production of knitwear fabric. Mauritius, an important SSA fabric producer, has a deficit in the production of cotton yarn for knitwear, and Lesotho, a major exporter of knit shirts, does not produce yarn or fabric. Both countries have planned investments coming on line in the future, but these industries will take time to get into full-time operation. *See id.*
320. *See id.*
321. *Id.*
322. *Id.*
323. *See id.* The volume disadvantage was cited in particular in the context of the U.S. market, as the EU market generally demands smaller quantities on a flow basis. *See id.*
324. *Id.*
325. *Id.* at 3-43.
326. *Id.*
327. *Id.*
328. *Id.*
329. Kenya, Lesotho, Mauritania, Mauritius, and South Africa accounted for 87 percent of total SSA textile and clothing exports in 2001. *See U.S. Trade and Investment with Sub-Saharan Africa,*

supra note 181, at 5-32.

330. *See* ITC TEXTILE & APPAREL REPORT, *supra* note 162, at 3-20.

331. Boos, *supra* note 234, at 207.

332. Major SSA cotton exporters include Guinea Bissau, Malawi, and the West and Central African nations of Benin, Burkina Faso, Chad, Mali, and Togo. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 117 ("The ratio of agricultural exports to agricultural value-added is certainly not a perfect measure of the extent to which agricultural livelihoods are export-oriented. But it suggests that the direct involvement of people working in agricultural activities in LDCs in exports is rather limited, *with a few notable exceptions, including Guinea-Bissau, Malawi and the West African LDCs which export cotton.*" [emphasis added]). Supplementary export data is available at the U.S. Department of State's website, http://www.state.gov/p/af/ci/ (last visited July 13, 2004). In one month alone (March 2004), U.S. cotton exports totaled nearly $656 million, more than quadruple Mali's annual cotton exports by value in 2002. *See* U.S. Dep't of Agriculture, Foreign Agricultural Service, *available at* http://www.fas.usda.gov/cotton/circular/2004/07/master2.htm#Worldpercent20Cottonpercent20Outlook (last visited July 22, 2004). China and Turkey are the largest markets for U.S. cotton exports. *See id.*

333. *See 2004 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act, supra* note 181, at 16-17.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *See* U.S. Trade and Investment with Sub-Saharan Africa, *supra* note 181, at 2-11 to 2-13.

346. *See id.* at 2-19 to 2-22. The ITC also reports on export diversification into other agricultural products, motor vehicles and parts, and information technology products, although this expansion has been limited primarily to South Africa, Kenya, and Uganda. *See id.*

347. Certain endogenous factors (mostly state-owned monopsonies and monopolies) are at work that hurt the productivity and lower the income of WCA cotton producers. *See* Baffes, *supra* note 20, at 14-20. Reforms in this area have been undertaken or are underway. *See id.* at 25-28. *See generally* Takamasa Akiyama, John Baffes, Donald F. Larson & Panos Varangis, *Commodity Market Reform in Africa: Some Recent Experience* (World Bank Policy Research Working Paper 2995, March 2003).

348. *See* Baffes, *supra* note 20, at 22.

349. *See id.*at 22-23.

350. Baffes, *supra* note 20, at 26; *see supra* note 20 and accompanying text.

351. Baffes, *supra* note 20, at 26.

352. *Id.*
353. *See generally* Baffes, *supra* note 20, at 26.
354. *Id.* at 27-28.
355. *See id.*
356. *Id* at 28.
357. *See id.* As noted in the WTO's Trade Policy Review conducted for Benin in 2004:

> The timid progress made and the currently limited opportunities for diversification (towards cassava and yams) mean that the cotton subsector remains the dominant activity, providing the majority of export earnings, which explains Benin's position and sense of urgency during the Doha negotiating round. The wide-ranging reforms implemented in the cotton subsector have, *inter alia*, led to the liberalization of the marketing of seed cotton and cotton ginning, as well as the abolition of the practice of fixing the producer price for cotton (up to the 2001-2002 season) and preparations for privatizing the State enterprise SONAPRA.

WTO Secretariat, *Trade Policy Review, Benin*, WT/TPR/S/131 at 56 (May 24, 2004).

358. As noted in the WTO's Trade Policy Review conducted for Burkina Faso in 2004:

> The State has continued to reform the cotton subsector, the cornerstone of the rural economy. The Textile Fibres Company (SOFITEX), in which the State has become a minority shareholder, remains the leading operator in the subsector because of its de facto monopoly on the collection of seed cotton in the cotton-growing areas of the west and south-west. Since the first review, the objective of reform in the subsector has been to give producers a more important role in managing the subsector (with the State taking on a secondary role), to raise their incomes, and to establish a fund to provide support during periods when the selling price of cotton fibre on global markets does not cover production costs. The level of prices guaranteed to producers prior to the season depends on previous trends in global prices and the performance of SOFITEX. Another aim of the reform is to open up new cotton-growing areas in the centre and the east to allow the entry of new operators able to provide cotton producers with support, as SOFITEX did in the past. In the long term, the latter should be privatized.

WTO Secretariat, *Trade Policy Review, Burkina Faso*, WT/TPR/S/132 at 52 (May 24, 2004).

359. As noted in the WTO's Trade Policy Review conducted for Mali in 2004:

> Cotton production is still the cornerstone of trade in agricultural products, as well as of the manufacturing sector, and giving impetus to this activity plays a central role in alleviating poverty. The cotton subsector is still dominated by the Mali Textile Development Company (CMDT), in which the State is the largest shareholder. The CMDT has a legal monopoly on the ginning and marketing of cotton fibre in the cotton-growing area attributed to it. The

> objective of the ongoing reform in this subsector is the emergence of new operators and privatization of the CMDT in 2006. A new formula for determining producer prices that takes into account, *inter alia*, the global price for cotton was put into effect during the 2003-2004 season and the minimum price was raised in order to increase producers' incomes.

WTO Secretariat, *Trade Policy Review, Burkina Faso*, WT/TPR/S/133 at 50 (May 24, 2004).

360. *See* World Trade Organization, Committee on Trade and Development, *Participation of the Developing Countries in the Global Trading System*, WT/COMTD/W/100, Annex Chart 2, at 14 (June 19, 2002).
361. Economic Development in Africa: Trade Performance and Commodity Dependence, *supra* note 59, at 1-2.
362. *See id.* at 2-3.
363. *See id.* at 8 (citations omitted).
364. *See id.* at 58-59.
365. *See id.* The provision of subsidies is also working at cross-purposes with efforts to provide debt relief to countries in the region. In this connection the following UNCTAD observation is particularly salient:

> The World Bank estimates that in 2002 the world market price of cotton would have been more than 25 percent higher but for the direct support of the United States for its cotton producers. Furthermore, various estimates suggest that in 2002 cotton subsidies by the United States and the EU caused a loss of up to $300 million in revenue to Africa as a whole, which is more than the total debt relief ($230 million) approved by the World Bank and the IMF under the enhanced HIPC Initiative to nine cotton-exporting HIPCs in West and Central Africa in the same year. The cost of lower cotton prices to Mali, according to Oxfam, amounted to $43 million in 2001. This is exactly the amount of debt relief Mali received from the World Bank and the IMF in the same year under the enhanced HIPC Initiative. In Benin, Burkina Faso and Mali, about 11 million people depend on cotton as their only source of income, and in Benin, for example, lower cotton prices have been associated with a 4 percent rise in poverty in 2001.

Id. at 25-26 (footnotes omitted).

366. *See* Decision Adopted by the General Council on 1 August 2004, *supra* note 3, Annex A, para. 17 ("Members agree to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.").
367. *See* BHALA & KENNEDY, *supra* note 64, at 434-35, 800-05 (stating that LDCs are exempted from the SCM Agreement's prohibition on export subsidies); *See id.* at 434.
368. Direct payments received by cotton farmers under the 2002 Farm Act, although claimed to be exempt green box subsidies, were found by a WTO panel to be amber box subsidies because such payments did not satisfy the Annex 2, para. 6(b) criterion that decoupled farm support not

be conditioned on the type or volume of production. *See supra* note 64 and accompanying text.

369. Annex 2, paragraph 6, of the Agreement on Agriculture on decoupled farm support provides:

> 6. Decoupled income support
>
> (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.
> (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.
> (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
> (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.
> (e) No production shall be required in order to receive such payments.

370. *See* Baffes, *supra* note 20, at 32.
371. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 228.
372. *See id.*
373. *See id.*
374. The 2004 framework agreement on agriculture concluded by the WTO members identifies a category of "special products" for which special border measures could be imposed. However, such defensive measures are of little help to SSA countries hurt by the offensive use of domestic and export subsidies in developed countries that depress the price of cotton on world markets. The concept of "special product" could thus be expanded in recognition of the fact that for many LDCs, exports of commodity crops such as cotton are critical to their economic survival.
375. Given the existence of substitutes as well as equivalent products, such partial elimination of support should be considered a second-best solution to a more comprehensive approach. *See* UNCTAD LDC REPORT 2004, *supra* note 12, at 228. If this approach were adopted with the LDCs as the target group, product ranking would be of importance. The key strategic products, depending on the method of identification, would include, in alphabetical order, beans, beef and veal, cotton, garlic, maize, milk, onions, potatoes, rice, sheepmeat, sorghum, sugar and wheat. *See id.*
376. *See* Boos, *supra* note 234, at 216.
377. Economic Development in Africa: Trade Performance and Commodity Dependence, *supra* note 59, at 54.
378. *See* Boos, *supra* note 234, at 216.
379. *See* U.S. Trade and Investment with Sub-Saharan Africa, *supra* note 181, at 3-1.
380. *Id.*
381. For an analysis of the nine SSA regional trade arrangements, *see id.* at 3-3 to 3-21.
382. UNCTAD LDC REPORT 2004, *supra* note 12, at 257.
383. *Id.*

384. *Id.*
385. *See supra* notes 205-217 and accompanying text.
386. Report of the Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (April 7, 2004). As interpreted by the Appellate Body, the Enabling Clause does not prohibit granting different tariff treatment to products originating in different GSP beneficiary countries, provided that such differential treatment does not treat similarly circumstanced developing countries in a dissimilar manner.). Report of the Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 173-176 (April 7, 2004). Given that AGOA beneficiaries include a mix of both LDCs and developing countries, if an LDC or a developing country from outside the region were to complain, the United States might be hard pressed to successfully defend AGOA. Thus, as a regional trade preference program, AGOA itself may be unlawful under the Enabling Clause. *See* Decision of November 18, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD, 26th Supp. 203 (1979). Moreover, AGOA has not received a WTO waiver from GATT obligations as have the other U.S. regional trade preference programs. *See, e.g.*, Decision of the WTO General Council of Nov. 15, 1995, WT/L/104 (granting the United States a waiver for the Caribbean Basin Economic Recovery Act). *See also Zoellick Says WTO Decision on EU Preferences Puts AGOA at Risk*, Inside U.S. Trade (Dec. 12, 2003).
387. Decision of November 18, 1979 on Differential and More Favorable Treatment, *supra* note 386.
388. *See* Joint Proposal, *supra* note 9, at 3, para. 16 ("Support given to the cotton sector by the United States, China and the European Union was estimated at US$ 6 billion in 2001/02, which corresponds in value terms to all global exports during that year [footnote omitted].").
389. *See* Cotton Sector Strategies in West and Central Africa, supra note 29, at 13.
390. Agreement on Subsidies and Countervailing Measures, April 15, 1994, art. 7.8, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).