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Carbbean Basin Initiative: Ten Years of Trade Preference

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CARIBBEAN BASIN INITIATIVE: TEN YEARS OF TRADE PREFERENCE

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I. INTRODUCTION

January 1, 1994 marks the start of the second decade of trade preferences under the Caribbean Basin Initiative (CBI). When he first announced U.S. plans for CBI, President Reagan heralded CBI as "a program that represents a long-term commitment to the countries of the Caribbean and Central America to make use of the magic of the marketplace, the market of the Americas, and to earn their own way towards self-sustaining growth."[1]

As CBI passes this 10-year milepost, it seems timely to reflect on how the Initiative has evolved during its first decade. This article takes an in-depth look at the structure and operation of the Caribbean Basin Economic Recovery Act (the "Act"), which is the implementing legislation for CBI. In addition to describing how CBI operates within the larger context of U.S. foreign trade policy, this article also explores some of the issues that may determine how effective CBI can be in the future.

II. CBI ORIGINS, GOALS, AND BENEFICIARIES

In unveiling plans for CBI in 1982, President Reagan outlined a broad-based program encompassing a number of public- and private-sector U.S. initiatives aimed to promote increased foreign and domestic investment in the Caribbean Basin countries, to diversify their economies, and to expand their exports. The economic initiatives of CBI, along with increased U.S. security assistance, formed the two pillars of a U.S. policy primarily designed to counter the expanding influence in the hemisphere of then-Soviet-backed Cuba.[2]

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1. President Reagan, speech before the Organization of American States, Washington, D.C., Feb. 24, 1982, *reprinted by* Cong. Res. Ser., Lib. of Cong, April 1982.

2. In addition to duty-free entry for eligible Caribbean products discussed in more detail in this Article, other CBI elements outlined by President Reagan included: U.S. economic assistance to aid private-sector development, a deduction on U.S. taxes for companies that

Specifically, the key goal of CBI was to modernize the region's agricultural sector and to encourage Caribbean producers and exporters to shift from relying on exports of a few low-value "traditional" products—such as sugar, bananas, coffee, cocoa—to developing a more diverse variety of higher-value "non-traditional" exports such as manufactured products.[3]

A. CBI and CBI-2

The Caribbean Basin Economic Recovery Act, which contains the statutory provisions that implement the trade-related aspects of the CBI, went into force on January 1, 1984.[4] As originally enacted, the Act was to last only until September 30, 1995.[5] The Caribbean Basin Economic Recovery Expansion Act of 1990 ("CBI-2") was signed into law on August 20, 1990.[6] In addition to expanding trade benefits under the Act, CBI-2 eliminated the 1995 termination date and effectively extended the program in perpetuity.[7]

For Caribbean exporters, the intended hallmarks of CBI were simplicity and ease of use. Many Caribbean products qualify for duty-free entry either under CBI or the U.S. Generalized System of Preferences (GSP).[8] However, GSP has a much more complex structure that subjects imports to statutory limits[9] that were seen to

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hold business conventions in qualifying Caribbean Basin countries to promote the development of the tourism sector; trade and investment financing, business development missions, technical assistance program; and support from other trading partners and multinational development institutions such as the Inter-American Development Bank and the World Bank. President Ronald Reagan, *Address Before the Permanent Council of the Organization of American States*, 18 WEEKLY COMP. PRES. DOC. 217-223 (Mar. 1, 1982).

3. LATIN AMERICAN/CARIBBEAN BUSINESS DEVELOPMENT CENTER, U.S. DEPT. OF COMMERCE, 1991 GUIDEBOOK: CARIBBEAN BASIN INITIATIVE at 7 (November 1990) [hereinafter 1991 GUIDEBOOK].

4. Pub. L. 98-67, title II, 97 Stat. 384, (codified at 19 U.S.C. 2701 et seq. Relatively minor amendments were made by Pub. L. 98-573, 99-514, 99-570, and 100-418. Hereinafter CBI ACT.

5. Actually, the Act only contains the trade-related provisions of CBI, even though it is often referred to as CBI itself.

6. Customs and Trade Act of 1990, Pub. L. 101-382, title II, 104 Stat. 629, 19 U.S.C. 2101 note. Hereinafter CBI EXTENTION ACT.

7. *Id.* at § 211 (19 U.S.C. 2706(b)), which repealed § 218 of the CBI ACT, *supra* note 4.

8. The U.S. GSP program provides duty-free tariff treatment to products of more than 140 developing countries. All CBI countries are also GSP beneficiaries. Legislative authority for the GSP was provided by the Trade Act of 1974, Title V (Pub. L. 93-618, 88 Stat. 2066 *et seq.*), as amended (19 U.S.C. 2461 *et seq.*). The GSP program became fully operational on Jan. 1, 1976, and was renewed by the Trade and Tariff Act of 1984, Title V (Pub. L. 98-573, 98 Stat. 8019) [hereinafter GSP ACT]. The program was extended through September 1994 as part of the CONFERENCE REPORT ON THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993 (H.R. REP. 103-213), 139 CONG. REC. H6030 (Aug. 4, 1993).

9. GSP beneficiaries can lose the right to export certain products to the United States under the program if they supply greater than 50 percent of the value of total U.S. imports of that product or if their exports exceed a specific annually adjusted dollar value. When these

disadvantage small, relatively inexperienced Caribbean producers and exporters.[10] CBI has none of these GSP complications or restrictions. Thus, all eligible Caribbean products, with the exception of a few agricultural products subject to quotas,[11] may be exported duty-free to the United States in unlimited quantities under CBI.

B. Country Eligibility Criteria

The Act names twenty-seven "countries and territories or successor political entities" that may be considered for CBI benefits.[12] Countries must be formally designated by the President to actually receive CBI benefits. There are currently twenty-four designated CBI countries.[13] To receive CBI designation, countries must sign an extradition agreement with the United States and must agree not to give preferential tariff treatment to products of any other industrialized country if such preference adversely effects the United States.[14]

CBI countries also face several other restrictions. The violation of any of these restrictions may be cause for termination of benefits; however, the President may waive these restrictions for reasons of national economic or security interest of the United States. The waivable restrictions apply to a country if it: (1) is Communist; (2) has nationalized or expropriated U.S. property (including intellectual property); (3) broadcasts U.S. copyrighted material without the owners' consent; or (4) has not or is not taking steps to afford internationally-recognized worker rights.[15] The Act originally included a non-waivable requirement that CBI countries must cooperate with the United States in preventing illicit drug

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GSP "competitive need" limits are exceeded, the normal rate of duty is applied; however, eligible Caribbean products still may enter the United States duty-free under CBI. GSP ACT, *supra* note 7 at § 504(c)(1) [19 U.S.C. 2464(c)(1)]. Beneficiaries also can lose their eligibility for the program if their national incomes exceed a statutory per capita gross national product (GNP) value, set at $8,500 per capita in 1985 and indexed to growth in U.S. GNP in subsequent years. GSP ACT, *supra* note 7 at § 504(f)(1) [19 U.S.C. 2464(f)(1)].

10. Bureau of Public Affairs, U.S. Dept. of State, Background on the Caribbean Basin Initiative 13 (March 1982) (*reprinted by* Cong. Res. Ser., Lib. of Cong., April 1982).

11. Restrictions on ethanol, sugar, and other agricultural products are described below.

12. Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Cayman Islands, Montserrat, Netherlands Antilles, St. Kitts-Nevis, Turks and Caicos Islands, and the British Virgin Islands. CBI ACT, *supra* note 4 at § 212(b) [19 U.S.C. 2702(b)]. Aruba became the twenty-eighth CBI country when it gained independence from the Netherlands Antilles in 1986. *See* Harmonized Tariff Schedule of the United States, general note 3(c)(v)(A) (HTS).

13. Includes Aruba. Anguilla, Cayman Islands, Suriname, and Turks and Caicos Islands have neither requested nor been designated for CBI benefits.

14. CBI ACT, *supra* note 4, at § 212(b) [19 U.S.C. 2702(b)].

15. *Id.*

production and trafficking.[16] The Anti-Drug Act of 1986[17] eliminated this requirement from the CBI Act.[18] The 1986 Narcotics Control Trade Act[19] included the requirement that both CBI beneficiaries cooperate with U.S. antidrug efforts.[20]

In fact, no country has ever lost its CBI benefits for reasons specified in the CBI legislation. Panama is the only country ever to lose CBI benefits, but that temporary suspension (between April 1988 and March 1990) was for Panama's failure to cooperate with U.S. narcotics laws under the Narcotics Control Trade Act.[21] U.S. economic sanctions against Haiti initially applied October 1991 effectively halted most U.S.-Haitian trade, but Haiti was not suspended from CBI.[22] Nicaragua's designation as a CBI beneficiary was delayed because of worker rights violations in that country. Nicaragua was finally designated for CBI in November 1990,[23] after President Bush waived the worker rights criteria "for national security reasons."[24]

C. *Worker Rights and Intellectual Property Concerns*

While no country has ever lost its CBI benefits for reasons specified in the Act, there have been numerous allegations that some CBI countries routinely violate the eligibility criteria. Country

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16. CBI ACT, *supra* note 4, at § 212(b)(6) [19 USC 2702(b)(6)].

17. Formally known as the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, title IX–Denial of Trade Benefits to Uncooperative Major Drug Producing or Drug-Transit Countries, 19 U.S.C. 2101, 100 Stat. 3207-164.

18. The Anti-Drug Act also removed a similar requirement from the GSP legislation. *Id.* at § 9002.

19. Formally known as Tariff Treatment of Products of Uncooperative Major Drug Producing or Drug-Transit Countries, Pub. L. 93-618, Title VIII, § 801 *et seq.*, 19 U.S.C. 2491 *et seq.* This act was added as subchapter VII to the Trade Act of 1974 by the Anti-Drug Act of 1986, *supra* note 16 at § 9001.

20. This act requires the President to deny CBI or GSP benefits to countries that do not cooperate with U.S. narcotics control programs or to apply additional duties to products of these countries. *Id.* at § 802(a) [19 U.S.C. 2492(a)].

21. Proclamation No. 5779, 53 Fed. Reg. 98550 (1988).

22. This embargo was imposed following the September 1991 military coup that overthrew Haitian President Jean-Bertrand Aristide. President Bush, Exec. Order No. 12,779 (Prohibiting Certain Transactions With Respect to Haiti), 56 Fed. Reg. 55975 (1991).. The United States, through a series of temporary embargo waivers, allowed U.S. businesses with assembly operations in Haiti to continue to ship parts and materials to Haiti and to import finished products from that country until May 21, 1994. On May 8, 1994 the United Nations Security Council approved Resolution 917, tightening economic sanctions against Haiti. A full U.N. trade embargo on all trade with Haiti except food and medicine went into effect on May 21, 1994.

23. Proclamation No. 6223 (To Designate Nicaragua as a Beneficiary Country for Purposes of the Caribbean Basin Economic Recovery Act), 55 Fed. Reg. 47477 (1990).

24. Presidential Determination No. 91-8 (Waiving Worker Rights Criteria with Respect to Nicaragua), 55 Fed. Reg. 49499 (1990).

compliance with CBI eligibility criteria is not subject to an annual review, as is compliance under GSP.[25] However, worker rights and intellectual property criteria for CBI and GSP are identical.[26] Complaints from U.S. citizens about CBI countries thus generally must be made during the annual GSP review. Although a case has yet to be tested, if a GSP review determines a CBI country in violation of worker rights or intellectual property criteria, that country presumably would stand to lose *both* GSP and CBI benefits.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has filed a number of petitions under the GSP review process alleging worker rights violations in several CBI countries. Based on these petitions, the United States has examined worker rights practices in El Salvador and Panama since 1991 and in Guatemala since 1992.[27] In 1993, President Clinton announced that Panama had taken steps to afford internationally recognized worker rights but that practices in Guatemala and El Salvador would remain under review,[28] while new investigations would begin of worker rights practices in Costa Rica, the Dominican Republic, and Haiti.[29]

The Motion Picture Export Association, which represents major cinema, television, and home video producers and exporters, has long complained that several CBI countries violate U.S. copyright

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25. The interagency Trade Policy Staff Committee (TPSC), chaired by the United States Trade Representative, administers the GSP program through an annual review and advises the President on modifications of country and product eligibility. Modifications are based on the consideration of petitions from any interested parties received by the TPSC, TPSC recommendations, and the President's discretionary authority. Interested parties can request a review of the beneficiary status of any country on the basis of country practices, including worker rights and intellectual property protection practices. GSP ACT, *supra* note 7 at § 502(c) [19 U.S.C. 2464(c) and U.S. DEPT. OF STATE DISPATCH , *Gist: Generalized System of Preferences,* at 661 (Sept. 2, 1991).

26. Worker rights criteria were made identical by CBI EXTENSION ACT, *supra* note 5, at § 213.

27. OFFICE OF THE U.S. TRADE REPRESENTATIVE (UISTR), *Results of the Review of Petitions Requesting Changes in the List of Countries and Articles Eligible for Duty-Free Treatment Under the GSP in the 1991 Annual Review,* 57 Fed. Reg. 30286 (1992).

28. USTR, *Results of the Review of Petitions Requesting the Review of Petitions Requesting Changes in the List of Countries and Articles Eligible for Duty-Free Treatment Under the GSP in the 1992 Annual Review,* 58 Fed. Reg. 37034 (1993).

29. In addition to the AFL-CIO, some worker rights petitions were filed by the International Human Rights Law Clinic (Washington College of Law) and the International Labor Rights Education and Research Fund. USTR, *Kantor Announces Acceptance of 1993 GSP Petitions,* USTR press release 93-61 (Oct. 5, 1993); USTR, *Results of the Review of Petitions Requesting Changes in the List of Countries and Articles Eligible for Duty-Free Treatment Under the GSP in the 1991 Annual Review,* 57 Fed. Reg. 30286 (1992). Acceptance of the petition against Haiti was done as "an acknowledgement of the severe worker rights problems that exist in Haiti at the present time," but Ambassador Kantor stated in his press release that the United States would suspend the active phase of review for the time being because of the ongoing transition to the return to office of Haitian President Aristide.

laws through unauthorized use of satellite-carried U.S. cable television signals and video tape piracy.[30] The International Intellectual Property Alliance, which represents U.S. copyright industries, also has alleged that some CBI countries fail to provide adequate and effective protection to U.S. intellectual property.[31] As a result of petitions from these organizations, the United States began a review of intellectual property protection in Guatemala in 1991 and of practices in Honduras and the Dominican Republic in 1992.[32] El Salvador was named as the subject of a new investigation of intellectual property protection to begin in 1993.[33]

III. TRADE PREFERENCES

Under CBI, the United States unilaterally accords preferential duties—in many instances duty-free entry—to eligible Caribbean Basin products. The CBI countries have no obligation to extend reciprocal trade preferences. The United States has only one other similar program of unilateral trade concessions—the Andean Trade Preferences Act for the countries of Bolivia, Colombia, Ecuador, and Peru.[34]

A. *Rules of Origin*

At the core of any trade agreement or program such as CBI are the "rules of origin," which establish the basic criteria for product eligibility. CBI generally requires that eligible products be grown, produced, or manufactured in a CBI country. Products not *wholly* grown, produced, or manufactured in a CBI country must be "new or different" from any foreign materials or components used in their manufacture (the "substantial transformation" requirement). This requires that the cost or value of materials and processing in a CBI

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30. U.S. INTERNATIONAL TRADE COMMISSION (USITC), ANNUAL REPORT ON THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC INITIATIVE ON U.S. INDUSTRIES AND CONSUMERS 1-9 to 1-10, Sixth Report 1990, (USITC publication 2432, September 1991) [hereinafter USITC SIXTH REPORT].

31. USTR, *Results of the Review of Petitions Requesting Changes in the List of Countries and Articles Eligible for Duty-Free Treatment Under the GSP in the 1991 Annual Review*, 57 Fed. Reg. 30286 (1992).

32. Termination of the review of Honduras (scheduled for December 1993) is contingent on the government of Honduras enacting a comprehensive intellectual property law. USTR, *Results of the Review of Petitions Requesting the Review of Petitions Requesting Changes in the List of Countries and Articles Eligible for Duty-Free Treatment Under the GSP in the 1992 Annual Review*, 58 Fed. Reg. 37034 (1993).

33. USTR, *Kantor Announces Acceptance of 1993 GSP Petitions*, USTR press release 93-61 (Oct. 5, 1993).

34. The Andean program, which entered into force in 1992, in fact was modeled on the CBI. CBI EXTENSION ACT, *supra* note 5, at § 243.

country total at least 35 percent of the customs value of the product.[35] All eligible products must be exported directly to the customs territory of the United States, which includes Puerto Rico.[36] In addition, articles grown, produced, or manufactured in Puerto Rico and "by any means advanced in value or improved in condition" in a CBI country also are eligible for duty-free entry under CBI.[37]

B. *Duty-Free Provisions*

CBI offers as its primary benefit duty-free access to the United States for a wide range of products grown, produced, or manufactured in designated countries. To claim CBI duty-free admission, exporters must accompany all CBI-eligible products with a Certificate of Origin Form A (Revised), which also is used for products entering under GSP.[38]

Some agricultural products (including dairy products, cotton, peanuts, ethanol, sugar, and beef) remain subject to U.S. quotas and/or health requirements.[39] Specific rules control imports of ethanol.[40] Imports of sugar and beef from CBI countries are allowed only after countries submit a "Stable Food Production Plan" to the United States to ensure that food production for domestic consumption will not be adversely affected by increased production for export.[41] Specifically excluded from CBI are canned tuna, petroleum

35. Inputs from Puerto Rico and the U.S. Virgin Islands are allowed to count toward the 35 percent CBI content. Alternatively, inputs from the United States are allowed to account for as much as 15 percent of the Caribbean content. CBI ACT, *supra* note 4, at § 213(a)(1) [19 U.S.C. 2703(a)(1)].

36. *Id.*

37. Any materials added to such articles must be of U.S. or CBI-country origin. *Id.*, at § 213(a)(5) [19 U.S.C. 2703(a)(5)].

38. The exporter deletes the words "Generalized System of Preferences" on the Form A and substitutes the words "Caribbean Basin Initiative," and the letter "C" is inserted as a prefix to the applicable tariff schedule provision. 1991 GUIDEBOOK, *supra* note 3, at 7.

39. For more detailed information on current U.S. agricultural policies for Caribbean Basin products, *see* OFFICE OF INTERNATIONAL COOPERATION AND DEVELOPMENT, U.S. DEPT. OF AGRICULTURE AND AGENCY FOR INTERNATIONAL DEVELOPMENT, AGRICULTURAL MARKETING HANDBOOK FOR CARIBBEAN BASIN PRODUCTS (Nov. 1991).

40. Ethanol produced from agricultural feedstock grown in a CBI country is admitted duty-free in unlimited quantities. Ethanol produced from non-CBI agricultural feedstock is restricted to 60 million gallons or 7 percent of the U.S. domestic ethanol market, whichever is greater. These restrictions were imposed to discourage the establishment of "pass through" operations by European and Brazilian ethanol producers in which little value is added in CBI countries. The Tax Reform Act of 1986, *Treatment of Imports of Ethyl Alcohol*, as amended (Pub. L. 99-514, 19 U.S.C. 2703 note), § 423(a), as amended by the Steel Trade Liberalization Program Implementation Act of 1989 (Pub. L, 101-221), § 7(a). *See also id.* at K-1 to K-3.

41. CBI ACT, *supra* note 5, at § 213(c)(1)(B) [19 U.S.C. 2702(c)(1)(B)].

and petroleum derivatives, certain footwear, most textiles and apparel,[42] and sugar from any "Communist" country in the region.[43]

Import relief procedures apply to imports under CBI determined to threaten or cause injury to U.S. industries or national security.[44] In addition, U.S. agricultural producers may petition the Secretary of Agriculture for emergency import relief on certain perishable CBI agricultural products, including live plants and fresh cut flowers, fresh or chilled vegetables, fresh fruit, and concentrated citrus juices.[45]

The technical mechanisms for CBI duty-free entry are fixed in the Harmonized Tariff Schedule of the United States (HTS). The United States affords most-favored nation (MFN) tariff treatment to all CBI countries under U.S. domestic law.[46] The CBI establishes preferential tariff rates by reducing the MFN tariff rate for Caribbean Basin products to zero.[47] In addition to the CBI program, Caribbean Basin

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42. *Id.* at § 213(b) [19 U.S.C. 2701(b)].

43. *Id.* at § 231.

44. If injury is found, the President may by proclamation suspend CBI duty-free treatment for that product and proclaim a duty rate. *Id.* at § 213(3)(e) [19 U.S.C. 2703(3)(e)]. Sect. 201 of the Trade Act of 1974 (19 U.S.C. 2251) establishes procedures for emergency import relief for U.S. industries seriously injured by increased imports. Criteria for import relief are based on art. XIX of the GATT, referred to as the GATT "escape clause." Sect. 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) establishes procedures for import relief for imports that threaten to impair national security.

45. The President may withdraw CBI duty-free treatment for the product if injury is determined. *Id.* at § 213(3)(f) [19 U.S.C. 2703(3)(f)].

46. MFN treatment guarantees the lowest applicable U.S. tariffs, which in some cases may be zero. MFN tariff treatment is in accordance with U.S. international obligations under the General Agreement on Tariffs and Trade (GATT). The basic statute currently in force with respect to MFN treatment is § 126(a) of the Trade Act of 1974 (Pub. L. 93-618, approved Jan. 3, 1975, 88 Stat. 1978, 19 U.S.C. 2136).

47. General note 3(c) to the HTS reflects special tariff treatment to eligible products of designated countries under various U.S. trade programs, including the CBI. Because the Act offers Caribbean Basin countries market access that is better than MFN treatment, the United States had to obtain a waiver of Art. I of the General Agreement on Tariffs and Trade (GATT). Art. I of the GATT requires each contracting party to extend "any advantage, favor, privilege or immunity" granted to any one contracting party to all other contracting parties. The GATT waiver, formally obtained in February 1985, is reported in USITC, OPERATION OF THE TRADE AGREEMENTS PROGRAM, 36TH REPORT (1984) 37-38 (USITC pub. 1725, July 1985).

products also may enter the United States duty free under GSP[48] and a small number of miscellaneous duty-reduction programs.[49]

CBI-2 expanded the list of Caribbean products eligible for duty-free entry to include articles assembled or processed wholly from components or materials originating in the United States. This provision maintained the exclusion of textiles and petroleum products, but opened the way for duty-free imports of completed Caribbean footwear, hitherto largely excluded.[50] In addition, the United States made incremental expansions to CBI in September 1991[51] and in July 1992.[52]

C. *Reduced-Duty Provisions*

CBI-2 introduced duty-reductions for a number of articles formerly excluded from all CBI benefits. Beginning January 1, 1992, duties on handbags, luggage, leather wearing apparel, and flat goods such as change purses, wallets, eyeglass cases and portfolios are being reduced by a total of 20 percent between 1992 and 1996.[53]

D. *CBI Textile and Apparel*

Textile and apparel products generally are excluded from CBI because the United States, like other industrialized countries,

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48. Caribbean products may enter duty-free under CBI even if the products have lost GSP eligibility. Thus, in 1992 cigars, raw cane sugar, leather footwear uppers, and medical instruments from the Dominican Republic and raw cane sugar and certain frozen vegetables from Guatemala entered duty-free under CBI during 1992 even though the products lost GSP eligibility during that year. 1991 GUIDEBOOK, *supra* note 3 at 8; and USITC, IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT ON U.S. INDUSTRIES AND CONSUMERS, EIGHTH REPORT 3-3, (USITC pub. no. 2675, September 1993) [hereinafter USITC EIGHTH REPORT].

49. For example, aromatic drugs received a temporary reduction in duty to free under HTS heading 9902.29.22 during 1992. The Bahamas was the leading CBI beneficiary of that temporary duty reduction. USITC EIGHTH REPORT, *supra* note 47 at 2-17.

50. Prior to CBI-2, most Caribbean footwear was not eligible for duty-free treatment under CBI. Exceptions were thonged footwear, disposable footwear, and most parts of footwear such as unformed leather uppers. CBI ACT, *supra* note 4, at § 222. This provision amended ch. 98, subch. II, note 2 of the HTS and applies to articles that are "assembled or processed" in CBI countries wholly from components or materials originating in the United States, excluding textile and apparel articles and petroleum and petroleum products.

51. This measure added certain articles previously excluded from CBI and removed content and country of origin restrictions from certain products, including athletic equipment, bandages, carpets, jute yarns, mattresses, plastic sheets, wrist watches, and meats of chickens, ducks, geese, and turkeys. Proclamation No. 6428, 57 Fed. Reg. 50003 (1991).

52. This measure made technical corrections to the HTS, expanding CBI to include such articles as plastic floor, wall, and ceiling coverings; plastic plates, sheets, and film; vulcanized rubber sheets, plates, and strips; conveyor or transmission belts; and ink pads. Proclamation No. 6455, 57 Fed. Reg. 30069 (1992).

53. CBI ACT, *supra* note 4, at § 212 (h) [19 U.S.C. 2703(h)].

subjects most imports of textile and apparel imports to quotas negotiated under the Multifiber Arrangement.[54]

HTS category 9802 reduces the duties for U.S.-origin products assembled or processed outside of the United States and subsequently returned.[55] This "production-sharing" provision requires that duty be paid only on the value added in the foreign country, and not on the value of the exported and re-imported U.S. content. More than 80 percent of apparel imported from CBI countries enters under production-sharing tariff provisions in which fabrics formed and cut in the United States are assembled or processed in a CBI country (primarily to take advantage of lower Caribbean labor costs) and returned to the United States.[56]

In addition to production-sharing, CBI countries enjoy a "special access" program that gives Caribbean textiles and apparel preferential quota treatment. Under this program, the United States has negotiated bilateral "guaranteed access level" (GAL) agreements with CBI countries since 1986.[57] Unlike other U.S. textile and apparel quotas, GAL quotas may be increased upon request by the CBI country and are not charged against a CBI country's quota.[58] Because the fabric for the articles qualifying for GAL treatment must be formed and cut in the United States, these articles qualify for 9802 tariff treatment.[59] Costa Rica, the Dominican Republic, Guatemala, Haiti, Jamaica, and Trinidad and Tobago have GAL agreements.

E. Separate Cumulation Provision

One important benefit introduced by CBI-2 is the requirement that the United States not cumulate (i.e., aggregate) imports from a CBI country with imports from non-CBI countries in unfair import investigations.[60] The Department of Commerce and the U.S.

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54. The GATT-sanctioned MFA, formally known as the Arrangement Regarding International Trade in Textiles, has governed world trade in textiles and apparel since 1974. Under the MFA, industrialized countries negotiate bilateral agreements with exporting developing countries to set quotas on particular products or groups of products.

55. Item 9802.00.80 applies to imported assembled products such as apparel containing U.S. components. HTS item 9802.00.60 applies to imported products containing metal of U.S. origin processed abroad and returned for further processing. These HTS provisions formerly were Tariff Schedules of the United States (TSUS) items 807.00 and 806.30, respectively.

56. USITC EIGHTH REPORT, *supra* note 47, table 2-7, at 2-12.

57. President Reagan announced the special access program, inviting CBI countries to negotiate GAL agreements, on Feb. 20, 1986. COMMITTEE FOR IMPLEMENTATION OF TEXTILE AGREEMENTS, *Implementation and Enforcement of the Special Access Program Under the Caribbean Basin Initiative,* 51 Fed. Reg. 21208 (1986).

58. *Id.*

59. GAL products are classified as HTS 9802.00.8010 (formerly TSUS 807-A)

60. CBI ACT, *supra* note 4, at. § 224 (amends sec. 771(7) of the Tariff Act of 1930, 19 U.S.C. 1677(7)(C)(iv)).

International Trade Commission (USITC) jointly conduct such investigations to determine if imports injure, or threaten to injure, U.S. industries. Normally, these agencies aggregate the volume and price effects of imports from two or more countries to obtain cumulative injury effects.[61] The CBI-2 separate cumulation rule stipulates that CBI countries not be aggregated with non-CBI countries. This provision aims to make it less likely that imports from a CBI country will be found to be a cause of injury to U.S. industries.

Separate cumulation recently was applied in the case of a 1993 antidumping investigation injury determination by USITC involving steel wire rod from Trinidad and Tobago and other countries.[62] In that investigation, U.S. industries complained that they had been materially injured by imports of steel wire rod from Brazil, Canada, Japan, and Trinidad and Tobago being sold in the United States at less-than-fair-value. In this investigation, USITC aggregated imports from Brazil, Canada, and Japan (and subsequently found injury), and made a separate injury determination with respects to imports from Trinidad and Tobago that found no injury.[63] In a dissenting view, USITC Commissioner Don Newquist found a threat of injury from imports from Trinidad and Tobago. Commissioner Newquist further noted that the Congressional intent of the separate cumulation provision was not to take a "hands-off" approach to CBI countries in such investigations, but to ensure that injury analysis is consistent with the underlying goal of CBI, which is to encourage increased exports from the Caribbean Basin countries.[64]

IV. INVESTMENT BENEFITS

Specific measures to encourage investment in the region were not a part of the original CBI legislation. In 1986, the United States

61. 19 U.S.C. 1677(7)(C)(iv)(I).

62. Certain Steel Wire Rod from Brazil, Canada, Japan, and Trinidad and Tobago, (USITC Pub. 2647, June 1993) (Prel. Invest. Nos. 731-TA-646-649). For additional information on the initiation of this investigation, *see also* INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPT. OF COMMERCE, *Initiation of Antidumping Duty Investigations: Steel Wire Rod from Brazil, Canada, Japan, and Trinidad and Tobago,* 58 Fed. Reg. 29195 (1993).

63. In contrast, an antidumping investigation involving cut flowers from Costa Rica and other countries conducted before this CBI-2 cumulation provision become effective determined that Costa Rican exports sold at less than fair value were a cause of injury to U.S. industry. USITC, CERTAIN FRESH CUT FLOWERS FROM CANADA, CHILE, COLOMBIA, COSTA RICA, ECUADOR, ISRAEL, KENYA, MEXICO, THE NETHERLANDS, AND PERU (USITC Pub. No. 1877, July 1986) (Prel. Inves. nos. 731-TA-327-334); USITC, CERTAIN FRESH CUT FLOWERS FROM CANADA, CHILE, COLUMBIA, COSTA RICA, ECUADOR, ISRAEL, KENYA, MEXICO, THE NETHERLANDS AND PERU, (USITC Pub. No. 1987, March 1987) (Final Invest. nos. 731-TA-327-331).

64. USITC, CERTAIN STEEL WIRE ROD FROM BRAZIL, CANADA, JAPAN, AND TRINIDAD AND TOBAGO, (USITC Pub. No. 2647, June 1993) (Prélim. Invest. Nos. 731-TA-646-649).

formally created an investment mechanism to benefit CBI countries through special provisions in the U.S. Internal Revenue Code (Tax Code). Section 936 of the Tax Code grants a tax credit on income earned in U.S. possessions such as Puerto Rico.[65] The credit completely exempts from Federal taxes the income of qualifying U.S. corporations in Puerto Rico *so long as the funds remain in Puerto Rico.* To further encourage investment, Puerto Rico also grants local and Commonwealth tax credits to section 936 funds deposited in Puerto Rican financial institutions.[66]

In 1986, U.S. and Puerto Rican tax laws were modified to allow investors to borrow section 936 funds at below-market interest rates[67] from Puerto Rican financial institutions to finance projects in CBI countries.[68] To be eligible for section 936 project financing, a CBI country must sign a Tax Information Exchange Agreement (TIEA) with the United States.[69] A total of 10 CBI countries have signed TIEAs and are eligible for section 936 financing.[70] CBI-2 requires that Puerto Rico lend a minimum of $100 million in section 936 funds annually.[71] The Government of Puerto Rico reported that between

65. 28 U.S.C. 936.

66. Changes to U.S. and Puerto Rican tax laws concerning section 936 tax credits are discussed in USITC, ANNUAL REPORT ON THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT ON U.S. INDUSTRIES AND CONSUMERS, THIRD REPORT, 1981 3-5 to 3-6 (USITC Pub. No. 2122, September 1988) [hereinafter USITC THIRD REPORT] Section 936 is described in more detail in USITC, REPORT IN THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT ON U.S. INDUSTRIES AND CONSUMERS, SEVENTH REPORT, 1991 1-8 to 1-11 (USITC Pub. No. 2553, Sept. 1992) [hereinafter USITC SEVENTH REPORT]. For additional information on section 936, see 1991 GUIDEBOOK, *supra* note 3 at 67; and ECONOMIC DEVELOPMENT ADMINISTRATION OF PUERTO RICO, SOME COMMON QUESTIONS ON CBI/936 FINANCING, (Economic Development Administration of Puerto Rico pamphlet, Apr. 1990).

67. Because section 936 funds held in Puerto Rican financial institutions are tax exempt, U.S. firms with such funds on deposit are willing to accept relatively low rates of return. This allows Puerto Rican financial institutions to lend section 936 funds at below-market rates--typically at 1 or 2 percentage points below the London Interbank Offer Rate.

68. U.S. DEPT. OF THE TREASURY, INTERNAL REVENUE SERVICE, *Requirements for Investments to Qualify Under Section 936(d)(4) as Investments in Qualified Caribbean Basin Countries,* 55 Fed. Reg. 21926 (1986).

69. A TIEA is a mutual and reciprocal obligation to exchange information with the United States relating to the enforcement of tax laws that provides a means by which a signatory government can pursue certain tax evaders.

70. The following countries have concluded TIEAs with the United States: Barbados, Costa Rica, Dominica, the Dominican Republic, Grenada, Guyana Honduras, Jamaica, St. Lucia, and Trinidad and Tobago. A TIEA (or certification by the U.S. Treasury Department as having an effective tax information exchange program under a bilateral income tax treaty) also makes a CBI country eligible for the U.S. convention tax deduction. A U.S. company that holds a business meeting or convention in a CBI country with a TIEA may deduct the expenses of the convention when calculating its U.S. taxes. CBI ACT, *supra* note 4, at § 222.

71. CBI EXTENTION ACT, *supra* note 5, at § 227.

1986 and 1992, a cumulative total of nearly $870 million in section 936 loans for 56 projects had been made.[72]

The United States passed new bill modifying the rules for the section 936 tax credit in 1993.[73] These changes do not alter the CBI lending arm of the section 936 program. However, the lower U.S. tax credit under this new legislation could reduce the incentives U.S. corporations have to keep their funds in Puerto Rico, in turn ultimately curtailing the amount funds available for CBI loans.

V. TRADE FLOWS

A. *Bilateral Trade*

Between 1984 and 1992, U.S. exports to the CBI countries nearly doubled from $5.9 billion to $10.9 billion, while total imports from the region rose only from $8.6 billion to $9.4 billion. CBI has enabled an increasing share of Caribbean products to enter the U.S. market duty-free. Total duty-free imports (under all provisions) from CBI countries increased from $4 billion in 1984 (35 percent of imports) to $6 billion in 1992 (65 percent of imports). Duty-free CBI imports rose from $576 million in 1984 to $1.5 billion in 1992; MFN imports held steady during this period at $2 billion; and GSP imports declined from nearly $600 million in 1984 to $340 million in 1992.[74] Significantly, although apparel production has been the single most dynamic sector in CBI countries, with exports to the United States growing at almost 30 percent annually since 1985, most textile and apparel products are not eligible under CBI.[75]

Despite the sharp rise in imports under CBI, just four countries supplied for over three-fourths of this trade. Those countries were the Dominican Republic, Costa Rica, Guatemala, and Honduras.[76] Not coincidentally, each of these four countries has aggressively pursued measures to improve its foreign investment climate by

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72. Commonwealth of Puerto Rico, Dept. of State, *Projects Promoted by Puerto Rico's Caribbean Development Program*, 8 CARIBBEAN HIGHLIGHTS 22-25 (January 1993).

73. New rules governing the section 936 tax credit were approved as part of the CONFERENCE REPORT ON THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993. H. REP. NO. 103-213, 103rd Cong., 1st Sess. (1993). This new legislation, which goes into effect January 1, 1994, offers U.S. companies the option of a 60 percent tax credit on income generated in Puerto Rico or a 60 percent tax credit on wages and benefits paid to Puerto Rican workers. 139 Cong. Rec. H5953 (1993).

74. USITC EIGHTH REPORT, *supra* note 47, at 2-12; USITC THIRD REPORT, *supra*, note 65, table 1-7, at 1-8.

75. USITC EIGHTH REPORT, *supra* note 47, table 2-7, at 2-12.

76. *Id.*, table 2-10, at 2-16.

strengthening its foreign investment codes and made extensive use of free trade zones.[77]

B. Future Trade Diversion?

Currently one of the most pressing concerns for CBI countries is avoiding trade diversion away from the Caribbean Basin now that the North American Free-Trade Agreement (NAFTA) has been implemented.[78] CBI tariff preferences have allowed many Caribbean products to compete successfully against comparable Mexican products for U.S. market share. This, in turn, has encouraged investment in the CBI countries. NAFTA effectively erases most tariff preferences CBI countries have enjoyed for years, and forces Caribbean producers to compete on equal footing with Mexican exporters.

The impact of NAFTA is most apparent on certain textile and apparel items. Under NAFTA, Mexico receives immediate duty-free and quota free treatment of all "special regime" apparel.[79] Mexico gains immediate quota elimination and gradual phase-out of the duties on textile and apparel for which yarn, fabric, cutting, and assembly all is done in a NAFTA country (the so-called "yarn-forward" rule of origin).[80] These Mexican products receive more favorable treatment than comparable Caribbean products because comparable CBI apparel products (subject to GALs) continue to face duties on the non-U.S. content.[81]

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77. The relationship between improvements in the foreign investment climate and increased success in attracting export-oriented investment in CBI countries is discussed in USITC SIXTH REPORT, *supra* note 29; USITC SEVENTH REPORT, *supra*, note 65; and USITC EIGHTH REPORT, *supra* note 47.

78. The United States, Canada, and Mexico signed the NAFTA text on December 17, 1993. Ratification by the United States is needed before the free-trade provisions can come into force. (*Editor's Note:* Ratification occurred effective January 1, 1994).

79. The special regime for Mexico is comparable to the special access program for CBI countries. The special regime resulted from a bilateral 1988 U.S.-Mexican agreement under which many textile categories received separate quotas for articles assembled from U.S. formed and cut fabrics and articles produced from foreign fabrics. Special regime shipments are charged against Mexico's quota for each textile and apparel category. USITC, PRODUCTION SHARING: U.S. IMPORTS UNDER HARMONIZED TARIFF SCHEDULE SUBHEADINGS 9802.00.60 AND 9802.00.80, 1988-1991 A-3 (USITC Pub. No. 2592, February 1993).

80. NAFTA, App. 2.1.

81. To provide tariff and quota treatment on CBI imports equal to the treatment accorded to Mexican imports under NAFTA, Representative Sam Gibbons introduced the Caribbean Basin Free-Trade Agreements Act (H.R. 1430) in March 1993. 139:34 Cong. Rec. H1526 (1993). In a May 25, 1994 speech in Honduras, Vice President Al Gore announced the U.S. administration's plan to present to the U.S. Congress a bill proposing tariff and quota treatment on CBI textile and apparel products equal to the treatment (so-called "NAFTA parity") accorded to comparable Mexican products. In exchange, CBI countries would be asked to improve their standards in investors' rights, intellectual property rights, labor rights, and environmental protection.

VI. CONCLUSION

While retaining its original focus and intent, CBI has evolved in several important ways. The United States strengthened worker rights criteria for beneficiaries. The United States also established a CBI investment component under section 936 of the Tax Code. A number of products originally excluded from the program have received preferential tariff treatment, although the Caribbean Basin's fastest-growing exports—textiles and apparel—remain ineligible.

The most immediate threat to CBI countries is the loss of their preferential trade relationship with the United States now that NAFTA has been enacted. However, NAFTA need not be the end of CBI benefits. Clearly, there is much Caribbean Basin countries can do themselves to help "lock in" CBI benefits. Most important, they can improve their foreign investment climate, raise the standards of worker rights and intellectual property protection, and continue to build on their democratic political institutions.