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The Caribbean Basin Initiative: A Proposal to Attract Corporate Investment and Technological Infusion via an Inter-American System of Cooperative Protection for Intellectual Property

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THE CARIBBEAN BASIN INITIATIVE: A PROPOSAL TO ATTRACT CORPORATE INVESTMENT AND TECHNOLOGICAL INFUSION VIA AN INTER-AMERICAN SYSTEM OF COOPERATIVE PROTECTION FOR INTELLECTUAL PROPERTY

I. INTRODUCTION

The Caribbean Basin Initiative is the first major effort by the United States to employ an institutionalized application of developmental policy aimed at the economic revitalization of developing nations in the Western Hemisphere.[1] The concept was first proposed by President Ronald Reagan in an address to the Organization of American States on February 24, 1982.[2] The plan envisioned an "economic program that integrates trade, aid and investment—a program that represents a long term commitment

1. Wolfgang Benedek, *The Caribbean Basin Economic Recovery Act: A New Type of Preference in GATT?* 20 J. WORLD TRADE L. 29, 29 (1986).

2. *Address of President Reagan Before the Permanent Council of the Organization of American States*, 18 WEEKLY COMP. PRES. DOC. 217 (Mar. 1, 1982) [hereinafter *Reagan Address*].

to the countries of the Caribbean and Central America."[3] The core provision, duty-free treatment, sparked real excitement and hope. Unfortunately, however, the Caribbean Basin Initiative (C.B.I.) has fallen short of all expectations.

A major shortcoming of the C.B.I. has been the program's inability to attract international investment to the region. International investment is a fundamental element in the modern equation for the economic revitalization of developing countries. The Caribbean region fails to attract foreign investment because it fails to offer a sense of security to the international investor. An inter-American system of cooperative protection for intellectual property would contribute to a sense of security, encourage investment, and establish a sound foundation upon which to build a lasting economic base.

II. OVERVIEW

The United States is currently pursuing the international protection of intellectual property through unilateral retaliatory trade practices[4] and multilateral negotiations within the Generalized Agreement on Tariffs and Trade (GATT).[5] However, these efforts are not conducive to the successful achievement of the goal. Retaliatory trade measures only exacerbate international animosity, and the GATT is far too diverse an organization within which to reach an effective consensus. The United States should consider more direct and effective avenues, such as the C.B.I., by which to secure international intellectual property rights.

The C.B.I. is a suitable mechanism because it is an international program for economic development which is embodied in the form of U.S. legislation, namely the Caribbean Basin Economic Recovery Act of 1983.[6] By its very nature, the C.B.I. affords the United States a unilateral authority to dictate the terms of a quasi-multilateral trade agreement. A simple amendment to the C.B.I. legislation would automatically establish an inter-American system of cooperative protection for intellectual property.

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3. *Id.*

4. *See infra* notes 59-60 and accompanying text.

5. Richard A. Morford, *Intellectual Property Protection: A United States Priority*; 19 GA. J. INT'L & COMP. L. 336, 338-40 (1989).

6. Caribbean Basin Economic Recovery Act, ch. 15, §§ 211-216, 97 Stat. 369 (1983) (as amended) (current version at 19 U.S.C. §§ 2701-2706).

This proposal envisions an amendment to the C.B.I. creating an inter-American system of cooperative protection for intellectual property based upon suggestions from the international private sector.[7] The centerpiece provision, modelled after the Hong Kong Registration of Patents Ordinance,[8] would establish the U.S. Patent and Trademark Office as the central figure in inter-American substantive principles of intellectual property. The revised C.B.I. would also include measures to secure effective national enforcement of intellectual property rights[9] and the creation of an inter-American, multilateral dispute resolution mechanism.[10] Only through the C.B.I. can such an international framework be realized.

III. True Intentions

An effort to amend the C.B.I. requires an honest analysis of the U.S. interests which manifested themselves through the legislative process to yield the final product. The United States has ostensibly created a bold international initiative to remedy the economic woes of the Caribbean Basin region, but the reality is that the United States seeks to achieve definite policy objectives through the C.B.I. Any proposed amendment which does not comport with those U.S. interests will probably fail.

The C.B.I. was not born of U.S. altruism. After all, the United States only purports to act as the generous, paternalistic neighbor; there are powerful U.S. interests at stake. Particularly, there are two interests which merit explicit discussion: national security and the assistance of U.S. private enterprise.[11]

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7. *See infra* text accompanying notes 67-71.

8. Registration of United Kingdom Patents Ordinance, in 2 Laws of Hong Kong 342 (1950).

9. *See* text preceding *infra* note 68.

10. *See infra* note 71 and accompanying text.

11. President Reagan described the Caribbean region as a "vital strategic and commercial artery for the United States." *Reagan Address*, *supra* note 2. *See also* Jean G. Zorn & Harold Mayerson, *The Caribbean Basin Initiative: A Windfall for the Private Sector*, 14 Law. Am. 523 (1983);

> The Congress finds that-
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> 1. A stable political and economic climate in the Caribbean region is necessary for the development of the countries in that region and for the security and economic interests of the United States;
>
> 2. the Caribbean Basin Economic Recovery Act [see Short Title note set out under this section] was enacted in 1983 to assist in the achievement of such a climate by stimulating the development of the export potential of the region;

The simple proximity of the Caribbean Basin to the United States makes this complex region[12] relevant to national security. Politically, the nations in this region represent an imperative security consideration regarding the United States' predominance in the Western Hemisphere.[13] This was a particularly sensitive area for the Reagan Administration as it grappled with the region's political instability throughout the 1980s. Unemployment, inflation, and staggering foreign debt all contributed to the human strife which made this region politically volatile.[14] The logical response was an effort to cure the economic woes at the root of these problems.

The C.B.I. also caters to U.S. private enterprise. Economically, the Caribbean region represents a vast market for U.S. goods and a fine investment opportunity for U.S. venturers.[15] Stronger economies in the region strengthen the market for U.S. goods. International investment, combined with intelligent manipulation of C.B.I. provisions, promises the potential for high returns, as well. The economic benefits to the United States also include the lucrative transportation, middleman, and retail side of the duty-free equation.

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and

3. the commitment of the United States to the successful development of the region, as evidenced by the enactment of the Caribbean Basin Economic Recovery Act, should be reaffirmed, and further strengthened, by amending the Act to improve its operation.

Pub. L. No. 101-382, 104 Stat. 655 (1990).

12. Each of the many nations involved has its own distinct characteristics, including linguistics, culture, history, and political tendencies. Gema M. Piñón & Raul J. Sánchez, *CBI II: Will United States Protectionist Tendencies Yield to Economic Development in the Caribbean Basin?*, 20 U. MIAMI INTER-AM. L. REV. 615, 619 (1989).

13. The United States seems to be expressing a tremendous interest in preserving political influence in the region. One of the primary purposes of C.B.I. is "to ensure the economic and military security of the United States by preserving its predominance in the Western Hemisphere." Zorn & Mayerson, *supra* note 11, at 524.

14. House Report No. 266 states:

> The Caribbean Basin countries have been seriously affected by the escalating cost of imported oil and declining prices for their major exports (*e.g.*, sugar, coffee, bauxite). This has exacerbated their deep-rooted structural problems and caused serious inflation, high unemployment, declining gross domestic product growth, enormous balance-of-payment deficits, and a pressing liquidity crisis.

H.R. REP. No. 266, 98th Cong., 1st Sess., *reprinted in* 1983 U.S.C.C.A.N. 635, 644.

15. In 1983, United States export to the Caribbean Basin amounted to approximately $6 billion. U.S. INT'L TRADE COMM., ANNUAL REPORT ON THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT ON U.S. INDUSTRIES AND CONSUMERS, SECOND REPORT 1986 (1987); *see also* Zorn & Mayerson, *supra* note 11, at 524. The C.B.I. seeks to facilitate this trade through "assist[ing] private enterprise, particularly United States businesses, by making the Caribbean region open to and safe for foreign and domestic private investment." *Id.*

While it should come as no surprise that the C.B.I. is not solely an exercise in humanitarianism, it is important to recognize the U.S. interests at stake in order to identify and exploit the mutually beneficial possibilities.

IV. Operative Means and Eligibility for Participation

President Reagan envisioned that the C.B.I. would approach its ends with four general provisions. First, beneficiary countries would be granted unilateral duty-free treatment for goods exported to the United States. Second, U.S. investors would benefit from various tax credits. Third, the United States would increase the amount of foreign aid to beneficiary countries. Finally, the program would encourage and provide private sector training, technical assistance, and other necessary support for fledgling Caribbean industry.[16] Unfortunately, the only core measure[17] of the bill that survived to pass into law is the duty-free treatment.[18]

Duty-free treatment is a valuable asset for less-developed nations. Recognizing this, Congress drafted the C.B.I. legislation to impose certain requirements and considerations on eligibility for beneficiary country status.[19] The implication of these requirements and considerations is very serious; they are powerful signals to developing nations as to what is a proper course. It is an opportunity to steer developing nations in the direction of responsible growth, which both respects foreign rights and provides a solid economic base.

In order to receive the benefits of the C.B.I., a nation or territory must be designated a "beneficiary country."[20] Only those nations and territories enumerated in the legislation may be designated,[21] and only the President of the United States can bestow

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16. *President's Message to Congress on the Caribbean Basin Initiative*, 18 Weekly Comp. Pres. Doc. 323 (Mar. 22, 1982).

17. The peripheral provisions of the C.B.I. legislation are not relevant to this proposal. Briefly, they deal with the eligibility of specific products for duty-free treatment, certain tax treatments, and a ban on the importation of sugar from communist countries. *See* Piñón & Sánchez, *supra* note 12.

18. 19 U.S.C. § 2701.

19. 19 U.S.C. § 2702(b) and (c).

20. 19 U.S.C. § 2702.

21. Only the following countries and territories, or successor political entities, are eligible: 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, Saint Vincent and the Grenadines, Surinam, Trinidad and

the status.[22] The authority granted the President is limited by the requirement that he notify Congress of the intended designation and the various considerations involved in the decision to designate.[23] Similarly, the President is empowered to revoke the designation of a beneficiary country in the same manner subject to the same limitations, but with sixty days notice to Congress and the beneficiary nation.[24]

The Act specifically prohibits the President from bestowing beneficiary country status upon any candidate nation that falls into certain categories.[25] Two of these categories affect intellectual

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Tobago, Cayman Islands, Montserrat, Netherlands Antilles, Saint Christopher-Nevis, Turks and Caicos Islands, and the British Virgin Islands. 19 U.S.C. § 2702(b).

22. 19 U.S.C. § 2701(a)(1)(A).

23. *Id.*

24. 19 U.S.C. § 2702(a)(2).

25. Section 2702(b) states:

> In addition, the President shall not designate any country a beneficiary country under this chapter-
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> 1) if such country is a Communist country;
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> 2) if such country
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> (A) has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens,
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> (B) has taken steps to repudiate or nullify-
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> i) any existing contract or agreement with, or
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> ii) any patent trademark, or other intellectual property of, a United States citizen or a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property so owned, or
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> (C) has imposed or enforced taxes or other exactations, restrictive maintenance or operational conditions, or other measures with respect to property so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that-
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> i) prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association,
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> ii) good-faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or
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> iii) a dispute involving such citizen, corporation, partnership, or association, over compensation for such a seizure has been submitted to arbitration under the provisions of the Conventions for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and promptly furnishes a copy of such determination to the Senate and House of Representatives;
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> 3) if such country fails to act in good faith in recognizing as binding or in enforc-

property:

> if such country:
> (A) has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens,
> (B) has taken steps to repudiate or nullify
> (i) any existing contract or agreement with, or
> (ii) any patent, trademark, or other intellectual property of, a United States citizen or a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property so owned, or
> (C) has imposed or enforced taxes or other exactations, restrictive maintenance or operational conditions, or other measures with respect to property so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that-
> (i) prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association,
> (ii) good-faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under inter-

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ing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute;

4) if such country affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce, unless the President has received assurances satisfactory to him that such preferential treatment will be eliminated or that action will be taken to assure that there will be no such significant adverse effect, and he reports those assurances to the Congress.

5) if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent;

6) unless such country is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of the United States citizens; and

7) if such country has not or is not taking steps to afford internationally recognized worker rights (as defined in section 2462(a)(4) of this title) to workers in the country (including any designated zone in that country).

19 U.S.C. § 2702(b).

> national law with respect to such citizen, corporation, partnership, or association, or
> (iii) a dispute involving such citizen, corporation, partnership, or association, over compensation for such a seizure has been submitted to arbitration under the provisions of the Conventions for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and promptly furnishes a copy of such determination to the Senate and House of Representatives;[26] and
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> if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent;[27]

While it is encouraging that Congress recognizes international intellectual property issues, the unfortunate truth is that these issues are relegated to secondary importance. The only two requirements which concern intellectual property[28] may be waived by the President if he determines that designation is in the economic or security interests of the United States.[29] This liberal waiver authority, however, defeats the economic or security interests that justify the waiver because intellectual property rights are a fundamental underpinning of those interests. The C.B.I. objectives are jeopardized by the nominal commitment to intellectual property.

The Act also lists several factors which the President need only consider in determining whether to grant beneficiary country status.[30] Two of those deal with intellectual property:

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26. 19 U.S.C. § 2702(b)(2).
27. 19 U.S.C. § 2702(b)(5).
28. 19 U.S.C. § 2702(b)(2) and (b)(5).
29. 19 U.S.C. § 2702(a)(2).
30. The Act outlines the following factors:
In determining whether to designate any country as a beneficiary country under this chapter, the President shall take into account-
(1) an expression by such a country of its desire to be so designated;
(2) the economic conditions in such country, the living standards of its inhabitants, and any other economic factors which he deems appropriate;
(3) the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets and basic commodity resources of such country;
(4) the degree to which such country follows the accepted rules of international trade under the General Agreement on Tariffs and Trade, as well as applicable trade agreements approved under § 2503(a) of this title;
(5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort interna-

> [T]he extent to which such country provides under its laws adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;[31] and
>
> [T]he extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent;[32]

Here again, Congress recognizes intellectual property issues, but relegates them to non-mandatory status.

In effect, requirements and considerations that apply to the designation process represent the ideals to which the United States hopes beneficiary countries will conform. It is really a kind of prioritized "wish list," with the less important "wishes" occupying the waivable or non-mandatory positions. Regrettably, by making intellectual property issues waivable or non-mandatory, U.S. policy de-emphasizes the fundamental economic benefits to all parties which result from solid protection of intellectual property.

V. EFFECTIVENESS

The stated objective of the C.B.I. is the economic revitalization of the Caribbean region. Therefore, an examination of success or failure, for our limited purposes, should derive from a "before and after" economic evaluation of the nations that have received beneficiary country status.

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tional trade;
(6) the degree to which the trade policies of such country as they relate to other beneficiary countries are contributing to the revitalization of the region;
(7) the degree to which such country is undertaking self-help measures to promote its own economic development;
(8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights;
(9) the extent to which such country provides under its laws adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;
(10) the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent;
(11) the extent to which such country is prepared to cooperate with the United States in the administration of the provisions of this chapter.

19 U.S.C. § 2702(c).

31. 19 U.S.C. § 2702(c)(9).

32. 19 U.S.C. § 2702(c)(10).

An evaluation of this kind reveals that the C.B.I. has been of little or no success, despite the eager participation of beneficiary nations.[33] Since the C.B.I. was signed into law in 1983, beneficiary countries have seen a steady decline in the total value of importation of their goods by the United States.[34] The United States, on the other hand, has seen no change in the level of exports to beneficiary countries.[35] In relative terms, the very nations intended for support have been steadily losing ground.[36]

Critics have blamed the poor performance on U.S. foreign policy objectives,[37] U.S. protectionist tendencies,[38] a lack of a centralized C.B.I. administration,[39] and the failure to capitalize on the tourism and service industries.[40] These are definite problems, but the critics have overlooked the fundamental starting point for the revitalization of developing economies in the modern world community: foreign investment.

The single most debilitating failure of the C.B.I. has been the program's inability to offer security to the investor. After all, economic revitalization cannot just occur out of nowhere; there must be investment. In order to attract investment, there must be a sense of security for the investor; and in today's international economy, that sense of security must be suited to the international investor.

The first step toward attracting foreign investment is to identify remediable deterrents. This proposal suggests that a vital consideration for the international investor is the degree of protection

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33. Piñón & Sánchez, *supra* note 12, at 623-624.

34. The Latin American and Caribbean Economic Commission reported a sharp foreign trade reduction over the last decade, and an average 17.2% reduction in per capita gross domestic product during the 1980s. *Mexico, Central American Countries Plan Free Trade Agreement to Be Reached by 1996*, 8 Int'l Trade Rep. (BNA) No. 3, at 87 (Jan. 16, 1991); U.S. INT'L TRADE COMM., ANNUAL REPORT ON THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT ON U.S. INDUSTRIES AND CONSUMERS, THIRD REPORT 1987, at ix (September 1988)[hereinafter THIRD REPORT].

35. THIRD REPORT, *supra* note 34.

36. Latin America and the Caribbean saw a 0.8% drop in real gross national product in 1990, and record loans for the year add to the staggering foreign debts. *Latin American Economies Register Decline of 0.8 Per Cent in 1990, IDB Report Shows*, 8 Int'l Trade Rep. (BNA) No. 15, at 554 (Apr. 10, 1991).

37. Piñón & Sánchez, *supra* note 12, at 627-28.

38. Francis W. Foote, *The Caribbean Basin Initiative: Development, Implementation and Application of the Rules of Origin and Related Aspects of Duty-Free Treatment*, 19 GEO. WASH. J. INT'L L. & ECON. 245, 261-73 (1985).

39. Piñón & Sánchez, *supra* note 12, at 638.

40. *Id.*

for intellectual property. It is submitted that the Caribbean Basin Initiative should be amended to reflect a solid commitment to this vital aspect of the emerging global economy.

VI. Analysis of the Relationship Between Economics and Protection for Intellectual Property

Protection for intellectual property is a fundamentally indispensable aspect of economic health for developing nations which seek to compete in the modern world market. Similarly, developed countries rely on adequate protection afforded by individual nations to maintain competitiveness. In the context of the C.B.I., reliable protection would have substantial economic benefits for both the United States and the beneficiary countries.

From the perspective of the United States, there is tremendous annual damage to the U.S. gross national product due to inadequate international protection for intellectual property. The Federal Trade Commission estimates that the national losses for 1986 approached $61 billion.[41] That astounding dollar figure represents roughly sixty per cent of the U.S. trade deficit.[42] In the face of such losses, U.S. industry is justifiably reluctant to invest in developing nations.[43]

Beyond lost profits, inadequate protection may actually threaten the very future of U.S. economic predominance. "There is a direct link between the protection of intellectual property rights and U.S. international competitiveness."[44] Financial losses yield an apathy toward investment in research and development, because the huge expenses related to that effort cannot be recouped sufficiently to justify the investment.[45]

The U.S. pharmaceutical industry, as the most frequently brutalized victim of international infringement, is a good example to

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41. The losses included nearly 5,500 jobs in the chemical, computer, and software industries alone. *Piracy of U.S. Intellectual Property*, 8 Int'l Trade Rep. (BNA) No. 4, at 134 (Jan. 23, 1991). Estimates place the losses to the movie, music, book, and software industries alone at $4.17 billion for 1990. *International Intellectual Property Alliance Targets 22 Countries for 'Special 301' Lists*, 8 Int'l Trade Rep. (BNA) No. 8, at 274 (Feb. 20, 1991).

42. *Piracy of U.S. Intellectual Property*, *supra* note 41, at 134.

43. Peter C. Richardson, *The Need for Adequate and Effective Protection of Intellectual Property: Perspective of the Private Sector*, 19 GA. J. INT'L & COMP. L. 352 (1989).

44. Carol J. Bilzi, *Towards an Intellectual Property Agreement in the GATT: View from the Private Sector*, 19 GA. J. INT'L & COMP. L. 343, 345 (1989).

45. *Id.*

illustrate the foregoing. In order to bring a new pharmaceutical product onto the market, it takes an estimated ten years and $125 million from the time of discovery in the laboratory.[46] This figure does not even take into account the millions of dollars poured into unsuccessful projects.[47] After a firm underwrites the cost of developing a product, infringers have a windfall by undercutting the price of the original. This infringement prevents the legitimate producer from recouping the investment, resulting in the virtual rape of the very individual or firm which releases the benefit to society.

The legitimate producer is usually powerless to protect against this literal robbery. Except in very limited circumstances, the U.S. intellectual property laws do not carry extraterritorial jurisdiction.[48] Intellectual property treaties[49] focus primarily on priority in the initial application process,[50] and have little or no effect on the

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46. *See* Richardson, *supra* note 43, at 356; *see also infra* text accompanying note 57.

47. *Id.*

48. In patent litigation, extraterritorial jurisdiction may attach where the defendant has a sufficient number of contacts with the state in which the District Court sits. *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 184 U.S.P.Q. 387 (7th Cir. 1975). There also appears to be a trend toward considering the aggregate of contacts with the United States as a whole. *Antonius v. Kamata-Ri Co.*, 204 U.S.P.Q. 111 (D.Md. 1979); *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 188 U.S.P.Q. 255 (D.Conn. 1975).

Following the same guidelines, U.S. trademark legislation grants broader extraterritorial jurisdiction, but even the most lenient cases have included facts such as U.S. citizenship of the defendant, contracts with U.S. firms for the purchase of parts to make the product which bears the infringing mark, and smuggling of those products into the United States. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed 319 (1952).

U.S. copyright laws do not grant liberal extraterritorial jurisdiction. *Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91 (2d Cir. 1981).

There have been instances where U.S. courts have adjudicated patent claims based upon violation of foreign laws committed in foreign jurisdictions. *Ortman v. Stanray Corp.*, 163 U.S.P.Q. 331 (N.D. Ill. 1969). However, this transitory cause of action theory appears to be rare in patent and trademark cases. *Packard Instrument Co. v. Beckman Instruments, Inc.*, 346 F. Supp. 408 (N.D. Ill. 1972) (patent matter); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956) (trademark matter). Copyright claims appear more susceptible to the theory. *London Film Productions Ltd. v. Intercontinental Communications, Inc.*, 580 F. Supp. 47 (S.D.N.Y. 1984).

49. *See, e.g.*, Universal Copyright Convention, Sept. 6, 1952, 21 U.S.T. 1749, T.I.A.S. 3324; Berne Convention, July 24, 1971 *reprinted in* MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, app. 27 (1991); Convention of the Union of Paris, July 14, 1970, 21 U.S.T. 1583; 24 U.S.T. 2140; T.I.A.S. 6923, 7727; Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, T.I.A.S. 8733; General Inter-American Convention for Trademark and Commercial Protection, Apr. 2, 1930, 40 Stat. 2907, 124 L.N.T.S. 357.

50. *See generally* Gabriel M. Frayne, *History and Analysis of TRT*, 63 TRADEMARK REP. 422 (1973); Benson, *The Impact of the Patent Cooperation Treaty (PCT) and the European Patent Convention (EPC) on U.S. Practitioners*, 60 J. PAT. OFF. SOC'Y 118 (1978).

infringer.[51] Ultimately, the legitimate producer can only look to the generally fruitless proceedings under the particular nation's laws.[52]

The abuses are routinely ignored by the national governments because developing countries generally do not appreciate the long-term benefits of intellectual property protection. Instead, these nations tolerate piracy to gain the immediate reward of lower prices resulting from rampant infringement.[53]

The reality is that developing countries do themselves a terrible disservice by failing to adequately protect intellectual property.[54] The short-term gains of infringement and piracy are far outweighed by the long-term benefits of adequate protection, such as stimulation of innovation, attraction of investment and technology, and maintenance of favorable trade relations.

Domestically, protecting intellectual property is the first step for developing countries in cultivating an environment in which native individuals and firms can blossom into internationally competitive industries.[55] This is accomplished primarily by inspiring innovation, because unbridled infringement discourages persons and firms from revealing their valuable secrets or creative fruits. Developing nations should protect their innovative element in order to encourage the sharing of originality and creativity. This releases the beneficial ideas so that all can reap the gains, while allowing others to legally improve on the ideas for further benefits. Moreover, that protection deters "brain drain," a phenomenon experienced by many underdeveloped nations whereby their most

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51. Conventions simply do not guarantee adequacy of protection. Even in those countries which have acceptable laws, the remedy is difficult to attain or insufficient to justify the effort. Richard V. Campagna, *Video and Satellite Transmission Piracy in Latin America: A Survey of Problems, Legal Strategies and Remedies*, 20 INT'L LAW. 961, 965 (1989); *see also* Bilzi, *supra* note 44, at 346. Conventions "have not been effective in stopping the tremendous losses suffered by industries due to counterfeiting and piracy. . . . Often, parties are only required to provide national treatment, which translates into no protection for foreigners when a country's domestic laws do not [even] adequately protect local owners of intellectual property rights." *Id.*

52. Campagna, *supra* note 51, at 965.

53. Returning to the pharmaceuticals example, the shortsighted rationale is that the need for inexpensive medicine outweighs the interests of U.S. corporate profit maximization. Richardson, *supra* note 43, at 356.

54. Carla Hills, the U.S. Trade Representative, commented, "Thailand's stake in improving protection is considerable, both in terms of attracting foreign investment and ensuring that its own artists and entrepreneurs received fair compensation for their efforts." *U.S. Launches Investigation of Thailand's Weak Enforcement of Copyright Legislation*, 8 Int'l Trade Rep. (BNA) No. 1, at 4 (Jan. 2, 1991).

55. Bilzi, *supra* note 44, at 346.

productive minds migrate to other nations which offer an environment more supportive and protective of their efforts.[56]

Protecting intellectual property further serves the developing nation by removing a major deterrent to international investment: fear of theft. "Without such protection, U.S. companies are reluctant to invest in developing countries and to transfer technology to those countries, for fear it will be lost or taken by others."[57] If that major deterrent can be eliminated, then investment and technology should begin to flow into these nations.[58]

On the international stage, intellectual property disputes are a major cause of unilateral trade retaliation measures.[59] In fact, most U.S. trade legislation provides for measures to identify and combat such problems abroad.[60] Developing countries are particularly injured by the proliferation of such solutions because these weaker nations depend on the multilateral system to preserve favorable trade circumstances.[61]

VII. Suggestions of the Private Sector

The private sector has been the driving force for higher international standards of intellectual property protection. In 1986, a coalition of twelve major U.S. corporations joined forces to form the Intellectual Property Committee (IPC).[62] This organization seeks to develop a comprehensive program for the international protection of intellectual property to be integrated into the General Agreement on Tariffs and Trade.[63] The IPC Program, though

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56. *Id.*

57. Richardson, *supra* note 43, at 356.

58. *Id.*

59. In response to Thailand's failure to provide adequate protection for intellectual property, the United States denied preferential tariff treatment under the Generalized System of Preferences. Bilzi, *supra* note 44, at 346. As another example, Brazil's unwillingness to pass acceptable patent protection laws prompted the U.S. Trade Representative to impose over $40 million in sanctions under § 301 of the 1974 Trade Act. *Hills Lifts $40 Million in Sanctions After Brazil Pledges to Enact Patent Law*, 7 Int'l Trade Rep. (BNA) No. 27, at 997 (July 4, 1990); Trade Act of 1974, ch. 12, § 301, 88 Stat. 2041 (1974) (as amended) (current version at 19 U.S.C. § 2411).

60. Trade Act of 1974, 19 U.S.C. § 2411; Tariff Act of 1930, ch. 4, § 337, 102 Stat. 1211 (1930) (as amended) (current version at 19 U.S.C. § 1337). *See* Bilzi, *supra* note 44, at 346.

61. Bilzi, *supra* note 44, at 347.

62. "The members of the IPC are Bristol-Meyers, DuPont, FMC Corporation, General Electric, Hewlett-Packard, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications." *Id.* at 343-44.

63. *Id.* at 344-45.

prepared with a focus on the GATT, offers an excellent framework which can be adapted to any international initiative on intellectual property.

The IPC collaborated with the European and Japanese private sectors,[64] also severely injured by inadequate international protection for intellectual property.[65] Working together, the three business groups developed a comprehensive trilateral report and proposal (Trilateral Proposal) which is widely endorsed by intellectual property associations.[66]

The Trilateral Proposal, entitled "Basic Framework of GATT provisions on Intellectual Property," calls for a three-pronged framework. The essential elements of adequate international protection for intellectual property are: (1) strong enforcement mechanisms; (2) fundamental substantive principles of intellectual property protection; and (3) multilateral consultation and dispute settlement procedures.[67] Only a combination of the three measures can yield a satisfactory result.

First, strict enforcement is absolutely necessary. The Trilateral Proposal suggests a double-edged approach to enforcement: (a) customs and border patrols under domestic trade law, and (b) remedies under domestic intellectual property laws.[68] The first measure is designed to combat the importation of infringing goods before they enter the stream of commerce. The second measure seeks to combat the domestic infringer. A participating party would be required to provide acceptable procedures and remedies to satisfy both of the enforcement requirements.

Second, there must be minimum standards of protection, known as fundamental substantive principles of intellectual property.[69] These substantive principles act as the reference point for the systems of participating nations. This requires minimum standards concerning the fundamental principles of patent, trademark, and copyright law.[70] Such a measure imposes qualifications on the

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64. The Union of Industrial and Employers' Confederations of Europe and the Japan Federation of Economic Organizations. The United States, the European Community, and Japan have taken the leading roles in the negotiations concerning intellectual property in GATT. *Id.* at 343-45.

65. *Id.* at 344.

66. *Id.*

67. *Id.* at 347.

68. *Id.* at 347-48.

69. *Id.* at 348.

70. *Id.* at 348-49.

registration process, the infringement laws, and the dispute resolution process.

Lastly, the Trilateral Proposal calls for the implementation of a multilateral dispute resolution mechanism. In the event that an owner of an intellectual property right cannot obtain effective redress within the legal framework of an individual nation, that owner's government could invoke the mechanism and force resolution before a multilateral tribunal.[71]

The private sector has identified and promoted these basic guidelines which are essential to the adequacy of an international agreement on protection for intellectual property. Unfortunately, efforts are focused on the GATT,[72] which represents the largest agreement on international trade. A workable consensus cannot emerge from this forum because there are too many members with too many diverse interests.

The Caribbean Basin Initiative, on the other hand, represents an excellent opportunity to present this promising set of ideas to the international community. Because the United States is the central figure and because it is U.S. legislation which governs the initiative, a simple amendment to the C.B.I. would automatically thrust this new agenda onto the international stage.

Adoption of and adherence to an inter-American system of cooperative protection for intellectual property could be included among the non-waivable requirements to receive or maintain C.B.I. designation. Compliance would not require radical change on the part of beneficiary countries, and in light of their already gloomy economic predicaments.[73] Most should opt for a responsible course toward economic advancement.

VIII. Proposal

Beneficiary nations might be initially hesitant to participate in an inter-American system of cooperative protection for intellectual property. This reluctance will probably be overcome by the desire to maintain beneficiary country status, but there should be additional enticements to encourage full participation. Thus, the implementation of the principles delineated in the Trilateral Proposal

71. *Id.* at 349.

72. *See* Bilzi, *supra* note 44, at 344-45; *see also* text accompanying *supra* note 63.

73. Text accompanying *supra* notes 33-36.

should be easily accomplishable with both immediate and long-term benefits to beneficiary countries. Perhaps these developing nations would finally accept an internationally sound system for the protection of intellectual property.

The proposal calls for incorporation of the three-pronged framework from the Trilateral Proposal. Any country wishing to receive or retain C.B.I. designation would have to comply with general guidelines based on the Trilateral Proposal.

Mirroring the first prong, beneficiary countries would have to provide for strict enforcement.[74] This could be easily accomplished since beneficiary countries already maintain customs and border patrols. The need for remedies under domestic intellectual property laws, if none exist, can be met by simply writing and enforcing the laws.

Skipping to the third prong, the revised C.B.I. would call for multilateral consultations and dispute settlement procedures.[75] Tailored to the C.B.I. context, and provided for in the actual legislation, a network of multilateral councils and tribunals would be organized, representative of the nations, to give the ultimate "teeth" to the system. Decisions of the domestic courts could be appealed to these bodies. This institution might also serve to provide the C.B.I. with the centrality it now lacks, and perhaps become a guiding force in the spirit of the European Court of Justice.

The difficulty with the Trilateral Proposal's framework is in reaching agreement on the second prong; there are many divergent notions about fundamental substantive principles of intellectual property.[76] Resolution of this discord requires substantial influence, and fortunately, the C.B.I. affords the United States the necessary clout to set the terms of this unique legislation/international agreement.

Beneficiary countries would have the opportunity to choose between two options. First, each beneficiary country could opt to incur the hardship and expense of establishing and maintaining a satisfactory patent, trademark, and copyright office in compliance with the Trilateral Proposal guidelines concerning substantive principles of intellectual property.

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74. Bilzi, *supra* note 44, at 347-48.

75. *Id.* at 349; *see also* text accompanying *supra* note 71.

76. *Supra* notes 69-70 and accompanying text.

In the alternative, a beneficiary country could opt to produce legislation which would mandate the grant of a domestic certificate of registration to any owner of a U.S. certificate of registration for a patent, trademark, or copyright from the United States Patent and Trademark Office (U.S.P.T.O.). Anyone seeking protection on an inter-American scale would simply apply for and obtain registration of the matter in the U.S.P.T.O. Upon presentation of the U.S. certificate, the beneficiary country would issue a domestic certificate, which would grant all rights and privileges in the protected matter, including the right to redress in the courts of that nation. This latter option benefits all parties involved.[77]

The proposal to link beneficiary countries to the U.S.P.T.O. is based on the Hong Kong model. According to the Hong Kong Re-

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77. The suggestions in this proposal are in line with the general theme of the principal U.S. objectives concerning intellectual property negotiations in the GATT, as expressed by Congress:

> INTELLECTUAL PROPERTY.- The principal negotiating objectives of the United States regarding intellectual property are-
> (A) to seek the enactment and effective enforcement by foreign countries of laws which-
> (i) recognize and adequately protect intellectual property, including copyrights, patents, trademark, semi-conductor chip layouts designs, and trade secrets, and
> (ii) provide protection against unfair competition,
> (B) to establish in the GATT obligations-
> (i) to implement adequate substantive standards based on-
> (I) the standards in existing international agreements that provide adequate protection, and
> (II) the standards in national laws if international agreement standards are inadequate or do not exist,
> (ii) to establish effective procedures to enforce, both internally and at the border, the standards implemented under clause (i), and
> (iii) to implement effective dispute settlement procedures that improve on existing GATT procedures;
> (C) to recognize that the inclusion in the GATT of-
> (i) adequate and effective substantive norms and standards for the protection and enforcement of intellectual property rights, and dispute settlement provisions and enforcement procedures, is without prejudice to other complementary initiatives undertaken in other international organizations; and
> (D) to supplement and strengthen standards for protection and enforcement in existing international intellectual property conventions administered by other international organizations, including their expansion to cover new and emerging technologies and elimination of discrimination or preconditions to protection.

The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1123-1124 (1988).

Clause (B)(i)(II) is directly on point; the here-proposed inter-American system of cooperative protection for intellectual property incorporates fundamental substantive principles of intellectual property in the "national laws" of the United States. *Id.*

gistration of Patents Ordinance,[78] any owner of a certificate of patent granted by the British Patent Bureau has the right to apply for and obtain a Hong Kong certificate of patent. The Hong Kong certificate of patent endows all domestic rights and privileges in the protected matter, including the right to rely on that certificate in the courts.

Moreover, in opting to produce legislation which grants domestic registrations in this way, these nations relieve themselves of the expense in maintaining an intellectual property institution. Were a nation to opt for maintaining its own system in compliance with the standards outlined in the Trilateral Proposal, it would have to maintain an office similar to the U.S.P.T.O.[79] Linking beneficiary countries to the U.S.P.T.O. eliminates these expenses, except for a skeleton administrative body. Most importantly, beneficiary countries could collect substantial revenues,[80] without incurring the overhead, by levying lucrative issue fees for the domestic certificates of registration.

In addition to the beneficiary countries, the United States and the international community would benefit, as well. This uniform application of fundamental substantive principles of intellectual property, according to U.S. standards, would be of tremendous value to the entire international private sector.[81] Provided that the enforcement measures were effective, international business would see an end to the billions and billions of dollars lost to infringement and piracy.

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78. Registration of United Kingdom Patents Ordinance, *supra* note 8, at § 3.

> Any person being the grantee of a patent in the United Kingdom, or any person deriving his right from such grantee by assignment, transmission or other operation of law, may, within five years from the date of issue of the patent, apply to have such patent registered in Hong Kong. Where any partial assignment or transmission has been made all proper parties shall be joined in the application for registration.

Id.

79. Such an office requires an educated and experienced staff of examiners, a complete library of the prior art, and a massive administrative corps.

80. In 1990, nearly 20,000 international patent applications were filed under the Patent Cooperation Treaty, *supra* note 49. This number does not include the much larger number of applications filed independently in individual nations. *The World Intellectual Property Organization*, 8 Int'l Trade Rep. (BNA) No. 7, at 256 (Feb. 13, 1991).

81. The U.S.P.T.O. routinely grants registrations to foreign nationals.

IX. Conclusion

The Caribbean Basin Initiative is an international program with great vision. Unfortunately, it has failed to deliver results commensurate with its potential. A remediable defect in the C.B.I. is its inability to promote substantial investment in the region. Investment would be attracted were there to be implemented an inter-American system for the cooperative protection of intellectual property.

Amending the C.B.I. so as to adopt the principles of the Trilateral Proposal and follow the Hong Kong model on an inter-American scale would provide a practical remedy to the C.B.I.'s failure to attract international investment to the region. Such a solution would be beneficial to all involved, and perhaps set the agenda for a worldwide agreement on the protection of intellectual property.

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