

COMMENTS

INTELLECTUAL PROPERTY PROTECTION IN
THAILAND: ASIA'S YOUNG TIGER AND AMERICA'S
"GROWING" CONCERN

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1. INTRODUCTION

Students of post-war Less Developed Country economic advancement will not be surprised to find that the next tiger to spring from the developing world will likely be an Asian species. Thailand is a nation of 51 million people with a per capita income of \$726 in 1985.¹ It is the eighteenth largest country in the world, the thirty-second in trade, and the thirty-first in Gross National Product (GNP).² While it has yet to match the economic successes of the four Newly Industrialized Countries (NICs)—Hong Kong, Taiwan, South Korea, and Singapore—Thailand is increasingly being touted as Asia's fifth tiger, or the Newly Agroindustrializing Country (NAC) among NICs.³

Thailand has reached the approximate level of development of Korea and Taiwan fifteen years ago,⁴ and is also outperforming its dynamic Southeast Asian neighbors. Thai economic growth of 4% in 1985 was the best in the Association of Southeast Asian Nations (ASEAN) and in 1986 and 1987, while other nations were experiencing recessions, Thailand's GNP growth rates were 4% and 6.5% respectively.⁵

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¹ STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 100TH CONG., 1ST SESS., REPORT OF A STAFF STUDY MISSION TO KOREA, TAIWAN, HONG KONG, CHINA, THAILAND, SINGAPORE, AND INDONESIA (Comm. Print 1987) [hereinafter STAFF STUDY].

² *Id.* at 17.

³ See Janssen, *A Slower But Surer Species Of Asian Tiger*, ASIAN BUSINESS, June 1988, at 72, 75 [hereinafter *Surer Species*]. Janssen notes that Thailand, because of its large agricultural base and its position as the only net food exporting nation in Asia, may follow a different course of development than the NICs, whose manufacturing products have led their export-oriented growth more than the agricultural and service sectors. *Id.*

⁴ STAFF STUDY, *supra* note 1, at 2.

⁵ *Id.* at 17. See also *Surer Species*, *supra* note 3, at 72.

After a three-year decline in the nation's trade deficit, the deficit nearly tripled in the first half of 1987, due to an increase in imports which reflected the continued recovery of the domestic economy from a two-year economic adjustment in 1984-86.⁶ Foreign exchange reserves rose to \$5.2 billion in 1987, and Thailand's external debt levelled off at about \$1.4 billion.⁷

The United States has benefitted from this growth, as evidenced by a 29% increase of U.S. exports to Thailand in the first six months of 1987.⁸ American investors also appear welcome, as they are entitled to national treatment under the United States-Thailand Treaty on Amity and Economic Relations,⁹ which is currently in force.¹⁰ A recent poll indicated that the foreign business community in Thailand is satisfied with, and optimistic about, the Thai investment climate.¹¹ The number of applications to Thailand's Board of Investment rose to 1,058 in 1987 from 431 in 1986.¹² The United States currently ranks third in overall investment in Thailand.¹³

Individuals familiar with third world economic success models will not be surprised that widespread piracy of U.S. copyrights, patents and trademarks has accompanied the growth of the Thai economy. In the past, piracy of intellectual property has acted as a rough barometer of economic progress, as developing pirate countries seeking a shortcut to economic prosperity have clashed with developed countries—primarily the United States—that seek respect for their property rights. Tony

⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, DEPARTMENT OF AGRICULTURE, AND DEPARTMENT OF COMMERCE, 1987 NATIONAL TRADE ESTIMATES REPORT ON FOREIGN TRADE BARRIERS (1987), at 307 [hereinafter NATIONAL TRADE ESTIMATES]. Thailand's trade deficit measured \$224 million in the first half of 1986, and \$596 million in the first half of 1987. *Id.*

⁷ *Surer Species*, *supra* note 3, at 72. Janssen attributes this levelling-off to an increase in Thai business' willingness to borrow domestically due to a drop in interest rates. *Id.*

Central to the recent success of the Thai economy has been the government's policy of tying the baht to the dollar. As the value of the dollar has declined, the low-cost baht has made Thai exports cheaper to buy abroad, and has helped to boost domestic tourism. It has also meant increased investment from Japan and Taiwan, as well as the three other tigers. Although the baht was untied from the dollar in 1984 and attached to a basket of currencies, the Thais have ensured that this basket contains about 80-90% dollars. *Id.* at 72-73.

⁸ NATIONAL TRADE ESTIMATES, *supra* note 6, at 307. United States exports had previously risen from \$849 million in 1985 to \$936 million in 1986. *Id.*

⁹ Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No.6540.

¹⁰ See STAFF STUDY, *supra* note 1, at 17.

¹¹ See NATIONAL TRADE ESTIMATES, *supra* note 6, at 307.

¹² *Surer Species*, *supra* note 3, at 73.

¹³ Interview with Supavud Saichueua, Economic Officer, Royal Thai Embassy, Washington, D.C. (Jan. 6, 1989) [hereinafter Embassy Interview].

Gurka, managing director of Commercial and Trademark Services, a Hong Kong-based group that identifies counterfeiting in Asia, has noted the path which pirate goods have followed in the post-war era. "In the late 1960s, Hong Kong took over the role Japan held in the late 1950s as 'copycat of the world.' Then in the late 1970s, it was Taiwan's turn, and right now, Thailand is about to burst into the fake export scene."¹⁴ Indeed, the Asian Pacific Chambers of Commerce recently ranked Thailand as the worst country in the region in respecting intellectual property rights.¹⁵

The success of Thailand, the four tigers, and other soon-to-be-booming Asian economies, plus the mounting U.S. trade deficit, has made the infringement of U.S. intellectual property a hotly disputed regional trade issue. In response to the problem, the U.S. government now considers intellectual property piracy as a major trading issue.¹⁶ United States action to combat piracy has included bilateral and multi-lateral efforts. The United States has initiated bilateral negotiations, where through the use of threats of revocation of benefits under the Generalized System of Preferences (GSP)¹⁷ and institution of unfair trade practices actions under Section 301 of the Trade and Tariff Act of 1984,¹⁸ it has attempted to engender domestic statutory reform in pirating nations. On the multilateral front, the United States has led the effort at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)¹⁹ to bring national intellectual property laws within the GATT's proscriptions of trade barriers.²⁰

¹⁴ Caplan, *Counterfeiting Asians Under Siege*, ASIAN BUS., May 1988, at 16, 17 [hereinafter *Counterfeiting Asians*]. Experts have also noted that counterfeit watchmakers have been shifting entire factories to Thailand. J. Com., Aug. 23, 1988 at 4A, col. 2. Moreover, representatives of various industries have remarked on this shift. Joseph E. Hart, Vice President and Managing Director of ATT-Thailand, a subsidiary of American Telegraph and Telephone, has stated that Bangkok has become the "piracy and counterfeiting capital of the world." Williams, *Thai Producers Grapple With Growing Piracy*, L.A. Times, March 14, 1988, at 1, col. 4 [hereinafter *Thai Producers*]. Also, Kim Durgen, a spokeswoman for Levi-Strauss, has recently stated that "Thailand is the one country where we continue to have problems with counterfeiting because of the absence of strict controls." Barmash, *Companies Report Progress Against Counterfeit Goods*, N.Y. Times, Sept. 19, 1988, at D1, col. 1.

¹⁵ Holstein, *Asia's Export Upstarts Face High Winds From Washington*, BUSINESS WEEK, Nov. 7, 1988, at 52 [hereinafter *Asian Upstarts*].

¹⁶ UNITED STATES GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: STRENGTHENING WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS, GAO/NSIAD-87-65 (1987) [hereinafter GAO REPORT].

¹⁷ 19 U.S.C. §§ 2461-66 (1988).

¹⁸ 19 U.S.C. §§ 2411-20 (1988). See *infra* notes 76-87.

¹⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 27 U.N.T.S. 19 [hereinafter GATT].

²⁰ See *infra* notes 88-99 and accompanying text. The principal multilateral intellectual property organization is the World Intellectual Property Organization (WIPO),
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While U.S. bilateral attempts to engender reform of domestic statutes have worked in other Asian countries,²¹ the path towards statutory reform in Thailand has been tortuous. Indeed, in April 1988, Thai Prime Minister Prem Tinsulanonda dissolved his cabinet after a government dispute over unpopular proposed copyright legislation.²² At that time, authorities in the field of international copyright noted that they were "not aware of any other government being so strongly affected by a copyright issue."²³ The Thais recently failed to provide adequate and effective protection for U.S. intellectual property rights before a U.S.-imposed December 15, 1988 deadline. As a result, the United States, on the last full day of the Reagan administration, announced a cut of \$165 million in Thailand's GSP benefits.²⁴

a 116-member organization whose function is to promote intellectual property protection and encourage investment, industrialization, and international trade. GAO REPORT, *supra* note 16, at 22. The United Nations Conference on Trade and Development has also served as a multilateral forum for discussion of intellectual property rights. *Id.* WIPO aims to strengthen intellectual property systems through its advisory services and education and training efforts; it also administers 17 multilateral "unions" composed of countries that adhere to specific agreements on intellectual property. *Id.* at 24 (listing the agreements).

Among the agreements WIPO administers is the Berne Convention For The Protection Of Literary And Artistic Works. The Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris, on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on March 20, 1914 and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, effective July 10, 1974 [hereinafter Berne Convention], *reprinted in* 7 COPYRIGHT 135 (1971) and in M. NIMMER, COPYRIGHT 1003 (1976).

Although the United States' recent signing of the Berne Convention has diffused somewhat the debate over copyright protection in Thailand, *see infra* notes 116-19 and accompanying text, and although WIPO is the best known multilateral forum in the intellectual property area, the United States has decided for a number of reasons that the GATT is a more effective vehicle for engendering intellectual property protection at the multilateral level. *See infra* notes 95-99 and accompanying text. *But see infra*, notes 152-54 and accompanying text.

²¹ *See* Tachuk, *Pirating Intellectual Property*, CANADIAN BUSINESS REVIEW, Summer 1987, at 19 [hereinafter *Pirating*]. Tachuk notes that as a result of U.S. efforts, Singapore in 1987 was about to apply a new copyright law, Malaysia had just completed a draft copyright law to accompany new patent and trademark statutes, South Korea had enacted legislation in December 1986 to establish a comprehensive copyright and patent system, and Taiwan had broadened its copyright and patent laws and proposed new trademark legislation. *Id.*, at 19-20.

²² N.Y. Times, Apr. 30, 1988, at 5, col. 1; Bangkok Post, Apr. 30, 1988, at 1, col. 4.

²³ *International Update*, 4 COPYRIGHT L. J. 95 (1988).

²⁴ N.Y. Times, Jan. 20, 1989, at D1, col.4. In addition to denying benefits under the GSP system for Thai imports to the United States totalling \$165 million, the United States revoked several waivers permitting Thailand to ship more products than usual. Office of the United States Trade Representative, U.S. Denies Thailand Duty-Free Benefits On Imports Worth \$165 million (Jan. 19, 1989), at 30. This decision is expected to affect \$8.3 million in Thai exports of jewelry, telegraphic and telephonic connection equipment, rice meal and flour, and dried mung beans. *Id.*

Application of the bilateral program has strained relations between Thailand and the United States and is a major source of friction. Given the important security relationship between the two countries, the fact that Thailand and ASEAN as a whole favor participation in a capitalist world economic order, and that increasing trade between the United States and Thailand would lead to many mutual benefits, it is worth considering whether alternatives to the U.S. bilateral strategy exist which would bring about more comprehensive protection in a less visible and antagonistic manner. Such a strategy would allow the United States to realize its goal of better protection by a means more suitable to the amicableness of our relations.

This Comment will discuss, first, the nature and scope of the pirate goods problem in Thailand. Second, it will summarize the U.S. bilateral program for combatting world-wide piracy and current efforts to make inadequate national intellectual property protection cognizable under the GATT. Third, it will discuss the consequences of U.S. use of unilateral trade measures to engender statutory reform in Thailand. Last, it will indicate whether alternatives to the U.S. bilateral program exist that are capable of addressing the piracy problem in the short and long term.

2. NATURE AND EXTENT OF THE PROBLEM

2.1. *The Scope of Pirating Activities*

2.1.1. *Global Effects of Piracy*

Studies on trademark counterfeiting have found eighty-two U.S. firms with combined losses of almost \$50 million in sales to counterfeiting in 1982.²⁵ The International Intellectual Property Alliance estimated in 1985 that piracy of copyrighted works in ten selected countries costs U.S. industry \$1 billion in lost sales annually.²⁶ The Pharmaceutical Manufacturers Association reported that as of June 1985, one of its companies lost \$27 million in potential sales of one

²⁵ GAO REPORT, *supra* note 16, at 15, (citing *The Effects of Foreign Product Counterfeiting on United States Industry*, USITC Pub. No. 1479 (1984) [hereinafter ITC Study]). This study defines trademark counterfeiting as the distribution of goods bearing unauthorized copies of U.S. trademarks. *Id.*

²⁶ *Id.* at 15. The International Intellectual Property Alliance is an organization whose membership includes the Computer Software and Services Industry Association, American Film Marketing Association, Association of American Publishers, Computer and Business Equipment Manufacturers Association, International Anticounterfeiting Coalition, Motion Picture Association of America, National Music Publisher's Association, and Recording Industry Association of America. *Id.* at 15 n.3. Thailand was among the 10 countries the Alliance identified in its study.

product in five developing countries.²⁷ United States industry losses worldwide have been estimated at \$50 billion annually.²⁸

Counterfeiting has also cost U.S. jobs. The U.S. Commerce Department's International Trade Commission has approximated that in 1982, 131,000 U.S. jobs were lost due to product counterfeiting.²⁹

2.1.2. *Magnitude of Piracy in Thailand*

Estimated losses to U.S. industry from piracy in Thailand reflect the gravity of the global problem. The Recording Industry Association of America has estimated that over 90% of the Thai market is captured by pirated products.³⁰ Moreover, a recording industry representative was denied permission to establish an office in Bangkok for enforcement purposes.³¹ Computer programs such as Lotus 1-2-3, WordPerfect, Ventura, and dBase, which all cost over \$400 in the United States, sell in Bangkok for around \$35.³²

The impact of fake products on sales of pharmaceutical goods is particularly evident. Pfizer International Corporation has stated that it earned \$2.2 million in 1984 on twelve of the U.S.-patented products it sells in Thailand, while fakes of the same products earned other companies \$4.2 million in the same period.³³ SmithKline Beecham estimated that its sales in Thailand in 1986 would have been \$7.6 million had it not been for counterfeiting. This figure contrasts sharply with the \$2.7 million SmithKline Beecham estimated for actual sales in that year.³⁴

2.2. *Thai Patent, Trademark and Copyright Protection*

Experts have suggested that Thailand is particularly well suited to

²⁷ *Id.* at 15.

²⁸ *Counterfeiting Asians*, *supra* note 14, at 16.

²⁹ *See supra* note 17 and accompanying text (citing ITC Study, *supra* note 25).

³⁰ STAFF OF HOUSE SUBCOMM. ON OVERSIGHTS AND INVESTIGATION OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., SELECTED PROBLEMS IN 5 FAR EAST COUNTRIES 9 (Comm. Print 1986) [hereinafter PROBLEM COUNTRIES].

³¹ *Id.*

³² *Asian Upstarts*, *supra* note 15, at 52.

³³ White, *Thailand's Drug-Copying Companies Keep Prices Down, Upset Foreign Firms*, Wall St. J., Dec. 1, 1986, at 25, col.2.

³⁴ *Id.* Industry officials have also noted other problems in the area of pharmaceutical goods. Foreign producers seeking to introduce new drugs to Thailand must submit a formula to Thai regulatory officials for approval. "Somehow that formula often leaks out to Thai producers before marketing approval is granted to the foreign firm." *Thai Producers*, *supra* note 14, at 9, col. 3 (statement of an anonymous U.S. business executive).

production of counterfeit goods because of its stable currency and its labor force, which is among the cheapest in Asia.³⁵ However, the main reason for the shift to Thailand is the standard of Thai patent, copyright and trademark protection. Thailand's patent law was enacted in 1979.³⁶ The Patent Act gives protection to inventions for a period of fifteen years from the application filing date while product designs are protected for seven years after the application filing date.³⁷ The Patent Act also provides for compulsory licenses if, after three years from the grant of a patent, there has been, for no legitimate reason, neither production of a patented product nor application of the patented process in Thailand.³⁸ Compulsory licenses are also provided if, for no legitimate reason, there has been no sale of the patented product or if a sale has been at "unreasonably high prices or such sales do not meet the public demand."³⁹

The Patent Act also contains numerous exclusions, including food and pharmaceutical products, pharmaceutical ingredients, agricultural machinery, plant or biological processes, scientific or mathematical rules and theories, and computer programs.⁴⁰ In addition, the statute proscribes protection for "inventions which are contrary to public order, good morals, or public health or welfare."⁴¹ United States sources have described the statute as "weak,"⁴² and list the exceptions, the requirement that a patent holder work the patent in Thailand to avoid compulsory licensing or cancellation and the case-by-case judicial determination of what constitutes working the patent as major statutory shortcomings.⁴³

³⁵ J. Com., Aug. 23, 1988, at 4A, col. 2.

³⁶ The Patent Act, B.E. 2522 A.D. 1979, *reprinted in* 82 PATENT AND TRADE-MARK REVIEW 278 (1984). The English translations of the Thai patent, copyright, and trademark statutes are also available in INTERNATIONAL LEGAL COUNSELLORS THAILAND, THAILAND BUSINESS LEGAL HANDBOOK 108 (7th ed. 1987) [hereinafter LEGAL HANDBOOK].

³⁷ LEGAL HANDBOOK, *supra* note 35, at 110.

³⁸ *Id.* at 111.

³⁹ *Id.* at 111.

⁴⁰ *Id.* at 109. The issue of the protection computer software should receive has been one of the most contentious points in the current United States-Thailand trade dispute.

⁴¹ *Id.*

⁴² PROBLEM COUNTRIES, *supra* note 30, at 9.

⁴³ NATIONAL TRADE ESTIMATES, *supra* note 6, at 311. Exporting and selling a product through an agent has been interpreted as satisfying the requirement that a patent holder work the patent in Thailand. *See id.* at 311.

Pharmaceutical industry sources have commented further on the protection accorded under the patent statute. "We have process protection in Thailand, but it's worthless. The burden of proof of [process patent] infringement is on us." INSIDE U.S. TRADE, Nov. 11, 1988, at 11 (statement of industry official). Drug patent holders also argue that it is easy for foreign infringers to copy a patented process used to make a

Thailand's Trademark Act⁴⁴ provides protection and registration requirements for Thai and foreign trademarks. Provisions of the Thai Penal Code also provide some protection and impose criminal liability on trademark infringers.⁴⁵

Trademark registration is effective for ten years, and after expiration, the owner of trademark may apply for renewal.⁴⁶ Trademarks may be challenged and a court may invalidate them for non-use.⁴⁷

Remedies under the Trademark Act include imprisonment for one year or a fine of not more than 10,000 baht.⁴⁸ The Act, however, does not address the legal action that the owner of a registered trademark may take against an infringer; the owner must, therefore, rely on remedies under the Civil and Commercial Code and under the Penal Code.⁴⁹ Section 420 of the Civil and Commercial Code provides the owner of a registered trademark with a civil action for compensation.⁵⁰ Sections 273-75 of the Penal Code provide criminal penalties of three years imprisonment and a fine of not more than 6,000 baht, or imprisonment for one year or a fine of not more than 2,000 baht, depending on the type of violation.⁵¹

The United States considers the Trademark Act deficient since it does not protect service, certification, or well-known marks.⁵² United States observers have also noted that enforcement of the law is poor and that the penalties under the Trademark Act are "relatively low."⁵³

The source of protection for foreign copyrights is an issue of current Thai-U.S. negotiations. The Thai parliament has also addressed this issue.⁵⁴ Parties to the current United States-Thailand debate have cited three sources of potential protection for domestic and foreign copyrights in Thailand: the Copyright Act,⁵⁵ The Berne Convention for the Protection of Literary and Artistic Works,⁵⁶ and the 1966 United

drug and "add a slight twist to the process to avoid infringement." *Id.*

⁴⁴ The Trademark Act, B.E. 2474 (1931), as amended by The Trademark Act, B.E. 2504 (1961), translated in LEGAL HANDBOOK, *supra* note 36, at 118-23.

⁴⁵ LEGAL HANDBOOK, *supra* note 36, at 118-19.

⁴⁶ *Id.* at 121.

⁴⁷ *Id.* at 122.

⁴⁸ *Id.* Ten thousand baht is about \$390.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 123. Six thousand baht is approximately \$240. Two thousand baht is about \$80.

⁵² See NATIONAL TRADE ESTIMATES, *supra* note 6, at 311.

⁵³ PROBLEM COUNTRIES, *supra* note 30, at 9.

⁵⁴ See *infra* notes 100-129 and accompanying text.

⁵⁵ The Copyright Act, B.E. 2521 (1978), translated in LEGAL HANDBOOK, *supra* note 36, at 112-18.

⁵⁶ See *supra* note 20.

States-Thailand Treaty of Amity and Economic Relations.⁵⁷

Under the Copyright Act, copyright subsists for the life of the author plus fifty years in "literary work, dramatic work, artistic work, musical work, audiovisual material, cinematic film, disseminated sound or disseminated pictures, or any other works in the fields of literature, science, or fine arts."⁵⁸ The Act does not specifically mention computer software.⁵⁹

Concerning international copyrights, the Copyright Act protects, subject to Royal Decree, work copyrighted under the national laws of signatories of international conventions on copyright that Thailand also has signed.⁶⁰ The United States has argued that, its membership or non-membership in the Berne Convention notwithstanding, the 1966 Treaty protects U.S. copyrights. However, until the recent U.S. approval of the Berne Convention, U.S. authors were not accorded direct protection, since the 1983 Royal Decree that implemented the Thai Copyright Act referred only to Berne signatories.⁶¹ A Thai court subsequently ruled that U.S. authors were not protected under the bilateral treaty,⁶² although works first published in Berne Convention member countries were protected.

The Copyright Act provides for imprisonment as punishment for infringement and contains a number of fines for violations of the rights to reproduction and adaptation or for publicizing without permission.⁶³ The Copyright Act also proscribes contributory infringement and allows a copyright owner to bring a civil action for any damages that exceed the amount of the fine he or she receives.⁶⁴

⁵⁷ See *supra* note 9.

⁵⁸ LEGAL HANDBOOK, *supra* note 36, at 112, 117.

⁵⁹ *Id.* at 112; PROBLEM COUNTRIES, *supra* note 30, at 9.

⁶⁰ LEGAL HANDBOOK, *supra* note 36, at 116. Thailand is a signatory to the Berne Convention. The United States has recently amended its copyright law in order to join the Berne Convention. This fact has defused the debate over the amount of protection to be accorded to United States copyrights. See *infra* note 88 and accompanying text.

⁶¹ PROBLEM COUNTRIES, *supra* note 30, at 9. Article V, Sec. 2 of the 1966 treaty provides:

Nationals and companies of either Party shall have within the territories of the other Party the same right as nationals and companies of the other Party in regard to patents for inventions, trade marks, trade names, designs and copyright in literary and artistic works, upon compliance with the applicable laws and regulations, if any.

19 U.S.T. at 5850.

⁶² PROBLEM COUNTRIES, *supra* note 30 at 9.

⁶³ See LEGAL HANDBOOK, *supra* note 36, at 117-18 (setting forth the amount of the fines).

⁶⁴ *Id.* at 118.

3. TRADE-BASED METHODS TO COMBAT PIRATE GOODS

3.1. *Bilateral Efforts: The Trade and Tariff Act of 1974*

As noted previously,⁶⁵ protection of intellectual property is a priority component of U.S. trade policy. In 1984, the United States instituted a policy of encouraging host-country statutory reform through bilateral negotiations and the threat of unilateral trade measures. Initially, the International Trade Administration of the Department of Commerce, together with the Commerce Department's Patent and Trademark Office, compiled a series of unpublished papers highlighting the problem of piracy in ten countries considered to be the worst global offenders.⁶⁶ Information from these reports was used to compile the United States Trade Representative's (USTR) *Annual Report on National Trade Estimates* required by the Trade and Tariff Act of 1984.⁶⁷ This report was subsequently used in a general review of the GSP.⁶⁸

The United States then focused its attention on priority cases. Priorities were defined with two principles in mind: that reduction in international piracy be engendered through efforts to reduce the production of pirated goods rather than through efforts to reduce the access of these goods to foreign markets; and, that attention be concentrated initially on the worst offenders.⁶⁹ The USTR commented at the outset of the program that it would attempt to influence regional infringement practices by picking a country and making an example of it.⁷⁰ If the target nation was able to attract more foreign investment after reforming its laws, the United States would use the target nation's positive experience to demonstrate the benefits of increased protection to

⁶⁵ See *supra* note 16 and accompanying text.

⁶⁶ GAO REPORT, *supra* note 16, at 40. Thailand was one of the 10 countries the Commerce Department identified.

⁶⁷ *Id.* at 41.

⁶⁸ *Id.* The GSP allows certain developing countries to import certain commodities duty-free in order to encourage developing country national economic progress. Briefly, it operates in the following manner. The United States applies two sets of criteria when evaluating whether a country is to participate in the GSP program. First, it applies mandatory criteria pursuant to 19 U.S.C. 2462(b) (1988) which renders ineligible for trade benefits Communist governments and governments that nationalize United States property. Second, the President applies discretionary criteria pursuant to 19 U.S.C. 2462(c) (1988), where the President "takes into account" "the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." See *Four Pacific Rim Nations Are Graduated From GSP Status*, 34 Pat. Trademark & Copyright J. (BNA) 282 (1988).

⁶⁹ GAO REPORT, *supra* note 16, at 42.

⁷⁰ *Id.*

other nations in the region.⁷¹

The United States then commenced, in a number of specific cases, a process of persuasion where it emphasized the positive consequences of stronger laws.⁷² These included: attracting foreign investment; encouraging the transfer of technology; encouraging licensing agreements; promoting beneficial subcontracting relationships; improving the target nation's reputation and visibility as a supplier; and protecting consumers in the target country.⁷³ The United States has also held education and training seminars.⁷⁴

Absent significant progress by these means, the United States, resorts to unilateral trade action. Unilateral action generally can take two forms: the threat of revocation of benefits under the GSP program and the threat of the initiation of an unfair trade practices action under Section 301 of the Trade and Tariff Act of 1974, as amended in 1984.⁷⁵

The U.S. System of Preferences was enacted in 1974 and allows the United States to designate certain products as eligible for duty-free entry into the United States. It is intended to promote economic development in developing countries.⁷⁶ In 1984, the GSP was amended to include among its list of objectives the provision of "effective means under which foreign nationals may secure, exercise and enforce exclusive intellectual property rights"⁷⁷ in recipient nations. Specifically, the 1984 Act amended Section 502(b) of the 1974 Act by making intellectual property protection a mandatory criteria for the grant of benefits.⁷⁸ It also included intellectual property protection in the discretionary cri-

⁷¹ *Id.*

⁷² *Id.*

⁷³ Address by Eileen Hill, International Economist, International Trade Administration, United States Department of Commerce, Institute of Public Policy Studies, University of Michigan (Mar. 13, 1987) [hereinafter Hill Speech].

⁷⁴ GAO REPORT, *supra* note 16, at 45. The United States conducted seminars on copyright protection in Malaysia, Thailand, and Indonesia in 1985. *Id.*

⁷⁵ The provisions of the 1974 Trade Act concerning the Generalized System of Preferences are contained at 19 U.S.C. §§ 2461-66 (1988). The provisions concerning the enforcement of United States rights under trade agreements and response to certain foreign trade practices are codified at 19 U.S.C. §§ 2411-20 (1988). For information on the 1984 amendments to the Trade Act see generally Comment, *Toward Negotiating a Remedy to Copyright Piracy in Singapore*, 7 Nw. U. J. INT'L. LAW & BUS. 561, 577-83 (1986) [hereinafter *Singapore*].

⁷⁶ See generally *Singapore*, *supra* note 75, at 576.

⁷⁷ 19 U.S.C. § 2461 (1988) (Statement of Purpose of 1984 Amendment). See also GAO REPORT, *supra* note 16, at 47-48. Previously, the criteria for eligibility included the level of national economic development, the extent to which other nations were undertaking comparable efforts, and the impact of granting GSP status on U.S. producers only. 19 U.S.C. § 2461 (1982).

⁷⁸ 19 U.S.C. § 2462(h)(4)(A) (1988).

teria the President may consider when deciding whether a country qualifies for participation.⁷⁹ The Act requires the President to conduct periodic reviews of the program to determine a country's "competitive need limitations" and requires the President to cut benefits if the beneficiary nation reaches a certain level of competitiveness.⁸⁰ The President may, however, waive the competitive need limitation for certain articles if he deems a waiver to be in the national interest.⁸¹ When considering the decision, the President must give "great weight" to a country's protection of copyrights, patents, and trademarks.⁸²

The 1984 amendments also authorize the USTR, on its own initiative, to institute an unfair business practices case under Section 301 of the 1974 Trade Act,⁸³ the consequences of which are more serious to a target nation's economy than the revocation of GSP benefits. Section 301, as amended, gives the President sweeping power to enforce U.S. rights under any trade agreement or to respond to foreign trade practices that are "unjustifiable, unreasonable, or discriminatory and burden[] or restrict[] United States commerce."⁸⁴ The 1984 amendments specifically include inadequate intellectual property protection as within the scope of "unjustifiable" or "unreasonable" trade practices.⁸⁵

Section 301 has proved effective in the past. After the United States initiated an investigation under Section 301 in 1985 against South Korea, the Koreans agreed to provide better protection for U.S. patents—particularly chemicals and pharmaceutical goods—and copyrights.⁸⁶ The Koreans would have faced retaliatory trade measures if the action had not been settled.⁸⁷

3.2. *Multilateral Action through the GATT*

The United States has also focused on the GATT as a multilateral method of strengthening protection of intellectual property.⁸⁸ The United States initiated discussions on the issue within the GATT

⁷⁹ 19 U.S.C. § 2462(c)(5) (1988).

⁸⁰ 19 U.S.C. § 2464(c)(1), (2)(A), (2)(B) (1988).

⁸¹ 19 U.S.C. § 2464(3)(A) (1988).

⁸² 19 U.S.C. § 2464(3)(B)(ii) (1988).

⁸³ 19 U.S.C. §§ 2411-20 (1988).

⁸⁴ 19 U.S.C. § 2411(a)(1)(B)(ii) (1988).

⁸⁵ 19 U.S.C. § 2412(d)(3)(B) (1988).

⁸⁶ See Anderson, *Intellectual Property: Foreign Pirates Worry U.S. Firms*, CHEMICAL AND ENGINEERING NEWS, Sept. 9, 1986, at 8, 11.

⁸⁷ *Id.*

⁸⁸ For information concerning the history and purposes of the GATT, see generally J.M. FINGER AND A. OLECHOWSKI, *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS*, (1987) [hereinafter *GATT HANDBOOK*], and Ehrenhaft, *A U.S. View of the GATT*, 14 INT'L BUS. LAW 146 (1986).

framework at the end of the Tokyo Round,⁸⁹ emphasizing its preference for the enactment of a code to prevent trade in counterfeit trademark goods.⁹⁰ The United States prepared a draft of the code, which was never submitted to the GATT membership for consideration.⁹¹

The Uruguay Round is the eighth and most recent round of GATT talks.⁹² At the outset of the Uruguay Round in an April, 1986 policy statement, the United States outlined two proposals for action on intellectual property. First, the United States indicated its intention to work towards the completion and implementation of an anticounterfeiting code to eliminate the market for the import of counterfeit trademark goods.⁹³ Second, the United States declared that it would work to conclude an agreement to combat intellectual property practices that distort international trade.⁹⁴ Subsequently, intellectual property negotiations were included among the topics for consideration at the Uruguay Round.

The United States believes the GATT provides a more effective vehicle for reform than existing multilateral bodies, including the World Intellectual Property Organization (WIPO).⁹⁵ Two reasons account for this view. First, the GATT procedures for adopting new measures are more fluid than other international bodies because most GATT nations have not formed voting blocs due to their varying economic interests in the wide range of subjects that the GATT encompasses.⁹⁶ Also, GATT obligations are embedded in codes, to which adherence is optional.⁹⁷ The chances of general approval and maximum participation in codes are good because of the wide bargaining that comprises the approval process.⁹⁸ Second, GATT dispute settlement procedures are considered better than the procedures in WIPO, where the International Court of Justice adjudicates the aggrieved party's complaints.⁹⁹

⁸⁹ GAO REPORT, *supra* note 16, at 35.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Farnsworth, Brazil and India fight New Copyright Rules, N.Y. Times, Dec. 6, 1988, at D2, col. 5. Trade ministers from member countries most recently met in Montreal in December, 1988.

⁹³ GAO REPORT, *supra* note 16, at 35.

⁹⁴ Office of the United States Trade Representative, Administration Statement on the Protection of U.S. Intellectual Property Rights Abroad, Apr. 7, 1986, *quoted in* GATT HANDBOOK, *supra* note 88, at 206 n.1.

⁹⁵ See *supra* notes 16-20, and accompanying text.

⁹⁶ GAO REPORT, *supra* note 16, at 36.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 37.

4. APPLICATION OF THE UNITED STATES BILATERAL STRATEGY TO THAILAND.

By the time the United States began to exert pressure on Thailand to change its laws, U.S. bilateral action had already brought about reform in role model countries Taiwan, South Korea, and Singapore.¹⁰⁰ In addition, the United States had made progress towards reform in Malaysia and Indonesia.¹⁰¹

The United States initially applied its policy of persuasion in the Thai context by conducting a seminar on the problem in Thailand in early 1985.¹⁰² It then began to threaten to institute unilateral trade measures in response to continued failure by the Thais to provide better protection. The areas on which the United States has focused are computer software, where the United States seeks copyright protection, and pharmaceutical goods, where the United States seeks interim patent protection until the Thais can amend their patent law.

The threat of GSP revocation was the initial trade measure the United States utilized,¹⁰³ and it announced a cut in benefits of \$165 million on January 19, 1989.¹⁰⁴ Moreover, the prospect of a threatened Section 301 trade action on either the issue of computer software or drug patents has surfaced. However, the United States has not made a specific proposal.¹⁰⁵

One development the United States may not have anticipated was the gravity of the domestic political consequences that followed American attempts to force former Prime Minister Prem Tinsulanonda to submit copyright reform legislation to the Thai House of Representatives. Thai Foreign Minister Siddhi Savetsila recently noted that Thailand and the United States are on a "collision course" as a result of the inadequacy of patent and copyright statutes as they apply to computer

¹⁰⁰ *Pirating*, *supra* note 21, at 19.

¹⁰¹ *Counterfeiting Asians*, *supra* note 14, at 20.

¹⁰² See *supra* note 74 and accompanying text.

¹⁰³ See Sikes, *Thai Copyright Issue May Topple Government*, J. Com., Apr. 21, 1988, at 8A, col. 2 [hereinafter Sikes]. In 1987 Thailand ranked seventh in the world in receipt of GSP benefits with sales to the United States worth \$550 million. J. Com., Aug. 23, 1988, at 4A, col. 2.

¹⁰⁴ See *supra* note 24 and accompanying text. Before the cut in GSP benefits was announced, Thai Commerce Ministry and Embassy officials projected that a cut could potentially cover items worth \$300-360 million a year. Bangkok Post, Dec. 22, 1988, at 1, col. 1. Based on mid-year trade statistics, the Thai Farmer's Bank estimated that a cut of this magnitude would have caused Thai exporters to pay \$48.4 million in import tariffs, a figure which would represent 3.4% of the value of total Thai exports to the United States (which totaled \$1.4 billion in 1988). *Id.* Nonetheless, advisors to Thai Prime Minister Chatichai Choonhavan had estimated that they did not expect the cut to be so large. *Id.*

¹⁰⁵ Bangkok Post, Dec. 22, 1988 at 1, col. 2.

software and drug patents.¹⁰⁶ This statement and the recent U.S. decision on GSP benefits followed a year of attempts by the United States to have the Thais enact stronger legislation, and of attempts by the Thai government to push an unpopular Copyright Amendments Bill through the Thai legislature.

4.1. *Legislative Action on the Copyright Amendments Bill*

In June 1987, the Cabinet of Prime Minister Prem Tinsulanonda was forced to postpone debate on the Copyright Amendments Bill to avert a political conflict with a well-organized opposition, including members of the Prime Minister's ruling Democratic Party.¹⁰⁷ The bill was intended to satisfy U.S. industry concerns, expressed through the United States government, that the Thai statutes did not provide adequate penalties for copyright violations and that the Thai government was not aggressive enough in enforcing copyright protection.¹⁰⁸ Despite the opposition, Prime Minister Prem was obligated, in part by U.S. threats at trade retaliation, to submit the Copyright Amendments Bill to the Thai legislature in April 1988.

Members of the Democratic Party January 10 dissidents had expressed their intention to oppose the bill even before House consideration.¹⁰⁹ Despite the opposition of thirty-one members of the January 10 dissidents in the Democratic Party, and of the other members of the opposition, the Copyright Amendments Bill was approved by the House on April 28, 1988 by a vote of 183-134.¹¹⁰ Prime Minister Prem nevertheless dissolved his Cabinet and Parliament that day after sixteen Democrat ministers, led by Deputy Prime Minister Bhichai Rattakul, resigned because "they could not control" the dissidents.¹¹¹ The move to dissolve the legislature nullified the recently-enacted copyright legislation.¹¹² At the time of dissolution, the King's Royal Decree also announced a general legislative election for July 24, 1988.¹¹³

The dissolution of Parliament proved to be only one step in a contentious political struggle. After the July elections, the new Prime Minister, Chatichai Choonhavan, announced, after holding talks with U.S.

¹⁰⁶ *Asian Upstarts*, *supra* note 15, at 52.

¹⁰⁷ See Sikes, *supra* note 103, at 8A.

¹⁰⁸ *Thailand Rushing to Draft Patent, Copyright Rules under U.S. Threat*, 6 INSIDE U.S. TRADE 2 (1988) [hereinafter *Thailand Rushing*].

¹⁰⁹ Bangkok Post, Apr. 20, 1988, at 1, col. 2.

¹¹⁰ Bangkok Post, Apr. 29, 1988, at 1, col. 1.

¹¹¹ Bangkok Post, Apr. 30, 1988, at 1, col. 4; N.Y. Times, Apr. 30, 1988, at 5, col. 1 (quoting Democrat Party Secretary General Sanan Kachornprasat).

¹¹² Bangkok Post, Apr. 30, 1988, at 1, col. 6.

¹¹³ *Id.*

Commerce Secretary William Verity, that he would reintroduce the Copyright Amendments Bill.¹¹⁴ Predictably, public debate over the issue again became heated.¹¹⁵ United States and Thai negotiators met twice while the Thais redrafted the Copyright Amendments Bill. The first round of these discussions occurred in Hawaii in November 1988, and the second round convened in Washington in December. By the time of the November meetings in Hawaii, tension over the copyright issue appeared to have eased in view of the adoption of the Berne Convention by the United States.¹¹⁶ Nevertheless, the extent of protection that the United States would receive under the Convention and draft reform laws and the issue of retroactive protection for U.S. copyrights remained unresolved.¹¹⁷ Moreover, the two nations were still far apart on the issue of protection of U.S.-patented drugs. The United States at the beginning of November had rejected, on the grounds that the term of protection was too short, a Thai proposal to protect U.S. pharmaceutical goods until the Thais could address the politically sensitive patent issue by statutory reform.¹¹⁸ Finally, the nations still disagreed on the categorization of computer software, with the Thais citing a recent Judicial Council ruling that software is a scientific work entitled to patent protection, and the United States maintaining that software is a literary work entitled to protection under the copyright law.¹¹⁹

Substantive disagreement over the scope of copyright and patent protection and political posturing persisted as the December talks approached.¹²⁰ The Thais continued to argue that an amendment to the

¹¹⁴ Bangkok Post, Sept. 19, 1988, at 3, col. 1.

¹¹⁵ See Bangkok Post, Sept. 20, 1988, at 6, col. 1 (editorial supporting reform of the copyright laws); Bangkok Post, Sept. 20, 1988, at 5, col. 1 (indicating student opposition to reform); Bangkok Post, Sept. 24, 1988, at 4, col. 2 (op-ed piece opposing reform); Bangkok Post, Oct. 1, 1988, at 5, col. 2 (letters to the editor in support of better protection of intellectual property).

¹¹⁶ See *supra* note 60 and accompanying text. See also Bangkok Post, Nov. 10, 1988, at 32, col. 1 (indicating Prime Minister Chatichai Choonhavan's view that both parties appeared after the Hawaii talks to have a better understanding of the issues); *Thailand Rushing*, *supra* note 108, at 2 (indicating that the adoption by the United States of the Berne Convention was expected to ease Thailand's burden of providing protection).

¹¹⁷ *Thailand Rushing*, *supra* note 108, at 2. At the meeting, the United States also expected Thailand to increase penalties for violations and to provide greater enforcement of its laws. *Id.* See also Bangkok Post, Oct. 26, 1988, at 32, col. 1.

¹¹⁸ *Thailand and U.S. Still Far Apart on Patent Protection as Deadline Nears*, *INSIDE U.S. TRADE*, Nov. 11, 1988, at 10.

¹¹⁹ Bangkok Post, Nov. 11, 1988, at 15, col. 6.

¹²⁰ See Bangkok Post, Nov. 18, 1988, at 3, col. 1 (indicating that a visiting delegation of United States Senators to Bangkok expressed the United States' intention to "push hard" on the protection of intellectual property). See also Bangkok Post, Dec. 1, 1988, at 4, col. 1 (statement of Prime Minister Chatichai Choonhavan that Thai interests will be protected at the talks with United States officials).

copyright statute was not needed in view of the United States approval of the Berne Convention.¹²¹ The United States, however, still remained doubtful over the level of protection to be provided¹²² and awaited clarification of the Thai position on the issue of translation rights and length of protection.¹²³

These issues, however, were minor compared to the continuing disagreement over protection of computer software and interim patent protection for pharmaceutical goods. The United States argued that software should be protected under the copyright law,¹²⁴ but the Thais rejected U.S. demands that the Copyright Amendments Bill include such protection.¹²⁵ Consequently, the prospect of a Section 301 action surfaced.¹²⁶

With respect to pharmaceutical goods, the Thais indicated their willingness to implement temporary measures by using Public Health Ministry regulations to provide protection for one year, and their predisposition to await the outcome of the Uruguay Round before commencing further discussions on patents.¹²⁷ The United States, however, sought tougher interim protection until new patent legislation could be enacted.¹²⁸ After the December negotiations, Thailand indicated that it would maintain its position despite any revocation of GSP benefits.¹²⁹

4.2. Sources of Thai Opposition

Dissident members of the Democrat Party and other opponents of reform have proffered numerous reasons why passage of the Copyright Amendments Bill and more generally, the enactment of more comprehensive intellectual property protection, would not serve Thailand's national interests. Participants in the Thai debate and commentators on the advantages of protection for developing nations have justified their positions on legal, economic, and nationalist grounds.

The main legal objection to the Copyright Amendments Bill was that it contravened Article 162 of the Thai Constitution.¹³⁰ Specifically, opponents argued that the Constitution unambiguously states that any

¹²¹ Bangkok Post, Nov. 17, 1988, at 1, col. 2.

¹²² Bangkok Post, Nov. 23, 1988, at 30, col. 6.

¹²³ Bangkok Post, Nov. 17, 1988, at 1, col. 2.

¹²⁴ Bangkok Post, Nov. 11, 1988, at 15, col. 2.

¹²⁵ Bangkok Post, Dec. 10, 1988, at 3, col. 5.

¹²⁶ See Bangkok Post, Dec. 20, 1988, at 1, col. 4.

¹²⁷ Bangkok Post, Nov. 11, 1988, at 15, col. 2; Embassy Interview, *supra* note 13.

¹²⁸ Bangkok Post, Nov. 11, 1988, at 15, col. 2.

¹²⁹ See Bangkok Post, Dec. 14, 1988, at 3, col. 8.

¹³⁰ Surin Pitsuwan, *Copyright Bill Now More of a "Political Plaything,"* Bangkok Post, Jan. 28, 1989, at 3, col. 1. See also Surin Pitsuwan, *Copyright Bill Now More of a "Political Plaything,"* Bangkok Post, Jan. 28, 1989, at 3, col. 1.

treaty—in this case the 1966 Treaty of Amity and Friendship between the United States and Thailand¹³¹—that needs legislation to define and fulfill the treaty's obligations requires the approval of a joint session of Parliament.¹³² The 1966 Treaty, however, received no such joint approval, since it was signed and ratified by the revolutionary government of Field Marshall Thanom Kittikachorn without having been approved by the national legislature.¹³³ According to this view, the Copyright Amendment Bill was, therefore, ahead of the Constitutional process.¹³⁴

Other objections to both the legislation and to stronger protection in general were grounded in the view that protection of foreign rights would not serve Thai development interests.¹³⁵ Dr. Surakiart Sathirathai, a law professor at Chulalongkorn University and an advisor to Prime Minister Chatchai, has stated, "Let's be frank. To give absolute protection under a copyright system would do no good for the Thai scientific community. Much of what we do in science is derivative [of foreign products] but contributes to the welfare of the country. We have to provide certain mechanisms for fairness to the Thai public."¹³⁶

¹³¹ See *supra* note 9.

¹³² *Political Plaything*, *supra* note 130.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ The issue of protection of intellectual property rights has in the past been viewed as a North/South issue and commentators have put forth the economic argument against patent protection on numerous occasions. See generally Greer, *The Case Against Patent Systems In Less-Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973) (arguing that the purposes of patent protection—encouraging the creation of new inventions—are not served by LDC protection of foreign patents since the creation of inventions in advanced countries does not depend on LDC markets, and since only some instances of transfer of technology to less developed nations are patent dependent); Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831 (1987) [hereinafter *International Patent System*] (arguing that the traditional rationale for patent protection in developed nations does not apply to developing countries). Professor Oddi, however, recognizes that we are in a period of "patent ascendancy," where many developing nations feel that participation in the international economic system will promote economic development. *Id.* at 836.

The United States emphasizes the benefits of better protection in the course of consultations as part of its bilateral strategy. See *supra* notes 72-74 and accompanying text. Commentators have also noted that the position of Asian nations as producers of knowledge as well as consumers has contributed to a growing acceptance of intellectual property rights. See generally Altbach, *Economic Progress Brings Copyright to Asia*, FAR E. ECON. REV., Mar. 3, 1988, at 62, 63 [hereinafter Altbach, *Economic Progress*]; Altbach, *Toward a Worldwide Copyright Era*, PUBLISHER'S WEEKLY, Dec. 11, 1987, at 44 [hereinafter Altbach, *Copyright Era*].

¹³⁶ *Thai Producers*, *supra* note 14, at 9. Dr. Surakiart's comments echo the sentiment of some Western commentators, who have offered a "stages of development" argument. According to this view, "[i]ndustrial development requires, at some stage, the copying of ideas and inventions already available." *Counterfeiting Asians*, *supra* note 14, at 17 (statement of Hong Kong University Lecturer Michael Pendleton).

The United States has emphasized that it believes this view has its limits, and that good laws and enforcement practices are a necessary step to development. See Hill

Development rationales similarly underlie the debates over whether computer software should qualify for copyright or for patent protection, and whether patent protection should be granted for foreign-patented drugs. On the computer issue, opponents of copyright protection for software have argued that software should be patentable since, after expiration of the statutory period of patent, the information supplied in the patent registration enters the public domain. The Thais could then use the information and the product to develop their own technology. If software was protected by copyright, not only would the applicant for protection not have to supply technical information upon registration, but the term of protection would be much longer—life plus 50 years.¹³⁷ With respect to drugs, opponents of patent protection note that Thailand is a largely rural community which is primarily self-medicated since access to doctors is difficult.¹³⁸ Production in violation of the patent holders' rights in the United States is justified, therefore, on public health policy grounds.¹³⁹

The most vocal opposition to reform has come from those parties who believe that passage of new legislation would amount to an unpatriotic caving-in to U.S. demands. At the height of the debate over the Copyright Amendment Bill, Mr. Surin Pitsuwan, a member of parliament who was also a member of a scrutinizing committee assembled to approve the bill before submission to the House, noted that the controversy over the bill had less to do with its merits than its politics.¹⁴⁰ Mr. Surin also noted that proponents of the bill have been accused of being traitors, betraying the Thai nation on an issue of "national honour."¹⁴¹

Speech, *supra* note 73, at 13. It cites two examples and offers one explanation for its view. First, the United States has noted that Japan improved its laws over 30 years ago to attract cutting-edge technology and to concentrate its research efforts on developing new technology. Second, the United States has noted that where domestic laws have been weakened, such as in Britain in the 1950s when patent protection was suspended, the country became less competitive globally. Last, the United States has noted that lack of protection hurts domestic authors, since if there is protection only for domestic products and pirating of foreign works, the price of domestic works will be more than the foreign goods. The foreign goods will, therefore, take over some of the domestic market from domestic goods. *See id.* at 13-15.

¹³⁷ Embassy Interview, *supra* note 13.

¹³⁸ *Id.* This fact is attributable both to the number of doctors (the ratio of doctors to the general population is relatively low) and to the lack of access to doctors in many rural areas. *Id.*

¹³⁹ *Id.* Other explanations for the opposition to the copyright bill place noticeably less emphasis on the public benefits to be derived from greater access to technology, and in the case of patents and trademarks, to cheaper goods. Owners of pirate industries appear to have much political influence. *See generally Counterfeiting Asians, supra* note 14, at 20.

¹⁴⁰ *See Political Plaything, supra* note 130.

¹⁴¹ *Id.* *See also* Surin Pitsuwan, *Democrat MP Recounts Battle Over Copyright,*

Opposition to reform based on arguments of state sovereignty has continued throughout the escalating trade dispute.¹⁴²

In addition to the perception among certain Thai constituencies that the United States is engaged in an insulting process of browbeating, opposition is founded on the view that the United States lacks the moral imperative to force young industrializing nations to abandon pirate production. Proponents of this view note that the United States pirated many goods from Western Europe, particularly England, during the 19th century.¹⁴³ Moreover, they have remarked at the inordinate amount of time it took the United States to join the Berne Convention and at its reasons for opposing the convention until recently.¹⁴⁴

Other opponents have stated that copyright is a western concept "which was created to maintain a monopoly over the protection and distribution of knowledge and knowledge-based products."¹⁴⁵ These critics note that copyright is not part of Asian cultural traditions but is imposed on Asian nations by their advanced country trading

¹⁴² See sources cited *supra* note 115.

¹⁴³ See *Counterfeiting Asians*, *supra* note 14, at 17. "For most of our first century of nationhood, we were takers. . . . We stole what others created. Nobody could match us in our disdain for the rights of foreign authors such as Dickens, Thackeray or Gilbert and Sullivan . . ." *Thai Producers*, *supra* note 14, at 9 (statement of former United States Secretary of Commerce William Verity).

Michael Pendleton, a lecturer at Hong Kong University, an expert on intellectual property law, and an editor of a specialist publication entitled IP ASIA has also noted that "[r]ight up until 1955 the [United States] didn't recognize foreign copyright." *Counterfeiting Asians*, *supra* note 14, at 17.

¹⁴⁴ ASIAN BUSINESS has observed that a February 1988 press release issued by the United States stated that "[O]pposition to joining has, in part, been based on the belief that it (the Berne Convention) provides too much protection." *Counterfeiting Asians*, *supra* note 14, at 17.

Thai observers have also noted that it is curious that the United States has not better understood and accommodated the domestic Thai political difficulties, which have accompanied the issue, in view of the politics of the United States' delay in adopting the Berne Convention. Embassy Interview, *supra* note 13. Some Thais acknowledge that the United States took so long to join Berne because joining the convention would require amendment of the manufacturing clause, the clause in United States copyright law which links copyright protection to the manufacture of copies of certain works in the United States. *Id.* See generally, A. LATMAN, R. GORMAN, AND J. GINSBURG, COPYRIGHT FOR THE EIGHTIES (1985) [hereinafter GORMAN]; Note, *Abandon Restrictions, All Ye Who Enter! The New United States Copyright Law and the Berne Convention*, 9 N.Y.U.J. INT'L L. & POL. 455, 469-71 (1977). The Thais note that the clause owes its existence to the United States government's failure to combat the powerful domestic printing industry, which had urged strongly the enactment of what many would characterize as protectionist legislation. Embassy Interview, *supra* note 13. See also GORMAN, *supra* note 144, at 300-02.

¹⁴⁵ Altbach, *Economic Progress*, *supra* note 135, at 43. In the 19th century English philosopher John Stuart Mill defined copyright as a device for protecting knowledge monopolies of the "haves" against the real educational, cultural and scientific needs of the underdeveloped world. *Id.*

partners.¹⁴⁶

4.3. Consequences of Unilateral Trade Measures

The U.S. use of unilateral trade sanctions has caused some individuals in Thailand to argue for a reorientation of the Thai development strategy away from the United States.¹⁴⁷ Two features of U.S. regional economic and security policy also appear to foster this sentiment. First, the United States is in many ways still viewed with suspicion after it backed out of its support of South Vietnam.¹⁴⁸ These parties question whether or not the Thais should depend on the United States as an ally. Second, opponents of reform have noted that the United States recently graduated Taiwan and Singapore from benefits under the GSP program despite the progress that these countries had made on intellectual property rights.¹⁴⁹

Continuation of a strained relationship between the United States and Thailand would be undesirable in view of the increased prospects for bilateral trade.¹⁵⁰ Moreover, the United States also has an interest in further cultivating friendly relations in an area of the third world which, as a result of the prosperity it has enjoyed under a world economic order dominated by the United States, is more consistently pro-American than other regions of the third world.

Finally, it appears that the very difficulty Thailand has encountered over reform of its domestic law may be due in part to a healthy state of democratic institutions in that nation. While other nations in the region have been able to adopt effective protection in a relatively short period of time, the obstacles to quick passage in Thailand may be the result of the ability of the Thai opposition to use the parliamentary process to voice its concerns institutionally. The United States may want to encourage this process even if it slows down reform.¹⁵¹

5. SOURCES OF RECONCILIATION

As a result of lax protection in Thailand and of the United States' use of unilateral trade measures, relations between the two nations have strained. On the one hand, American groups ranging from industry to Congress to the Executive have become angered, in the context of

¹⁴⁶ *Id.* at 63.

¹⁴⁷ Embassy Interview, *supra* note 13.

¹⁴⁸ *Id.*

¹⁴⁹ See *Four Pacific Rim Nations Are Graduated From GSP Status*, 35 Pat. Trademark & Copyright J. (BNA) 283 (Feb. 11, 1988).

¹⁵⁰ See *supra* notes 6-13.

a mounting U.S. trade deficit and cries that American industry can no longer compete globally, with what they perceive to be a basic affront to U.S. property rights. On the other hand, those favoring reform on the Thai side have had to address legitimate economic arguments concerning the desirability of protection, politically powerful groups opposed to reform, and too much partisan nationalist sentiment.

However, resolution of the issue would produce many benefits for both nations. An optimal solution would be one which protects U.S. property interests and allows Thai supporters of reform to accommodate their development needs and domestic constituencies.

5.1. *The GATT as an Alternative to the Bilateral Program.*

The GATT initially holds the promise of a compromise solution. The U.S. decision to work through the GATT evidences the American view that the GATT will be an effective anti-piracy measure in the long term. Moreover, resolution of the issue through GATT mechanisms would be more acceptable to the Thais, as reform opponents could not claim that the United States is singling out Thailand for unfair treatment.

While the GATT may offer promise for the future, however, it is not an acceptable means of protecting U.S. interests in the short term. It is highly unlikely that any new codes will come into existence before 1990, when the Uruguay Round talks are scheduled to conclude.¹⁵² The Uruguay Round's Ministerial Declaration provides, however, a provision for the enactment of codes which are agreed to during the course of the Round, but observers have noted that the nations are unlikely to break precedent and make such a move.¹⁵³

Moreover, a fundamental difference still exists between developed and developing countries over the propriety of including intellectual property in the GATT. Many developing countries have argued that WIPO is the more appropriate forum for resolution of this issue. This argument surfaced in the ministerial talks in Montreal, where Brazil and India have led a group of developing nations in blocking progress on a U.S. proposal for a broad program.¹⁵⁴

5.2. *Joint Ventures between Thai and American Producers*

Reconciliation might also be served by joint ventures between Thai

¹⁵² See GAO REPORT, *supra* note 16, at 37.

¹⁵³ *Id.*

¹⁵⁴ See *Nordic Countries Try to Break Deadlock on Covering Intellectual Property in GATT*, Daily Report for Executives (BNA) No.202 (Oct. 19, 1988).

producers and American rights-holders. Under such arrangements, U.S. rights-holders who market their goods in Thailand could enter into agreements with Thai producers to produce legitimate articles. Having entered into contracts to produce legitimate goods, the Thai producers would then have an incentive to police pirate goods and might be in a better enforcement position than some U.S. companies because of the Thai firms' permanent presence in Thailand. Such arrangements have reportedly been used by European firms in the area of trademarks.¹⁵⁵

These arrangements, however, would not be implemented as easily regarding copyrights or patents. The United States' adoption of the Berne Convention is expected to bring protection of U.S. copyrights up to the international standard, thus obviating the need for any such joint ventures, although enforcement problems may persist. Also, since the Patent Act specifically excludes pharmaceutical goods from patent protection,¹⁵⁶ firms could not enter into joint ventures.

5.3. *Indexing Interim Patent Protection to the Availability of Low-Cost Pharmaceutical Goods*

Another possible source of compromise concerns patent protection of drugs. While the Americans appear to have accepted the reality that patent protection is too sensitive a political issue in Thailand to allow for immediate reform of the Patent Act, the current dispute exists over the quality of interim protection.¹⁵⁷

One method of accommodating American needs for adequate protection and Thai needs for low-cost drugs would be to index interim protection for American pharmaceutical goods to the availability of affordable medicine. Many problems, however, exist with such an approach. First, the United States would be subject to attack from its domestic industry. Second, fashioning such an arrangement for Thailand might impede efforts to obtain a higher standard of patent protection in other nations.

5.4. *Economic Progress of Thailand*

While much pirating activity has been transferred to Thailand as a result of tightening of statutes in other Asian nations, the shift may have occurred in part because former pirate nations have experienced

¹⁵⁵ Telephone interview with Supavud Saicheua, Economic Advisor to the Royal Thai Embassy (Feb. 6, 1989).

¹⁵⁶ See *supra* note 39 and accompanying text.

¹⁵⁷ See *supra* note 39 and accompanying text.

even greater economic success than Thailand. These countries appear to have followed the model where Asian nations increasingly become producers as well as consumers of knowledge, and recognize that knowledge is an international good that needs regulation.¹⁵⁸ Moreover, commentators have noted that we are in a period of "patent ascendancy," where many developing countries have opted to protect intellectual property and thus participate more fully in the international economic system.¹⁵⁹

Waiting for the Thais to reach a level of economic development where they feel better protection would serve their national interests does not, however, present a valid policy option in view of the strong domestic consensus in the United States that piracy must stop now.

6. CONCLUSION

The increasing acceptance of intellectual property protection in many nations suggests that the piracy problem, at least as it exists in Southeast Asia, will at some point become a thing of the past.¹⁶⁰ In the short term, however, both sides to the current negotiations are accountable to mobilized political forces.

Even if Thailand and the United States agree that protection in the future should be more comprehensive, they will continue to differ over when better protective measures should be instituted. Fortunately, the nations will continue to discuss the problem against a backdrop of agreeable relations and of greater worldwide movement towards protection of intellectual property.

¹⁵⁸ See Altbach, *Economic Progress*, *supra* note 135, at 63. Japan has even been a leader, along with the United States, in promoting measures in the GATT to protect intellectual property. See *supra* note 92 and accompanying text.

¹⁵⁹ See *International Patent System*, *supra* note 135, at 836.

¹⁶⁰ See generally Altbach, *Copyright Era*, *supra* note 135, at 44; Altbach, *Economic Progress*, *supra* note 135, at 62.