



1-1-1990

The Next "Little Tiger": Manufacturing and Intellectual Property Rights in Thailand

Into Bo Champon

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

Recommended Citation

Into B. Champon, *The Next "Little Tiger": Manufacturing and Intellectual Property Rights in Thailand*, 3 *TRANSNAT'L LAW* 275 (1990).
Available at: <https://scholarlycommons.pacific.edu/globe/vol3/iss1/12>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in *Global Business & Development Law Journal* by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

The Next “Little Tiger”: Manufacturing and Intellectual Property Rights in Thailand

Table of Contents

PART I: MANUFACTURING IN THAILAND

| | | |
|-----|--|-----|
| I. | INTRODUCTION | 277 |
| II. | BUSINESS CLIMATE FOR FOREIGN INVESTMENT IN THAILAND | 279 |
| A. | <i>Economic Outlook</i> | 279 |
| B. | <i>General Regulations & Treaties with the United States</i> | 280 |
| C. | <i>The Board of Investment and Incentives to Foreign Investors</i> | 280 |
| 1. | <i>The Board of Investment (BOI)</i> | 280 |
| 2. | <i>Thai Ownership in Joint Ventures</i> | 282 |
| 3. | <i>BOI Approval Procedures</i> | 282 |
| 4. | <i>Income Tax & Customs Duty Incentives</i> | 283 |
| 5. | <i>Foreign Trade Zones: “Investment Promotion Zones”</i> | 284 |
| 6. | <i>Special Repatriation Rule for Promoted Activities</i> | 284 |
| D. | <i>Forms of Business Organization</i> | 285 |
| 1. | <i>Sole Proprietorships and Partnerships</i> | 285 |
| 2. | <i>Limited Companies</i> | 286 |
| E. | <i>Control of Foreign Business</i> | 287 |
| F. | <i>Labor</i> | 288 |
| 1. | <i>General Labor Regulations</i> | 288 |
| 2. | <i>Local Labor</i> | 289 |
| 3. | <i>Work Permits for Foreign Employees</i> | 290 |

| | | |
|------|---|-----|
| G. | <i>Taxation</i> | 291 |
| 1. | <i>General Tax Classifications</i> | 291 |
| 2. | <i>Company Income Tax</i> | 291 |
| 3. | <i>Personal Income Tax</i> | 292 |
| 4. | <i>Business, Excise & Withholding Taxes</i> | 292 |
| 5. | <i>Income Tax Liabilities for Foreign Companies</i> | 293 |
| 6. | <i>Tax Clearance Certificates</i> | 294 |
| 7. | <i>Remittance Tax</i> | 295 |
| 8. | <i>Remittance Tax under the Treaty of Amity & Economic Relations</i> | 295 |
| H. | <i>Repatriation Policy</i> | 297 |
| I. | <i>Infrastructure Constraints</i> | 298 |
| J. | <i>Political Stability</i> | 298 |
| 1. | <i>Comparing Thailand with Other Countries in the Region</i> | 298 |
| 2. | <i>The Thai Monarchy</i> | 299 |
| 3. | <i>History & Ethic Composition</i> | 300 |
| 4. | <i>OPIC & Other Insurance Programs</i> | 301 |
| K. | <i>Foreign Corrupt Practices Act</i> | 303 |
| III. | U.S. EXPORT CONTROLS: EXPORT ADMINISTRATION ACT OF 1979 | 306 |
| IV. | EXPORTING TO THE UNITED STATES & OTHER MAJOR INDUSTRIALIZED COUNTRIES | 307 |
| V. | FINANCING & MARKETING IN THE REGION | 309 |
| A. | <i>Thai Government Procurement</i> | 310 |
| B. | <i>Gray Market Goods</i> | 311 |
| VI. | CONCLUSION | 313 |
| | PART II: INTELLECTUAL PROPERTY RIGHTS IN THAILAND & U.S. TRADE-BASED RESPONSES | |
| I. | INTRODUCTION TO THAILAND'S INTELLECTUAL PROPERTY RIGHTS | 314 |
| II. | Survey of Intellectual Property Rights in Thailand | 315 |
| A. | <i>Patents</i> | 315 |
| 1. | <i>Patent Law in Thailand</i> | 315 |
| 2. | <i>Patentable Inventions</i> | 316 |
| 3. | <i>Rights Conferred by Patents</i> | 318 |
| 4. | <i>Compulsory Licenses</i> | 319 |
| 5. | <i>Cancellation of Patents</i> | 320 |
| 6. | <i>Annual Fees</i> | 321 |
| 7. | <i>Remedies of Patent Holder</i> | 321 |

- B. Trademarks 321
- C. Copyrights 322
- III. THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 325
 - A. Special 301 - Protection of Intellectual Property Rights 326
 - 1. Special 301 Provisions 326
 - 2. Implementation of Special 301 327
 - B. Super 301 329
 - 1. Section 301 of the Trade Act of 1974 329
 - 2. Super 301 330
 - C. Other Considerations 330
 - 1. Different Perspectives on Intellectual Property Protection 330
 - 2. General Agreement on Tariffs and Trade (GATT) 332
 - 3. Implementation 333
- IV. CONCLUSION 335

This article explores the business opportunities and legal aspects of manufacturing and assembling products in Thailand. The article is divided into two parts. Part I considers the possibility of shipping component parts from the United States, the problems associated with selling the finished products in the United States and other major industrialized countries, and the financing and marketing of the products in the region. As intellectual property is one of the most important considerations for the prospective manufacturer, a separate discussion in Part II analyzes intellectual property rights in Thailand and the relevant U.S. trade-based responses. The article suggests that Thailand, in offering increasingly lucrative investment opportunities, is on its way to becoming Asia's newest industrialized country.

PART I: MANUFACTURING IN THAILAND

I. INTRODUCTION

Fortune magazine commented in a recent issue that "Thailand is on the verge of becoming a tiger."¹ It is one of the ideal places to

1. Kraar & Woods, *The New Powers of Asia*, FORTUNE, Mar. 28, 1988 (LEXIS, Nexis

manufacture labor-intensive products. While its literacy rate is more than 84 percent,² its wage rate of less than \$3 per day is among the lowest in Asia. Unskilled Thai labor is plentiful. At the same time, Thai universities and technical schools produce more graduates than there are currently available positions. Its professional employees earn about \$240 per month at entry level. Strikes are infrequent, and trade union membership is under seven percent of the employed non-farm labor force.³ Thailand's good political relations with the United States facilitate the licensing and exportation of component parts to Thailand. As a beneficiary of the Generalized System of Preferences (GSP),⁴ Thai exports of finished products to the United States and other major industrialized countries face minimal tariffs. As the economic hub of South Asia, Thailand provides an entry for the foreign investor into the entire South Asian market.

library, Fortune file)[hereinafter Kraar & Woods, *The New Powers of Asia*]. The term "four little tigers" was used to refer to the four Asian Newly Industrializing Countries (NIC) - South Korea, Taiwan, Singapore, and Hong Kong. *Id.* (emphasis added). The term "Newly Industrializing Countries" or "NIC" was sometimes used loosely to include Thailand. *Pacific Rim: Five-Country Pacific Free Trade Zone Alternative To Gatt Round, Study Says*, 5 Int'l Trade Rep. (BNA) 1571 (Nov. 30, 1988). "Another important issue in negotiating a Pacific free trade zone would be the role of China and the newly industrialized countries, including Hong Kong, Korea, Singapore, Taiwan, and Thailand." *Id.* However, as of March 22, 1990, Thailand has not been classified officially as an NIC either by the World Bank or by the U.S. Department of Commerce. Telephone interview with J. Kelly, Thailand Desk, Int'l Trade Analyst, Int'l Trade Admin., U.S. Department of Commerce (Mar. 22, 1990). See *Thailand May Not Gain From NIC Status - World Bank*, REUTERS, July 4, 1989 (LEXIS, Nexis Library, Reuters file). The World Bank report said that Thailand may not benefit from making the transition to NIC because it is still a predominantly agricultural nation. It could only hope to join the ranks of the NICs by developing an edge in product innovation and differentiation. *Id.*

2. *Current World Data - Thailand*, KALEIDOSCOPE, Apr. 26, 1989 (LEXIS, Nexis library, Fortune file)[hereinafter *Current World Data - Thailand*]; *A Strategic Guide to the Rim*, 120 FORTUNE 72, 80 (1989) [hereinafter *Strategic Guide*] (89%).

3. *Investment Climate Statement, Thailand*, Airgram (Unclassified) from American Embassy in Bangkok to Dept. of Commerce, at 17-18 (Mar. 15, 1988)[hereinafter *Investment Climate Statement, Thailand*](available at the Int'l Trade Admin., Dept. of Commerce, Washington, D.C. 20230). *But see* FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES, THAILAND, INT'L MARKETING SERIES, at 7 (Dec. 1988) (published annually by the U.S. Embassy, Bangkok, Thailand)[hereinafter FOREIGN ECONOMIC TRENDS]. "About 12% of the industrial labor force is unionized, with heavy representation in the state enterprises." *Id.*

4. Customs Duties, 19 U.S.C.S § 2518(4)(B) (Law. Co-op. 1983 & Supp. 1989). *But see Japan: Progress In SII Talks Necessary to Mend U.S.-Japan Trade Rifts*, U.S. Official Says, 7 Int'l Trade Rep. (BNA) 18 (Jan. 3, 1990). A U.S. official, who spoke on the grounds of anonymity, said that it is "possible" that Thailand and Malaysia will lose their GSP status *this year*, given the rapid growth of their economies. If they do, he continued, "it should be looked upon as a positive development," because it would show that their economies had reached a competitive level that no longer merited such treatment." *Id.* The GSP provides duty-free treatment to imports from developing countries on a product-by-product basis and is reviewed annually. *Id.*

II. BUSINESS CLIMATE FOR FOREIGN INVESTMENT IN THAILAND

A. Economic Outlook

An informal survey conducted by the American Chamber of Commerce in Thailand during October, 1987, revealed that 22 percent of the respondents described their outlook as "enthusiastic," 62.4 percent as "optimistic," only 15 percent as "cautious" and 0 percent as "pessimistic." Moreover, 59.1 percent of these respondents were "more optimistic" about Thailand's prospects than they had been during the previous six month period.⁵ Reflecting this optimism, the value of U.S. direct investment in Thailand is at least \$4 billion, representing about a third of all foreign investment.⁶

In 1987, Thailand's real Gross National Product (GNP) grew by seven percent. In the coming years, the Thai economy is projected to grow at an even higher rate of eight to nine percent.⁷ Although its per capita GNP was \$870,⁸ disparities in income were significant. According to estimates of the U.S. Embassy in Bangkok, the per capita GNP was at least \$2,300 in the Bangkok area, or close to South Korea's overall GNP, but as low as \$300 in other regions. Official unemployment was 6.8 percent. Thailand's increasingly sophisticated manufacturing sector accounted for some 24.1 percent of its economy. The labor force grew by 3.2 percent to 29 million and received wages generally of less than \$3.00 per day. The Thai Securities and Exchange Commission (SET), established in 1988 to more tightly regulate investment activities in Thailand, should help attract more foreign and domestic capital to contribute to Thailand's growth.⁹

5. *Investment Climate Statement, Thailand*, *supra* note 3, at 1.

6. FOREIGN ECONOMIC TRENDS, *supra* note 3, at 11.

7. *Id.* at 3. A quarterly economic forecast is available as an annual subscription from WEFA Group, 150 Monument Road, Bala Cynwyd, PA 19004, (215) 896-4927. See *A Five-Year Economic Forecast*, 6 Int'l Trade Rep. (BNA) 1430 (Nov. 1, 1989).

8. *Strategic Guide*, *supra* note 2, at 80. Thailand's current real Gross Domestic Product or GDP is \$930 per capita, at an exchange rate of 25.71 baht.

9. *Investment Climate Statement, Thailand*, *supra* note 3, at 1. See FORBES, Feb. 19, 1990 (LEXIS, Nexis library, Forbes file) (From Sept. 15, 1989 to Jan. 12, 1990, Thai fund on New York Stock Exchange rose from \$19.25 to \$31.63). *But see* Asian Wall St. J., Jan. 29, 1990 (LEXIS, Nexis library, WSJ file) (Chao Thai Securities Co., the largest single source of volume on Thailand's stock market, was suspended).

B. General Regulations & Treaties with the United States

Thailand's Alien Business Law of 1972 (Alien Business Law) prohibits non-Thais from majority ownership of companies in many agricultural, industrial, commercial, and service enterprises, including law, architecture, accounting, and advertising.¹⁰ However, a grandfather clause exempts some foreign-owned companies established prior to 1972. In addition, under limited circumstances, foreign investors still may establish enterprises otherwise prohibited under the Alien Business Law.¹¹ The Treaty of Amity and Economic Relations between Thailand and the United States (Treaty of Amity and Economic Relations) guarantees the nationals and companies of each country national treatment, meaning that neither host country may discriminate against the other country's nationals in favor of their own nationals.¹²

C. The Board of Investment and Incentives to Foreign Investors

1. The Board of Investment

The Board of Investment (BOI) was established under the Investment Promotion Act of 1977 (Investment Promotion Act) as Thailand's central investment planning authority. It is chaired by the Prime Minister, who in turn appoints the Secretary General. The policy of the BOI is to encourage foreign and domestic investment in sectors and locations most appropriate for Thailand's economic development. The BOI grants "promotional privileges" to companies which are deemed suitable to the economy and the technology of

10. *Investment Climate Statement*, *supra* note 3, at 8. See *infra* notes 50-52 and accompanying text.

11. *Id.*

12. Article IV of the Treaty of Amity and Economic Relations between Thailand and the United States provides:

Nationals and companies of either party shall be accorded national treatment . . . [but] . . . each party reserves the right to prohibit . . . , or to limit the extent to which aliens may establish or acquire interests, in enterprises engaged . . . in communications, transport, fiduciary functions, banking involving depository functions, the exploitation of land or other natural resources, or domestic trade in indigenous agricultural products, provided that it shall accord . . . treatment no less favorable . . . than that accorded . . . any third country.

Treaty of Amity and Economic Relations, art. IV, paras. 1-2, May 29, 1966, U.S.-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540 [hereinafter Treaty of Amity and Economic Relations]. Article XIV however, allows either party to "terminate the Treaty by giving one year's written notice to the other party . . . at any time." *Id.* at art. XIV, para. 4; 19 U.S.T. at 5860.

Thailand. The BOI will consider, among other factors, the projected demand for the product, its production costs and value added, as well as the company's ratio of debt to equity and impact of the company on foreign exchange and other national resources.¹³ The BOI will automatically deny applications for promotional privileges where the applicant company will compete with firms which do not receive BOI's investment privileges, where investment privileges are not necessary, or where the project is inappropriate.¹⁴

In effect, the BOI gives special consideration to investment projects which either strengthen Thailand's balance of payments position through production for export, support the development of the country's resources, substantially increase employment, locate operations in the provinces, conserve energy or replace imported energy supplies, establish basic industries for future development, or are considered important and necessary by the government. Due to BOI's discretionary power to grant promotional privileges, foreign investors should investigate directly with the Office of the BOI before charting investment plans.¹⁵

13. The BOI will consider the following: a) adequate market demand for its products, commodities or services to warrant the increased production; b) low enough production cost to compete successfully with imports; c) added value of not less than 20% of sales revenue unless the production is mainly for export; d) ratio of debts to registered capital/equity of not more than 5 to 1; e) level of utilization of national resources including capital and raw materials; technical level; foreign exchange and remittances to Thailand; and "any other factors the BOI deems appropriate." THAI OFFICE OF ECON. COUNS. (BOARD OF INVESTMENT), PROMOTION INVESTMENT, 40 [hereinafter PROMOTION INVESTMENT](available at Thai Office of Economic Counselor (Board of Investment), 5 World Trade Center, Ste. 3443, New York, N.Y. 10048).

14. *Id.* at 40-41 provides:

1) where existing commercially viable firms already produce the products, commodities, or services without the BOI's investment privileges; 2) the BOI considers that the activity, although eligible for promotion, can be operated with a reasonable rate of return and no longer needs promotional benefits; 3) except in case of export, the existing production capacity is adequate to serve the domestic market demand for the next two years; 4) the project would use entirely imported raw materials, the production would be mainly for domestic distribution, and the existing import duty on the product already exceeds 40%; or 5) the BOI "supersedes" the promotion of the activity or "considers the project inappropriate" for promotional privileges. *Id.*

15. The BOI's address in Thailand is: Secretary-General/Office of the Board of Investment, 16th-17th Fl., Thai Farmers Bank Bldg., 400 Phaholyothin Road, Bangkok 10400, Thailand, Phone: 270-1400, 270-1410, 270-1420, Telex Nos: TH 82542, TH 81159, 84799 (Attn: BOI), Cable: "BINVEST"/Facsimile No: (662) 2710777.

Although Thailand's Land Code prohibits any foreigner from owning an unlimited interest in land, the Investment Act allows promoted companies to own land to carry out promoted activities. To qualify for the exemption under the Investment Act, the promoted person must file an application to acquire land at the Investment Services Center of the Office of the Board of Investment. The application must provide the relevant land map showing the location of the site and the construction plans. After approval, the BOI will notify the relevant land office. The remaining procedure is similar to the general practice for purchasing land. PROMOTION INVESTMENT, *supra* note 13, at 43.

2. *Thai Ownership in Joint Ventures*

The BOI's general criteria in granting ownership in Thai joint ventures to a foreign partner depends on the venture's purposes. Ventures in manufacturing for domestic use must be at least 51 percent Thai owned. Ventures in agriculture, animal husbandry, fishery, and mineral industries must be at least 60 percent Thai owned. If the project exports at least 50 percent of its output, then foreign ownership may be more than 50 percent. Finally, if the project exports all of its output, Thai ownership is not required. The BOI may waive the above criteria or add other conditions as it deems appropriate.¹⁶

3. *BOI Approval Procedures*

The Thai Government has established two "One-Stop Service Centers" in Bangkok to expedite applications for all permits and registrations required to open and operate an enterprise in Thailand.¹⁷ To receive investment promotion privileges, any person, ordinary or legal, must file an application for a Promotion Certificate. If approved, the BOI will issue a Letter of Notification of Approval which offers and states the conditions of the Promotion Certificate.¹⁸ Upon compliance with all the terms and conditions, the applicant will be issued a formal Promotion Certificate and will be classified as a "promoted person," and the applicant's industry will be considered

16. *Id.* at 41. The BOI periodically publishes a booklet entitled "Procedures for the Implementation of Promoted Projects," which details such requirements as the size, location, and performance of enterprises. The requirements are quite specific and vary according to the industry. Further information on BOI requirements may be obtained in the U.S. at: Office of the Economic Counselor, Thailand's Board of Investment, 5 World Trade Center, Ste. 3443, New York, NY 10048.

17. THAI OFFICE OF ECON. COUNS. (BOARD OF INVESTMENT), BACKGROUND: HISTORY, VITAL STATISTICS, ECONOMY, pt. 2, at 1 [hereinafter BACKGROUND] (available at Thai Office of Economic Counselor (Board of Investment), 5 World Trade Center, Ste. 3443, New York, N.Y. 10048).

18. The BOI ordinarily approves the application within 15 days. At this point, if the applicant has not set up either a company, foundation, or co-operative to actually carry out the project, it must do so before proceeding any further. PROMOTION INVESTMENT, *supra* note 13, at 41. The applicant must accept in writing the Letter of Notification within one month after receipt. Within six months of such acceptance, the promoted person must complete the required conditions and furnish the BOI Office with the following documents: 1) Memorandum of Association; 2) certificate of Business Registration; 3) certificate stating registered capital, list of Directors with the power to bind the Corporation, Company, or Federation and addresses of its offices; 4) list of shareholders/owners and their nationalities; and 5) a completed application form for Promotion Certificate ("Kor Kor Tor 05"). *Id.* at 41-42.

a “promoted industry,” eligible to receive promotional privileges.¹⁹

The procedures to obtain the Promotion Certificate may be viewed as a contract approach. The applicant submits what amounts to a letter of intent (the application); the BOI makes a conditional offer (the Letter of Notification of Approval); and the applicant accepts the offer (the written acceptance of the Letter of Notification of Approval). Upon the applicant’s performing all the conditions specified on the BOI’s offer, the BOI will issue the final Promotion Certificate. In 1987, the number of projects approved by the BOI for promotional privileges (incentives) more than doubled the 1986 figure.²⁰ Eighty percent of the approved projects were export-oriented.²¹

4. *Income Tax & Customs Duty Incentives*

“Promotional privileges” entitle the promoted person to many exemptions from and reductions in taxes and duties. Imported machinery, imported raw materials, and components receive favorable treatment. Taxes on income, goodwill, and royalties are variously exempted for three to eight years.²² A promoted person also is entitled to exemption from duties on machinery, and reduction of duties on raw materials and components (of up to 90 percent of the normal rate) imported into Thailand for the promoted project. However, if the machinery is sold or used by a third party at a later date, the BOI will impose the import duty plus a surcharge retroactively to the importation date.²³

19. *Id.* at 43.

20. In 1987, Foreign ownership of registered capital of promoted projects rose from 31% in 1986 to 46% of the total approved capital investment or \$322 million. *Investment Climate Statement, Thailand, supra* note 3, at 2.

21. *Id.* Thus, in this author’s opinion it is clear that the BOI prefers export-oriented projects. Furthermore, the BOI is considering a more selective approach, which will give preference to projects located outside metropolitan Bangkok.

22. Promotional privileges include:

- a) Exemption or 50% reductions of import duties and business taxes on imported machinery;
- b) reduction of import duties and business taxes of up to 90% on imported raw materials and components;
- c) exemption of corporate income taxes from 3 to 8 years. Losses may be carried forward and deducted as expenses up to 5 years;
- d) exemption of up to 5 years on withholding tax on goodwill, royalties or fees remitted abroad;
- e) Exclusion from taxable income of dividends derived from promoted enterprises during the income tax “holiday.”

PROMOTION INVESTMENT, *supra* note 13, at 43.

23. *Id.* at 44.

5. Foreign Trade Zones: "Investment Promotion Zones"

To disperse economic growth throughout the country and extend social services to the rural provinces, the BOI has established "Investment Promotion Zones" (IPZ) in Chiang Mai, Tak, Lamphun, Nakhon Ratchasima, Saraburi, Khon Kaen, and Songkhla provinces. Projects located in these IPZs receive special rights and benefits.²⁴ A joint effort between the Thai government and the private sector has established five "industrial estates" between 15 to 25 miles from Bangkok.²⁵ Although foreign companies are not required to operate within any of the trade zones, they receive significant reductions in business income tax if they locate there.²⁶ In addition, export companies receive exemptions from import duties and business taxes on export and import related items.²⁷ Balanced against the tax and duty advantages, some trade zones have inadequate infrastructures.²⁸ To promote more investment in export-oriented industries, the Thai Government is also considering establishing an "Export Processing Zone" in Chonburi Province.²⁹

6. Special Repatriation Rule For BOI's Promoted Activities

Thailand's Investment Promotion Act guarantees that a promoted person may remit money abroad in foreign currency if the money

24. *Investment Climate Statement, Thailand, supra* note 3, at 18.

25. BACKGROUND, *supra* note 17, at 2.

26. PROMOTION INVESTMENT, *supra* note 13, at 44 provides:

- a) 90% maximum reduction of business tax on the products sale for up to 5 years;
- b) 50% reduction of corporate income tax for 5 years after the termination of a normal income tax "holiday" or from the day of income earning;
- c) Double deduction allowance from the taxable corporate income for the cost of transportation, electricity and water supply;
- d) Deduction from the taxable corporate income up to 25% of the costs to install infrastructural facilities for 10 years from the date of income earning.

Id.

27. *Id.* at 45 provides:

- a) Exemption from import duties and business taxes on imported raw materials and components;
- b) exemption from import duties and business taxes on re-export items;
- c) exemption from export duties and business taxes;
- d) deduction allowance, from the taxable corporate income, of 5% of any increase in income from export over the previous year, excluding insurance and transportation costs.

Id.

28. Although the five "industrial estates" trade zones between 15 to 25 miles from Bangkok are to be completed with an infrastructure of roads, electricity, water supply, waste disposal, fire protection, and other facilities, the other trade zones in the provinces have many infrastructural constraints. *Id.* at 5-6.

29. *Investment Climate Statement, Thailand, supra* note 3, at 18.

represents: 1) Investment capital, or dividends, and other returns on such capital; 2) repayments on a foreign loan under a BOI approved contract which was brought in to invest in the promoted activity; or 3) payment under BOI approved contracts for a promoted person's use of rights and services relating to the promoted activity, for example, licenses. However, if the Bank of Thailand determines that repatriation of the money would adversely effect the balance of payments for Thailand, the Bank of Thailand may temporarily restrict the repatriation of investment capital. Even so, promoted investors may still repatriate at least 20 percent of their imported capital each year if the capital has been invested in Thailand for at least two years, and the dividends are at least 15 percent of the imported capital.³⁰

D. Forms of Business Organization

1. Sole Proprietorships and Partnerships

The principal forms of business organization in Thailand are sole proprietorships, partnerships, and limited companies.³¹ Thai sole proprietorships are substantially the same as American sole proprietorships.³² Although Thai partnerships are generally the same as American partnerships, some aspects are quite different. In an unregistered ordinary partnership, each partner is directly and jointly liable for the partnership's obligations without any limit.³³ If an ordinary partnership is registered with the Partnership and Companies Registration Office of the Ministry of Commerce in the district of its head office, it becomes a juristic entity separate from each partner. The partnership's creditor must look to the partnership's assets before any partner's. Claims against a partner for the partnership's obligations must be made within two years from the date she ceases to be a partner.³⁴

A limited partnership must be registered and is terminated upon the death of a general partner, even if its terms provide for an indefinite duration. A general partner may terminate the limited partnership only at the end of a financial year and only with six

30. PROMOTION INVESTMENT, *supra* note 13, at 44.

31. *Id.* at 56-65.

32. *See id.*

33. *Id.*

34. *Id.* at 57.

months notice. A limited partner may transfer her shares without prior consent of other partners. Unless the agreement provides otherwise, each partner's share in the profits and losses is calculated in proportion to her contribution.³⁵ Unlike most U.S. limited partnership law, the indefinite duration of Thai partnerships and the free transferability of partnership shares presumably do not render the limited partnership a corporation for double taxation purposes.

2. Limited Companies

Limited Companies have the basic legal characteristics of American corporations. However, unlike the American private corporations, all the shares of the Thai limited private company must be equal,³⁶ and there must no less than 7 and no more than 99 shareholders.³⁷ To form a limited private company, the promoter must file a Memorandum of Association (Article of Incorporation) with the Partnership and Companies Registration Office. After all shares have been subscribed to, a statutory meeting must be held to adopt the company bylaws and elect directors and auditors. The directors then require the subscribers to pay at least 25 percent of par value for their shares.³⁸ Within three months of the statutory meeting and after the shares have been paid for, the directors must apply for registration of the company. Within six months of the registration, an ordinary meeting of shareholders must be held.³⁹ A general meeting is required at least once a year. An extraordinary meeting may be called by directors or shareholders holding no less than one-fifth of the company's shares.⁴⁰

A limited public company, on the other hand, is established under the Public Company Act of 1978, and must have 100 or more shareholders. At least 50 percent of the total number of shares issued and sold must be held by individuals holding no more than 0.6 percent of the total.⁴¹ Presumably, this requirement provides for more corporate democracy and prevents institutions from taking over the company. The subscribers must pay 100 percent of par value.⁴²

35. PROMOTION INVESTMENT, *supra* note 13, at 56-58.

36. *Id.* at 60.

37. *Id.* at 60, 64.

38. *Id.* at 61-62.

39. *Id.* at 62.

40. PROMOTION INVESTMENT, *supra* note 13, at 62.

41. *Id.* at 64.

42. *Id.*

Unlike the directors of a limited private company, those of a public company must: 1) be shareholders of the company; 2) never have been declared bankrupt, incompetent, or quasi-competent; 3) never have been convicted by a final judgment or imprisoned for fraud; and 4) never have been expelled or discharged from a government agency.⁴³

E. Control of Foreign Business

The Alien Business Law restricts the participation of "aliens"⁴⁴ in certain types of business activities.⁴⁵ Aliens, according to the statute, include limited partnerships or a registered ordinary partnership with an alien manager.⁴⁶ The Alien Business Law divides the controlled businesses into three general categories, A,⁴⁷ B,⁴⁸ and C,⁴⁹ covering

43. *Id.*

44. *Id.* at 68. The statute defines "alien" very broadly as a natural or legal person without Thai nationality including:

- a) A legal person with at least 50% of its capital belonging to alien(s);
- b) A legal person with at least 50% of its shareholders, partners or members being alien(s);
- c) A limited partnership or a registered ordinary partnership with an alien manager.

Id.

45. PROMOTION INVESTMENT, *supra* note 13, at 68.

46. *Id.*

47. *Id.* at 69. Category A business are: *Agriculture*: Rice farming; salt farming, including salt mining, but excluding rock salt. *Commerce*: Internal trade in local agricultural products; land trade. *Services*: Accounting; law; architecture; advertising; brokerage or agency; auctioning; barbering, hair dressing, and beauty shop ownership. *Other businesses*: Construction. *Id.*

48. *Id.* at 69-70. Category B businesses are as follows:

Agriculture: Cultivation; orchard farming; animal husbandry, including silk worm farming; timber; fishing.

Industry and Handicrafts: Rice milling; flour making from rice and other cash crops; sugar milling; manufacturing of alcoholic and non-alcoholic drinks and beverages; ice making; manufacturing of pharmaceuticals; cold storage; timber processing; manufacturing of gold, silver, nielloware, and stone inlaid products; manufacturing of castings of Buddha images and bowls; wood carvings; lacquer-ware making; match manufacturing; manufacturing of white cement, portland cement, and cement finished products; dynamiting or quarrying of rocks; manufacturing of plywood, veneer wood, chipboard or hardboard; manufacturing of garments or footwear, except for export; printing; newspaper publishing; silk spinning, or weaving of silk fabric; manufacturing of finished products from silk fabric, silk yarn, or silk cocoons.

Commerce: All retailing except for items included in Category C; ore trading except for items included in Category C; selling of food and drinks except for items included in Category C; trading in antiques, heirlooms, or art objects.

Services: Tour agency; hotel, except hotel management; all businesses under the law governing places of services; photography, photographic processing and printing; laundering; dressmaking.

Other Businesses: Land, water, and air transportation in Thailand. *Id.*

49. *Id.* at 70-71. Category C business are as follows:

Commerce: All wholesale trade except in items included in Category A; all exporting; retailing of machinery, equipment, and tools; selling of food or beverages for promotion or tourism.

Industry and Handicrafts: Manufacturing of animal feeds; vegetable oil refining; textile

various agricultural, manufacturing, commercial, and service industries. Aliens generally are forbidden to engage in businesses enumerated in categories A and B. However, the Investment Promotion Act exempts aliens who are granted "promotional privileges" by the BOI and authorizes them to engage in businesses in Category B.⁵⁰ Aliens may engage in businesses in Category C only after obtaining a proper permit from the Department of Commercial Registration. Businesses which do not fall within any of the three categories are governed by the Civil and Commercial Code of Thailand, and are not forbidden to aliens.⁵¹

F. Labor

1. General Labor Regulations

Employee and employer associations are regulated under the Labor Relations Act of 1975 (Labor Relations Act) and must be licensed and registered with the Central Employees' Union and Employers' Association Registration Office of the Department of Labor (Department of Labor, or Department). The Department establishes procedures for settling labor disputes by a conciliation officer, arbitrator, or labor relations committee, and establishes rules governing strikes and lockouts. However, disputes often are resolved on an ad hoc basis, with the intervention of the Labor Department, the Ministry of Interior, or the Office of the Prime Minister.⁵² As with most governments in developing countries, the Thai Government discourages foreigners from working in the country in areas where local labor is available. The long list of the "Occupations Prohibited to Aliens under the Royal Decree of 1979"⁵³ and the stringent work permit requirements evidence such a policy.

manufacturing, including yarn spinning, dyeing and fabric printing; manufacturing of glassware, including light bulbs; manufacturing of foods bowls and plates; manufacturing of stationary and printing paper; rock salt mining; mining.

Services: Service businesses not included in Category A or Category B.

Other Businesses: Other construction not included in Category A. *Id.*

50. PROMOTION INVESTMENT, *supra* note 13, at 68.

51. *Id.* See also L. DROKER, OVERSEAS BUSINESS REPORTS - MARKETING IN THAILAND 34, 35 (Dec. 1987) [hereinafter DROKER, OVERSEAS BUSINESS REPORTS][published by the Office of the Pacific Basin and the Com. Section, the U.S. Embassy, Bangkok, Thailand].

52. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 34-35.

53. Occupations Prohibited to Aliens under the Royal Decree of 1979 are: laboring; work in agriculture, animal breeding, forestry, fishing and farm supervision (excluding specialized work); masonry, carpentry and other construction work; wood carving; driving of motor

2. Local Labor

The labor relations climate in Thailand is generally favorable to the investor, with little employee militancy exhibited. Trade union membership is under 7 percent of the employed non-farm labor force and strikes are infrequent.⁵⁴ The median age of its 53 million population is only 18 years old.⁵⁵ Although unskilled labor is plentiful and there is a surplus of graduates from Thai universities and technical schools, established companies still report shortages of qualified middle management personnel and technical workers.⁵⁶ Wages are among the lowest in Asia. The current minimum wage is \$2.88 per day in Bangkok and eight other provinces, and even lower in the other 63 provinces.⁵⁷

Thai labor law is liberal by international standards. Every employer with 20 or more regular employees must establish written employment terms specifying conditions of employment. The normal work week is 48 hours for industry, 54 hours for commercial operations, and 42 hours for hazardous work. The employment of children under the age of 12 is prohibited, and restricted for children between 12 and 18. All employers with 20 or more employees must contribute annually to the Workman's Compensation Fund which covers injury, sickness, or death.⁵⁸

vehicles and non-motorized carriers (except piloting international aircraft); shop attendant; auctioneering; supervising, auditing and giving services in accountancy (except occasional internal auditing); gem cutting or polishing; hair cutting, hairdressing, and beautician work; hand weaving; mat weaving or fabrication of wares from reed, kenal straw or bamboo pulp; manual fibrous paper fabrication; lacquerware fabrication; Thai musical instrument fabrication; nielloware fabrication; goldsmith, silversmith, or other precious metalwork; bronzeware fabrication; making Thai rolls; mattress or padded blanket fabrication; alm bowl fabrication; manual silk product fabrication; Buddha image fabrication; knife fabrication; paper or cloth umbrella fabrication; shoemaking; hat making; brokerage or agency work (*except in international business*); civil engineering work involving designing, calculation, organization, research, planning, testing construction, supervision or advisory work (*except work requiring specialized skills*); architectural work involving designing, drawing or estimating, and construction supervision or advisory work; dressmaking; pottery or ceramics; manual cigarettes rolling; *tourist guide or tour organizing agency*; Hawking business; Thai character typesetting; manual silk reeling and waving; *clerical or secretarial work*; legal or litigation services. PROMOTION INVESTMENT, *supra* note 13, at 76-77 (emphasis added).

54. *Investment Climate Statement, Thailand, supra* note 3, at 17-18. *But see* FOREIGN ECONOMIC TRENDS, *supra* note 3, at 7.

55. *Current World Data - Thailand, supra* note 2; *see also Strategic Guide, supra* note 2, at 72-84 (Thailand has 1,990 university students per 100,000 inhabitants which is slightly higher than Japan's 1,971, and about 10 times higher than China's 190. The same ratio is 680 for Malaysia, 600 for Indonesia, and 3,580 for the Philippines). *Id.*

56. *Investment Climate Statement, Thailand, supra* note 3, at 17.

57. *Id.*

58. *Id.* at 17-18.

3. Work Permits for Foreign Employees

The individual foreign employee or her prospective employer must apply for a work permit. If the prospective employer submits the application,⁵⁹ the actual work permit will be issued only after the alien has entered Thailand. If the employment will take place outside the Bangkok area, the applications must be submitted to the Provincial Labor Office.⁶⁰ The approved applicant may work in Thailand for a specified duration up to the visa expiration date only in accordance with the conditions stated on the work permit.⁶¹ The alien may apply for an extension by submitting an application before the expiration date of the work permit and evidence that she has complied with all its conditions. For example, a marketing manager may have to submit a list of her clients or proof of import and export operations.⁶² An employer who knowingly hires an unauthorized alien may be both fined and imprisoned. An alien who works outside the scope of her work permit is deemed to be working without a permit. "Work" is defined as "the acts or duties carried out by the alien," not "the activity receiving salary or wages."⁶³ Helping a friend as a favor is construed as "work" if such help results in income or interest to the friend.⁶⁴

59. PROMOTION INVESTMENT, *supra* note 13, at 74. The application must be submitted to: Director, Alien Occupation Division/Department of Labor Ministry of the Interior (Dindaeng) Thanon Fuang Nakhon, Bangkok 10200, Thailand. The applicant must sign the application, pay 1,000 *baht* or approximately \$38.90 annual recurring fee, and provide the following supporting documents: 1) Passport or a certificate of residence. A permanent resident of Thailand must also produce an identification card; 2) Details of the applicant's educational background or a certificate from the previous employer describing the alien's previous job. A Document in a language other than English must be translated into Thai and authenticated by an Embassy or by the Ministry of Foreign Affairs; 3) Medical Certificate from a "first class" physician stating that the applicant is of sound mind and body. This certificate may be obtained from any Government Hospital or private practitioner; 4) Three half-length, full-face photos (without hat) of 5 × 6 cm., no more than 6 months old; 5) An organizational chart giving the names and positions of all the employees in the company. It must state the work permit number next to each alien employee's name and the total number of Thai and foreign employees at the bottom; 6) The Company's Registration Document from the Trade Registration Department showing the business classification and purpose, the names of the partners, the Board of Directors, and the manager; 7) Copy of the Company's shareholders list certified by the Trade Registration Department; 8) If the application is submitted on behalf of the alien, an authorization letter with a 10 *baht* duty stamp; 9) Any other items requested by the Labor Department. *Id.* at 74-75.

60. *Id.* at 74.

61. *Id.* For example, the employer, place, position and activity of the employment. The conditions may include a requirement to report to the Department of Labor after each specified period, often after every three month period. *Id.*

62. *Id.* at 76.

63. *Id.* at 75.

64. PROMOTION INVESTMENT, *supra* note 13, at 75-76.

G. Taxation

1. General Tax Classifications

Like its counterpart in the United States, Thailand's tax code is quite comprehensive. The Finance Ministry administers the nation's taxes according to the Revenue Code's three tax classes.⁶⁵ The company income tax applies to companies incorporated under foreign law, registered ordinary partnerships, registered limited partnerships, joint ventures, foundations and associations. The personal income tax is applied to individuals. Business and sales taxes are based on gross receipts from business activities in Thailand. The rates range from 0.1 to 40 percent depending on the business classification.⁶⁶

2. Company Income Tax

The standard "Company Income Tax" rate is 35 percent of the net profit derived from sources within Thailand. Companies listed on the SET pay a reduced rate of 30 percent. Foundations and associations are taxed at a rate of 10 percent, excluding registration fees, subscription fees for members, and donations of cash or property.⁶⁷ In lieu of a tax on net profits, companies engaging in international transportation are charged 3 percent of gross ticket receipts from passenger fares and freight charges within Thailand.⁶⁸ Companies are required to file annual balance sheets and profit and loss statements, which have been certified by a licensed Thai auditor, with the Registry of Companies and Partnerships within five months of the end of their accounting period.⁶⁹ Income tax returns must be filed within 150 days of the end of the accounting period. Corporate income tax is payable in two installments per year, with the first installment due on the estimated net profit within 60 days of the close of the first half of the accounting period. Any 12-month

65. *Id.* at 90. Within the Finance Ministry, the Revenue Department administers the business income taxes, the Excise Department administers the business transfer taxes and licensing fees, and the Customs Department Administers the import and export fees. *Id.*

66. *Id.*

67. *Id.*

68. See also *Investment Climate Statement, Thailand*, *supra* note 3, at 8-9; PROMOTION INVESTMENT, *supra* note 13, at 90-91.

69. PROMOTION INVESTMENT, *supra* note 13, at 90-91. These copies must also be filed with the Revenue Department within one month of approval by the General Meeting of Shareholders. *Id.*

accounting period may be selected.⁷⁰ The Royal Decree allows a depreciation deduction ranging from 5 to 20 percent in addition to normal business expenses. Net losses may be carried forward for five consecutive years.⁷¹

3. Personal Income Tax

An individual personal income tax rate may range from 7 percent for net income up to 40,000 baht to 55 percent for "net income" over 2 million baht.⁷² To arrive at net income, the Code permits a standard deduction of 10 percent to 85 percent depending on the types of income, and a personal allowance deduction from 2,000 baht to 13,000 baht.⁷³ A personal income tax return must be filed before March 31 of the following year. Taxes may be assessed within 5 years from the date of filing, or if no return was filed, within 10 years of the due date.⁷⁴

4. Business, Excise & Withholding Taxes

The business tax is a gross receipts tax on certain categories of businesses listed in the Business Tax Schedule. The rates range from 0.5 to 40 percent.⁷⁵ A trader must file an application for business tax registration within 30 days of commencing the business, as well

70. *Id.*; *Investment Climate Statement, Thailand, supra* note 3, at 8-9.

71. *Investment Climate Statement, Thailand, supra* note 3, at 8-9; PROMOTION INVESTMENT, *supra* note 13, at 90-91.

72. PROMOTION INVESTMENT, *supra* note 13, at 91-92.

73. *Id.*

74. *Id.*

75. *See id.* at 92-93. The business tax rates are as follows:

Category of Business

| | | |
|---------|-----------------------|------------------------------|
| Rate | Taxpayer | Sale of goods |
| 1.5-40% | Seller/importer/mfg'r | Rice and saw milling |
| 1.5-40% | Operator | Sale of stock |
| 3.5-4% | Seller | Hire of work |
| 10% | Contractor | Lease of movable property |
| 3-10% | Lessor | Warehousing |
| 2.5% | Operator | Hotel, restaurant, nightclub |
| 2.5% | Operator | Transportation |
| 2-15% | Operator | Pawn-broker |
| .5-2% | Operator | Brokerage & Agency |
| 2.5% | Broker/Agent | Sale of immovable |
| 3.5% | Seller | 12. Banking |
| 3-15% | Operator | 13. Insurance |
| 2.5-3% | Insurer | 14. Entertainment |
| 15-20% | Operator | |

Id.

as a monthly business tax return by the 15th day of the following month regardless of the amount of the gross receipts. As the business tax is collected from the manufacturer or importer, retailers are not liable for business tax payments on goods sold. Although the Revenue Department generally collects the business tax, the Customs Department collects the business tax on imported goods at the time of importation.⁷⁶ The business tax is assessed on the "Normal" Selling Price.⁷⁷ All business transactions including imports which involve the issuance of receipts and similar instruments are subject to a small stamp tax. An additional 10 percent surtax on the business tax is imposed as a municipal tax.⁷⁸ All companies are subjected also to excise taxes⁷⁹ and withholding taxes.⁸⁰

5. Income Tax Liabilities of Foreign Companies

Under the Revenue Code, Thai and foreign companies doing business in Thailand are taxed generally in the same manner.⁸¹

76. *Id.* at 93.

77. The formula is as follows:

"Normal" Selling Price = (C.I.F. Value + Import Duty) x (1 + "Standard Profit" Percentage);

Business Tax = "Normal" Selling Price x Business Tax Rate.

C.I.F. is cost of insurance plus freight. The "Standard Profit" percentage or rate is an estimate of the retail markup assigned by the Ministry of Finance to each category of goods.

DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 26.

78. *Id.* at 26-27.

79. *Id.* at 34. Excise taxes are levied on nine commodities: tobacco, liquor, nonalcoholic beverages, matches, cigarettes, cigarette lighters, snuff, cement, domestically produced petroleum and oil, and playing cards. *Id.*

80. Withholding taxes are required under the following circumstances: (1) employer must withhold personal income tax on salaries paid to employees; (2) business tax on work hire; (3) companies must withhold .75% on payments made to sellers of rubber, tapioca, maize, sugarcane, coffee, palm oil and rice; (4) companies must withhold 2% on payments to payee which does business in Thailand for advertising fees and other professional services; (5) banks, finance companies, securities and credit companies must deduct 1% from interest earned on deposits or notes paid to companies doing business in Thailand. Foundations or associations must deduct 5%; (6) 5% tax must be withheld from payments of contest prizes and raffles; (7) 5% tax must be withheld from payments of fees to actors, entertainers and sportsmen; (8) 5% tax must be withheld from payments to foreign contractors doing business in Thailand without a permanent establishment in Thailand; (9) payment of interest to person who are liable for personal income tax is subject to withholding tax except when paid by an individual to a Thai resident; (10) Thai companies which pay dividends or profits on shares to shareholders or partners who are liable for personal income tax are required to deduct tax at the standard personal income tax rate; and (11) interest payments on bonds, finance company notes, are subject to 15% withholding tax. PROMOTION INVESTMENT, *supra* note 13, at 94-95 (emphasis added).

81. One exception to this policy is foreign international transportation companies which are taxed at 3% of gross ticket receipts from passenger fares and freight charges within Thailand. *Investment Climate Statement, Thailand, supra* note 3, at 9.

Although the Civil and Commercial Code does not recognize a joint venture as a legal entity, the Revenue Code defines "joint venture" as a combination of any authorized person, limited companies, and juristic persons agreeing to carry on a specific project for a certain period of time. The Code taxes this combination as an entity.⁸²

Foreign companies which do not carry on business in Thailand nevertheless may be taxed on management and agency fees, on income from goodwill and intellectual property rights and technical assistance, on interest and dividends, income from property leases, and income from "liberal" professions such as law, medicine, engineering, architecture.⁸³ Thailand has entered into Double Taxation Treaties with 22 countries.⁸⁴ The purpose of the treaties is to reduce or eliminate the withholding tax or income tax in more than one country.⁸⁵ Even without the Double Taxation Treaty, the Most Favorite Nation clause for taxes under Article VI of the Treaty of Amity and Economic Relations provides that "[n]ationals and companies of either Party shall not be subject to the payment of taxes . . . more burdensome than those borne by . . . any third country."⁸⁶ In addition to income tax, a foreign company is subject to other business taxes, including municipal taxes, excise taxes, withholding taxes, and a remittance tax.

6. *Tax Clearance Certificate*

All aliens who enter Thailand for business purposes, or earn income during their stay, or who have been in the country for a total of 90 days or more, must obtain a tax clearance certificate before they may leave the country. The application must be filed within 15 days before departure even if no income was earned. Violators will be

82. *Id.*

83. PROMOTION INVESTMENT, *supra* note 13, at 98-99.

84. *How Thai Businesses Are Organized*, E. ASIAN EXECUTIVE REP., Apr. 15, 1988 (LEXIS, Intnew/Nexis library, Easian file) [hereinafter *How Thai Businesses Are Organized*]. These countries are Austria, Belgium, Canada, Denmark, Finland, France, India, Indonesia, Italy, Japan, Malaysia, the Netherlands, Norway, Pakistan, People's Republic of China, Philippines, Poland, Singapore, South Korea, Sweden, United Kingdom, and West Germany. Thailand is currently negotiating with the United States, Australia, and Romania. *Id.*

85. *Investment Climate Statement, Thailand*, *supra* note 3, at 9.

86. Treaty of Amity and Economic Relations, *supra* note 12, at art. VI, para. 1; 19 U.S.T. at 5850 (emphasis added). *But see* J. Curran, *How to Win in Pac Rim Stocks*, 120 FORTUNE 57 (1989), where the author states that "Thailand is the only major Asian market that has no tax treaty with the U.S., so investors stand to forfeit a chunk of their profits to the local taxman. Also, after you sell a Thai stock it can take up to three months to get your money." *Id.* at 64.

subject to a civil penalty of 20 percent of the tax liability, and a criminal penalty of 1,000 baht with up to one month imprisonment.⁸⁷

7. Remittance Tax

After deducting the standard allowances, ranging from 10 to 40 percent, remittance of assessable income out of Thailand to foreign companies or partnerships not doing business in Thailand is subject to a 25 percent withholding tax. The rate is 10 percent for banks, insurance companies, or similar businesses. After allowing for standard deductions,⁸⁸ a foreign company which remits profits out of Thailand for business carried on in Thailand must pay a 20 percent tax on the sums remitted in addition to corporate tax.⁸⁹ The effective rate is approximately 16.67 percent.⁹⁰ A return must be filed and the tax must be paid within 7 days of the remittance date.⁹¹ The tax also applies to the transfer of profits from a Thai branch office to its headquarters abroad.⁹²

8. Remittance Tax under the Treaty of Amity and Economic Relations

A remittance tax is imposed on all foreign companies doing business in Thailand, including U.S. companies and their Thai branches, but not on Thai companies remitting their profits overseas. Except for "communications, transport, fiduciary functions, banking in-

87. PROMOTION INVESTMENT, *supra* note 13, at 102-05.

88. *Id.* at 94. The standard deductions are: a) 20% up to 20,000 baht for services income; b) No deduction for interest, royalty, dividends; c) 40% for income from a liberal profession; and d) 10% for rental income. *Id.*

89. *Id.*; Telephone conversation with Sart Sirisinha (Thailand's Board of Investment, 5 World Trade Center, Ste. 3443, New York, N.Y. 10048, Telephone: (212) 466-1745/466-1746) (Mar. 29, 1990). Mr. Sirisinha also gave an example of a U.S. company doing business in Thailand earning \$100,000 net income before taxes. He stated that if the U.S. company remits \$20,000 out of Thailand, it must pay a remittance tax of 20% of the sum remitted or \$4,000. This \$4,000, he added, is not allowed as a credit against the regular 35% regular income taxes. Thus, the U.S. company must pay not only the \$35,000 regular income tax, but the \$4,000 remittance tax as well. See *supra* notes 13-30 and accompanying text for exceptions to the rules under the Investment Promotion Act.

90. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 34; *How Thai Businesses Are Organized*, *supra* note 84.

91. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 34. *But see* PROMOTION INVESTMENT, *supra* note 13, at 94. It is unclear from the text whether the remittance tax withheld must be forwarded to the Revenue Department with a tax return "within 7 days of the end of the month" the remittance was made or "within 7 days of the remittance date." *Id.*

92. PROMOTION INVESTMENT, *supra* note 13, at 94; DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 33-34; *How Thai Businesses are Organized*, *supra* note 84.

volving depository functions, the exploitation of land or other natural resources, or domestic trade in indigenous agricultural products,"⁹³ the application of the remittance tax on U.S. companies appears to be inconsistent with the National Treatment Clause of the Treaty of Amity and Economic Relations.⁹⁴

Each party, however, retains its rights and obligations under the General Agreement on Tariffs and Trade (GATT).⁹⁵ The National Treatment Clause under Article III of the GATT applies only to "products." Money would not likely be considered a "product." Thailand would have difficulty in arguing successfully that the remittance tax was "necessary for the protection of its essential security interests" under the Security Exceptions Clause under Article XXI of the GATT. Even if the remittance of profits out of Thailand is contrary to its security interest, the effects caused by Thai companies would be the same as those by U.S. companies. Similarly, Thailand's argument that the remittance tax is a measure "relating to the importation or exportation of gold or silver" authorized by the General Exceptions under Article XX of the GATT⁹⁶ would be unsupportable as its effects would be the same when caused by either Thai or U.S. companies. Accordingly, any exception to the National Treatment Clause to justify the remittance tax would have to be found elsewhere in the Treaty of Amity and Economic Relations.

Article VII of the Treaty of Amity and Economic Relations provides in part that:

1. Neither party shall apply restrictions on the making of payments, *remittances*, and other transfers of funds to or from the territories of the other Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people
2. If either Party applies exchange restrictions, it shall make reasonable provision for withdrawal⁹⁷

Thailand may argue that its trade deficit forces it to restrict the remittance of foreign funds out of the country "to assure the availability of foreign exchange for payments of goods and services

93. Treaty of Amity and Economic Relations, *supra* note 12, at art. IV, para. 2; 19 U.S.T. at 5848.

94. *Id.* at paras. 1-2; 19 U.S.T. at 5848.

95. *Id.*, at art. VIII, para. 6; 19 U.S.T. at 5854.

96. General Agreement on Tariffs and Trade, arts. III, XX, XXI, Oct. 30, 1947, 55 U.N.T.S. 194.

97. Treaty of Amity and Economic Relations, *supra* note 12, at art. VII, paras. 1-2; 19 U.S.T. at 5851-52 (emphasis added).

essential to the health and welfare of its people” and that the 20 percent remittance tax is reasonable. However, the facts are to the contrary. Although, in 1987, Thailand’s imports exceeded its exports by \$1,341 million, it received \$1,946 million from tourism, \$840 million from remittances by overseas Thai workers, and \$825 million from net capital inflows.⁹⁸ These sources ensure that Thailand will have sufficient foreign exchange for payments of goods and services. Thus, Thailand’s application of its remittance tax on U.S. companies without applying the tax as a credit against regular income tax seems to violate Articles IV and VII of the Treaty of Amity and Economic Relations.

H. *Repatriation Policy*

The Exchange Control Act of 1942 requires approval by the Bank of Thailand to repatriate investment funds, dividends, profits, repayments of loans and payment of interest, lease payments, and transfer of securities and paying documents.⁹⁹ Authorized commercial banks may approve the repatriation of royalties. To repatriate investment funds and returns on investment, the investor must show that the funds and returns were responsible for the original inflow of investment funds. To expedite the approval, Thai authorities advise that foreign investors register their investments¹⁰⁰ with the Exchange Control Officer at the Bank of Thailand, any of the 15 commercial banks incorporated in Thailand, or at any of the 14 foreign commercial banks with branches in Thailand.

Approval for repatriation is readily granted¹⁰¹ in the following cases: a) transfer of profits or dividends after deduction of income and other taxes and after appropriation of reserves; b) transfer of up to 50 percent of the net profit for the first 6 months of the accounting year; and c) liquidation of an enterprise in which funds have been invested, or upon submission of proof that the remitted

98. See FOREIGN ECONOMIC TRENDS, *supra* note 3, at 2.

99. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 32.

100. *Investment Climate Statement, Thailand*, *supra* note 3, at 10; see also DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 32 (filing Form E.C. 71).

101. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 32. Form E.C. 71 is required for purposes other than payment of imports. A source at the Bank of Thailand told the U.S. Embassy in Bangkok that the normal upper limit on processing repatriation requests is two weeks provided that the applicant’s documentation is in order. *But see Investment Climate Statement, Thailand*, *supra* note 3, at 11 (during 1987 stock market crash, process took about one month in Thailand due in part to one-time increase in requests).

funds are no longer required.¹⁰² Transfers of large amounts of funds may be permitted only in installments to prevent any undue fluctuations of the exchange rates.¹⁰³

I. Infrastructural Constraints

Infrastructural constraints threaten to limit future investment in Thailand. Most investments and economic developments have occurred in the Bangkok metropolitan area.¹⁰⁴ The development of new roads, bridges, expressways, and flyovers is lagging far behind new vehicle registration. New development in the provincial arteries is moving slowly as well.¹⁰⁵ The Port of Bangkok, which handles more than 99 percent of Thailand's total trade, is regarded as the least modern major port in Southeast Asia.¹⁰⁶ The development of alternative ports on the Eastern and Southern coasts will not ease port congestion until the early 1990s. Even then, the complementary railways and roads will not enhance the potential of these new ports for quite sometime.¹⁰⁷ Communications are also a problem. For example, the number of telephones per capita is very low even by standards of a developing country, and falls far below the rates in Asia's Newly Industrializing Countries (NIC).¹⁰⁸

J. Political Stability

1. Comparing Thailand with Other Countries in the Region

A Thai corporate executive was quoted as saying: "There are obvious political problems in the Philippines, Malaysia is torn by

102. *Investment Climate Statement, Thailand, supra* note 3, at 10.

103. *See supra* note 30 and accompanying text discussing special repatriation rule.

104. With about 10% of Thailand's population, Bangkok is more than 27 times larger than Songkhla, Thailand's second largest city. *Current World Data - Thailand, supra* note 2; REUTERS, Mar. 10, 1990 (LEXIS, Nexis library, Reuters file) (Bangkok's population has tripled in the past 30 years to nearly eight million). A more alarming result is that it is sinking at a rate of over four inches per year because water was being pumped out of the earth at private wells to supplement insufficient public water supplies. *See also Somerset Maugham Did Not Sleep Here, FORBES*, Dec. 11, 1989 (LEXIS, Nexis library, Forbes file), noting that "the infrastructure hasn't kept pace. Even filling in many of the sprawling canals, or klongs (which gave the city its sobriquet the Venice of Asia), hasn't helped. As soon as they are filled in and paved over, they become clogged with cars, trucks, buses, and tuk-tuks—the ubiquitous two-seater, three-wheeled vehicles powered by motorcycle engines and driven by daredevils." *Id.*

105. *Investment Climate Statement, Thailand, supra* note 3, at 5.

106. *Id.*

107. *Id.*

108. *Id.*

ethnic tensions between its Chinese and Malays, Indonesia has a lousy work ethic and serious corruption, and Singapore has a labor shortage. Where else can investors go?"¹⁰⁹ Although the Thai executive was perhaps exaggerating, the facts supporting his position are not difficult to find. Wages in the "Four Little Tigers"—Hong Kong, Singapore, Taiwan, and South Korea—are rising steadily. Their workers are becoming more demanding.¹¹⁰

Despite well-publicized reforms, China hardly has become capitalist. Almost all prices remain under state control, and party bureaucrats regularly meddle in factory management. As William Colby, an international lawyer and former director of the Central Intelligence Agency, predicted, "China will not play a major role in the world economy for the foreseeable future."¹¹¹ As a recent issue of *Fortune* magazine puts it, although "[t]hree resource-rich Southeast Asian nations, Malaysia, Indonesia, and the Philippines,¹¹² [are also] gaining ground, . . . only Thailand is certain to achieve the status of newly industrializing country (NIC) in the next decade."¹¹³

2. The Thai Monarchy

The Thai Monarchy is one of the most preeminent institutions¹¹⁴ in Thailand and is greatly respected by the Thai people.¹¹⁵ As the

109. Kraar & Woods, *The New Powers of Asia*, *supra* note 1. In this author's opinion, an important factor contributing to Thailand's stability is its people. With its form of buddhism, Thais are much less likely to revolt. Its devout belief is unequal even among the business people and intellectuals. See *East-West Trade: Trade and Investment in Eastern Europe Remain Relatively Risky, Analysts Warn*, 7 Int'l Trade Rep. (BNA) 296 (Feb. 28, 1990) (leading U.S. government and private analysts anticipate serious economic and social "disruptions" in Eastern Europe). See *Trade Policy: International Business Survey Finds Japan Rated the Most Unreliable Trading Partner*, 7 Int'l Trade Rep. (BNA) 380 (Mar. 14, 1990).

110. See Kraar & Woods, *The New Powers of Asia*, *supra* note 1 (In 1987, series of strikes resulted in a 20% average raise for South Korean workers); *FORBES*, Dec. 11, 1989 (LEXIS, Nexis library, Forbes file) (rising labor costs in South Korea and Hong Kong have made Thailand one of the fastest growing manufacturing sites in Asia; in last five years alone, major U.S. companies American Standard, Johnson & Johnson, Colgate-Palmolive and Monsanto set up shop in Thailand); *Bus. WEEK.*, Nov. 20, 1989 (LEXIS, Nexis library, Buswk file) (Korea's monthly wages, unadjusted for inflation, rose 70% in past two years, to average of \$634, higher than Taiwan and just as high as Australia; work stoppages led to \$4.5 billion worth of production losses. In response, Samsung and Goldstar are shifting assembly of low-end, labor-intensive products such as radios and black-and-white TVs to low-wage Thailand and the Philippines. Samsung is largest company in Korea with \$31 billion sales in 1988; Lucky-Goldstar is third largest with \$22.8 billion). See *Strategic Guide*, *supra* note 2, at 72-84 (real GDP per capita \$3,436 for South Korea, \$4,837 for Taiwan, \$8,158 for Hong Kong, \$6,817 for Singapore).

111. Kraar & Woods, *The New Powers of Asia*, *supra* note 1.

112. *Id.*

113. Kraar, *Asia's Rising Export Powers*, 120 *FORTUNE* 43, 43-50 (1989); *Strategic Guide*, *supra* note 2, at 72-84.

114. *N.Y. Times*, May 21, 1989 (Lexis, Nexis library, *Nyt* file) (he was born in Massachu-

New York Times indicated recently, "So skillful has the King been as a unifying force that no important sector of Thai society can be described as resentful of his power. . . neither the rising commercial, industrial and financial powers, nor the burgeoning intellectual community, nor the military, which still has a strong presence in every town."¹¹⁶ In fact, the King is deeply involved in Thailand's economic development, travelling constantly to monitor the more than 1,200 development projects under his patronage, including many dams in rural areas.¹¹⁷

Foreign investors should be aware that Thailand has the strictest lese-majeste law in the world.¹¹⁸ Casual comment on the privileged way of palace life can result in arrest and imprisonment.¹¹⁹ Even members of the foreign press are careful not to overstep unwritten but clearly understood limits of what can be written about the royal family.¹²⁰ Although it remains to be seen whether the monarchy will continue to be the preeminent and stabilizing institution, Thailand has now reached a point in its economic development, with enough competent administrators to run the country, that the country should continue to grow regardless of the Monarchy's role in Thai society.

3. *History and Ethnic Composition*

Through sheer luck and skillful leadership, Thailand managed to stay independent throughout the colonial era. France and Britain

setts). David K. Wyatt, a leading scholar of Thai history at Cornell University, credits the King with turning the monarchy into "the nation's strongest social and political institutions." *Id.*

115. Although Thailand is a constitutional monarchy, its common motto is: "Nation, Religion, King, and Constitution." Many Thais would take it in that order: King *over* Constitution. As freedom and democracy are embedded in every American child at an early age, the worship of the monarchy is implanted in every Thai child by requiring recitation of a prayer for the King in every public elementary and secondary school. It is difficult to imagine the people of any country who respect their King as much as Thai people do.

116. N.Y. Times, May 21, 1989 (LEXIS, Nexis library, Nyt file).

117. *Id.*

118. *Id.* The Crown Prince himself candidly admitted to a Thai women's magazine, *Dichan*, in October, 1987, that he was regarded as the family's "black sheep." *Id.* The Crown Prince's mother described the Crown Prince as "a bit of a Don Juan." *Id.* Moreover, leaflets which criticize the Crown Prince appear occasionally. By law the royal family is above criticism. REUTERS, Jan. 25, 1988 (LEXIS, Nexis library, Reuters file).

119. REUTERS, Jan. 25, 1988 (LEXIS, Nexis library, Reuters file). In December, 1987 four Thai were arrested for distributing leaflets and face up to 15 years imprisonment. REUTERS, Aug. 17, 1983 (LEXIS, Nexis library, Reuters file) (prominent Thai political activist sentenced to 3 years in jail for linking palace with politics and accusing Crown Prince of leading inappropriate personal life).

120. This author suggests that interested readers pursue more information privately from Thai students *outside* Thailand.

agreed to leave Siam alone to act as a “buffer” zone between the French colony in Indochina and the British colonies in Burma and Malaysia. In 1939, Siam’s shrewd leader changed the country’s name from Siam, which historically covered a much smaller territory, to Thailand¹²¹ in order to stop the mostly Laotian independence movements in the Northeast. The term “Thai” includes Thai, Thai Lao (Laotian), Thai Dum (Black Thai) and several other Thai tribes including Laotians in northeastern Thailand. Practically, all ethnic Thais, which comprise about 75 percent of Thailand’s population, would consider themselves as “Thai.”¹²²

The most important ethnic minority in Thailand are the Chinese, whose members migrated to Thailand more than a hundred years ago. Today, Chinese Thais practically control Thailand’s economy, own almost every business in Bangkok, and comprise more than 14 percent of Thailand’s population.¹²³ Although Thais generally accept the Chinese minority,¹²⁴ they exhibit a strong distrust for the Vietnamese minority, which fled from Northern Vietnam to Thailand during and after the World War II. For this reason, many Vietnamese fled Thailand to Laos after the Communist takeover. The Malay minority, found primarily in the South, is treated somewhat better. Because of Thailand’s acceptance of its large Chinese minority, the rejection of a tiny Vietnamese minority probably would never cause any significant political problems for Thailand.

4. OPIC and Other Insurance Programs

To protect against the relatively small probability of political turmoil in Thailand, a foreign investor can obtain investment insurance such as is offered by the Overseas Private Investment Corporation (OPIC). OPIC is an outgrowth of the Marshall Plan created after World War II, and of the subsequently created Agency for International Development (AID). Created as a part of the Foreign Assistance Act of 1969, it is “an agency of the United States under

121. N.Y. Times, May 21, 1989 (LEXIS, Nexis library, Nyt file).

122. *Current World Data - Thailand*, supra note 2.

123. *Id.* Commercial signs in modern Bangkok have been practically all Chinese until recently when a prime minister issued a regulation to change them to Thai. Many said that this regulation at least in part, resulted in the prime minister’s short rule. Although the regulation was subsequently repealed, the signs have not been reinstalled to the same extent. Chinese Thais owe allegiance to Thailand in part due to the contribution of a Chinese general, Chao Tark Sinh, who liberated Siam from Burma and later became king. In fact, Chinese Thais consider themselves more Thai than many ethnic Thais. *Id.*

124. Kraar & Woods, *The New Powers of Asia*, supra note 1.

the policy guidance of the Secretary of State” to encourage foreign investment.¹²⁵ The OPIC insures eligible¹²⁶ U.S. investors against three principal risks: 1) inconvertibility and nontransferability of the invested capital and profits; 2) confiscation, nationalization or expropriation of their enterprises; and 3) “political violence” including war, revolution, or insurrection and civil strife, which damages the physical assets of the enterprises.¹²⁷

The OPIC has an active program in Thailand. As of June 30, 1987, OPIC maintained 35 active contracts with U.S. firms engaged in business in Thailand.¹²⁸ As of March 31, 1989, the base premiums were \$0.30/\$100 for inconvertibility, \$0.60/\$100 for expropriation, and \$0.60/\$100 for war. The rates depend on many factors such as the country, the companies, and the products. The maximum insur-

125. 22 U.S.C. § 2191 (Law. Co-op. 1982 & Supp. 1989); see generally J. BARTON & S. FISHER, *INTERNATIONAL TRADE INVESTMENT - REGULATING INT'L BUSINESS* 913-16 (1986) [hereinafter BARTON & FISHER, *INTERNATIONAL TRADE*]; see DROKER, *OVERSEAS BUSINESS REPORTS*, *supra* note 51, at 28 (U.S. Dept. of Commerce reported OPIC operates under U.S. Investment Guaranty Program established in 1954).

126. To be eligible for OPIC insurance, the investment must be made by one of the following entities: 1) a U.S. citizen; 2) a U.S. corporation, partnership, or other association “substantially beneficially owned” by U.S. citizens; or 3) a foreign business at least 95 percent owned by investors as defined above. Even if a corporate investor meets the eligibility test, it may not be eligible if it owes a heavy debt to non-U.S. citizens, or if it appears from all the circumstances that foreign creditors can exercise effective control over the proposed venture. As a condition to payment from the OPIC, the investor must exhaust all remedies including all reasonable actions in the host country. The investor must also co-operate with the U.S. Government in pressing claims against the host government.

127. Before insurance against inconvertibility of currency is approved, the investor must obtain assurance from the host country that investor earnings will be convertible into dollars and that repatriation of investor’s capital will be permitted. Claims have been readily allowed even where the host government has discriminated against an investor. OPIC insurance against expropriation “includes, but is not limited to, any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor’s own fault or misconduct, and materially adversely affects the continued operation of the project.” 22 U.S.C. § 2198(b) (1988). Although OPIC legislation does not define “expropriation,” OPIC insurance contracts take a specific and enumerative approach. The OPIC standard insurance contract contains a lengthy description of what is considered to be expropriation. It specifies that an investor has an obligation to negotiate in good faith with the host government about the provision of compensation for expropriated property.

The statute does not define “political violence.” Article 1.07 of the standard OPIC contract provides protection against “injury to the physical condition, destruction, disappearance or seizure and retention of Covered Property directly caused by war (whether or not under formal declaration) or by revolution or insurrection” Before issuing insurance for loss due to “business interruption” or “civil strife” for the first time or for each subsequent significant expansion, the OPIC Amendments Act of 1985 requires the OPIC to submit to the Senate and House Committee a thorough analysis of the risks to be covered, anticipated losses, and proposed rates and reserves. In the case of insurance for business interruption loss, an explanation of the underwriting basis is also required. 22 U.S.C. § 2194(a)(4) (1988). See also DROKER, *OVERSEAS BUSINESS REPORTS*, *supra* note 51, at 28.

128. *Investment Climate Statement, Thailand*, *supra* note 3, at 17.

ance coverage against inconvertibility is \$67.5 million, \$80.7 million for expropriation, and \$64.4 million for war related losses. The maximum coverage amount changes quarterly.¹²⁹ Since December 1965, American investors may be provided with "extended risk" coverage under the Investment Guaranty Program.¹³⁰

K. Foreign Corrupt Practices Act of 1977: The Higher Moral Standard?

Corruption in Thailand, especially among low-level officials, although decreasing, is still widespread.¹³¹ However, the U.S. Foreign Corrupt Practices Act of 1977 as amended (FCPA)¹³² makes it a crime for U.S. domestic concerns or SEC registrants to bribe foreign officials beyond the "routine government function"¹³³ of small payments to low-level officials. Its antibribery provision prohibits both SEC registrants¹³⁴ and domestic concerns¹³⁵ from corruptly offering or giving anything of value to foreign officials, including any person

129. Telephone conversation with B. Marshak, Thailand Desk, Overseas Private Investment Corp. (May 3, 1989) (The most current information may be obtained from: Overseas Private Investment Corporation (OPIC), 1615 M Street, NW, Suite 400, Washington, DC 20527, Phone: (800) 424-6742).

130. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 28.

131. Worthy, *When Somebody Wants a Payoff*, 120 FORTUNE 117 (1989). "A EUROPEAN businessman mentioned to a friend earlier this year that he planned to open an office in Thailand. 'Are you crazy?' replied the friend, a Malaysian banker. 'Don't you know about all the payoffs that'll be required?' 'I know,' said the European. 'They work'." *Id.*

132. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (Supp V. 1981); Foreign Corrupt Practices Act Amendments of 1988, 15 U.S.C. § 78a note, *reprinted in* 28 I.L.M. 399, 455-60 (1989)[hereinafter FCPA of 1988].

133. FCPA of 1988, *supra* note 132, at §§ 5003(a), 30A(f)(3)(A). Section 104(h)(4)(A) defines the term "routine governmental action" as only those actions which "ordinarily and commonly performed by a foreign official in":

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protection perishable products or commodities from deterioration; or

(v) actions of a similar nature.

Id. at § 104(h)(4)(A).

134. *Id.* at § 30A(a) which provides that an issuer, or SEC registrant, is any company "which has a class of securities registered pursuant to section 12 . . . or which is required to file reports under section 15(d) . . ." *Id.*; 28 I.L.M. at 455.

135. A "domestic concern" is any U.S. citizen, national, resident, or any business entity (other than a SEC registrant, a company that complies with the SEC's registration statutes) that either has its principal place of business in the United States or is organized under the laws of any U.S. State, territory, commonwealth, or possession. FCPA of 1988, *supra* note 132, at § 104(h)(1); 28 I.L.M. at 459.

acting in an official capacity for a foreign government, foreign political party officials, a political party, or a candidate for foreign political office.¹³⁶

The 1988 Amendments to the FCPA, a part of the Omnibus Trade and Competitiveness Act of 1988, eliminated the old "reason to know" standard.¹³⁷ The amended FCPA prohibits offering or paying anything of value while "knowing" that all or part of such payment will be used for the prohibited acts.¹³⁸ A prominent commentator maintained that this amendment significantly relaxes the violation standard and that "knowing" is defined in terms of awareness or a firm belief that the relevant circumstances exist or the relevant result is substantially certain to occur.¹³⁹ However, Congress defined "knowing" to include both constructive and actual knowledge.¹⁴⁰ Violations incur a fine of up to \$2 million for a company and no more than \$100,000 or five years imprisonment for an individual.¹⁴¹ Criminal liability requires the awareness of "a high probability of the existence of the circumstance."¹⁴² "Conscious disregard" or "wilful blindness" is sufficient, but "simple negligence" or "mere foolishness" is not.¹⁴³

The internal accounting control provisions of the FCPA apply only to SEC registrants. SEC registered companies must maintain a system of internal accounting controls sufficient to provide reasonable assurances that certain control objectives are met. It prohibits off-the-

136. *Id.*; 28 I.L.M. at 355. Section 30A(a)(3) provides:

any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of . . . influencing any act or decision of such foreign official, political party, party official, or candidate . . . [or] inducing such foreign official . . . to do or omit to do any act in violation of the lawful duty of such foreign official . . . [or] inducing such foreign official . . . to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

Id. at §30A(a)(3). See also *id.* at §§ 30A(a)(1)-(2), 104(a)(1)-(3).

137. Barton & Fisher, *Introductory Note, United States: Omnibus Trade and Competitiveness Act of 1988*, 28 I.L.M. 399, 404 (1989) [hereinafter *Introductory Note*]. The reason to know standard prohibited offering or paying anything of value to any person if it is known or there is reason to know that all or part of the payment will be used to influence the prohibited acts. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (Supp. V 1981).

138. FRCP of 1988, *supra* note 132; 28 I.L.M. at 457.

139. *Introductory Note, supra* note 137; 28 I.L.M. 399, 403.

140. Berlack, *Analysis of the Amendments to the Export Administration Act of 1979 Contained in the Omnibus Trade And Competitiveness Act of 1988*, at 38 (Dec. 5, 1988) (WESTLAW, INT-TP file) [hereinafter Berlack, *Analysis of the Amendments*].

141. FCPA of 1988, *supra* note 132, at § 104(g).

142. Berlack, *Analysis of Amendments, supra* note 140, at 38.

143. *Id.* at 39.

books slush funds and inaccurately reported transactions.¹⁴⁴ Under the “knowing” standard, inadvertent or innocent errors in book-keeping will not incur criminal liability under the FCPA.¹⁴⁵ Although arguments have been made that the United States should not extend its moral principles extraterritorially,¹⁴⁶ which necessarily implies that the United States is on the higher moral ground than countries without a foreign corrupt practices act, corruption is not unknown in the United States and other western countries.¹⁴⁷ The only differences between the corrupt Thai official and the corrupt U.S. politician are the amount of money involved and their relative economic status.¹⁴⁸

As the penalties under the FCPA are quite severe and getting around the act short of perjury is practically impossible, U.S. companies should abide by the act. Moreover, the FRCP prohibits companies from paying fines imposed on individuals.¹⁴⁹ While waiting for further reform to lessen the penalties, the best strategy would be to use the FCPA in a positive way, such as by publicizing it. In the long run, U.S. business interests will be better served if U.S. companies and U.S. citizens would abide by a higher moral philosophy, even if it results in short-term economic costs. In addition, the people of Thailand and other foreign countries will come to favor honest U.S. companies and eventually will force their government officials to favor U.S. companies. Moreover, by following the FCPA today, U.S. companies will not be subject to blackmail by tomorrow’s new officials. Most importantly, companies which abide by the FCPA will not be subject to civil suits in U.S. courts by unsuccessful competitors.¹⁵⁰

144. FRCP of 1988, *supra* note 132, at § 30A(b); 28 I.L.M. at 456.

145. Berlack, *Analysis of Amendments*, *supra* note 140, at 38.

146. BARTON & FISHER, *INTERNATIONAL TRADE*, *supra* note 125, at 631.

147. Some of the more celebrated examples include the corruption which brought down U.S. Vice-President Agnew, and Japan’s Tanaka and Takeshita administrations.

148. In fact, it is arguable that the corrupt Third World official is on a “higher moral ground” than the more economically comfortable U.S. Tammany Hall politician: a low-level Third World official who corrupts to feed his hungry child is acting from necessity, where as an equivalent official in the so-called civilized society who corrupts to buy a yacht or a vacation home is merely following his decadent instincts for conspicuous consumption.

149. FRCP of 1988, *supra* note 132, at §§ 30A(b), 104(g)(3).

150. The United States Supreme Court recently held that the doctrine of sovereign immunity does not prohibit a civil action seeking damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, the Robinson-Patman Act, 15 U.S.C. § 13, and state antiracketeering acts, even if it requires imputing to foreign officials the obtaining of the bribes. *W. S. Kirkpatrick & Co., Inc. v. Environmental Technics Corp.*, 110 S. Ct. 701 (1990). The suit was brought by an unsuccessful U.S. bidder against two other U.S. companies after their guilty pleas to charges under the FRCP. *Id.*

III. U.S. EXPORT CONTROLS:
EXPORT ADMINISTRATION ACT OF 1979

Any company shipping component parts from the United States to Thailand must comply with both the U.S. Export Administration Act of 1979 (EAA) and Thailand's Import and Export Act.¹⁵¹ In the United States, the Bureau of Export Administration (BXA) administers export controls.¹⁵² The EAA provides that a license to export a product from the United States may be "general" (not requiring individual application and approval), "validated" (authorizing a specific export), or "validated authorizing multiple exports" (authorizing multiple exports).¹⁵³ Companies which intend to export component parts to their subsidiaries in Thailand need to apply for comprehensive operations validated authorizing multiple exports license.¹⁵⁴ If the product potentially could be later reexported to Laos, Thailand's neighbor, or to other countries in Group Y,¹⁵⁵ then a Statement by Ultimate Consignee and Purchaser also would be required.¹⁵⁶

Thailand's Import and Export Act of 1979 gives the Ministry of Commerce the authority to designate classes of goods under import controls. The controlled goods are classified under 45 classes and

151. In the United States, the Office of Export Administration of the Department of Commerce administers export controls.

152. In May 1988, the BXA opened its Western Regional Office in Orange County, California. Its services include on-the-spot guidance on export control regulations, detailed assistance in preparing license applications, in-depth seminars, and emergency processing of applications, usually within 48 hours. Its Export License Application and Information Network (ELAIN) is capable of receiving applications and issuing export license electronically for all Free World destinations. The System for Tracking Export License Applications (STELA) at the Washington, D.C. Office can give a brief, computer-generated up-to-the-minute status report on submitted applications. STELLA's automated voice response system can be accessed using a touch-tone telephone by dialing (202) 377-2752. As the Control List (*reprinted in* 50 U.S.C.S. § 2403(b) (Law. Co-op. 1982 & Supp. 1989)), changes vary frequently with the technological advances and political events, and exporters of components should check the latest version to avoid any civil and criminal penalties. On the West Coast, the Western Regional Office would be the most convenient location: U.S. Dep't of Commerce, 3300 Irvine Avenue, Suite 345, Newport Beach, CA 92660-3198, Phone: (714) 660-0144.

153. 50 U.S.C.S § 2403 (Law. Co-op. 1982 & Supp. 1989). This third class includes "distribution" licenses for sale of exports to approved distributors or users in non-controlled countries, "comprehensive operations" licenses primarily for sales to foreign subsidiaries, "project" licenses for all exports concerning one entire activity or project, and "service supply" licenses for sales of replacement and spare parts for goods previously sold.

154. The Application for Export License Form is, Form DIB-622P. *See* 15 C.F.R. § 775.2 (1989).

155. 15 C.F.R. § 785.2 (1989).

156. Form DIB-629P, 15 C.F.R. § 775.2 (1989).

usually compete directly with domestic products.¹⁵⁷ Since 1960, the Thai customs tariff has been based on the Brussels Tariff Nomenclature (BTN). Most duties are ad valorem and only some are specific. When the tariff schedule lists both specific and ad valorem duties for an item, the rate yielding the higher revenue applies. The ad valorem duties range from 0 percent to 150 percent.¹⁵⁸ The Tariff Classification Section of the Customs Department will provide an advance ruling to importers who provide it with samples, illustrations, a description of the goods, and a narrative justifying a certain classification. If the applicant seeks advice from outside technical experts, the Customs Department will charge the cost of such advice to the applicant.¹⁵⁹

IV. EXPORTING TO THE UNITED STATES AND OTHER MAJOR INDUSTRIALIZED COUNTRIES

The "Rule of Origin" must be considered whenever a component originates in the United States. The "Rule of Origin" provides that in order for a product to be considered from the United States, it must be wholly from the United States or, if assembled from imported parts, at least substantially transformed into a new product within the United States.¹⁶⁰ Even if the finished product is considered to be a "product" of Thailand, it may still be tax-free under the Generalized System of Preferences (GSP). The GSP uses the "Rule of Origin" to accord certain trade preferences to products from developing countries, including Thailand. GSP preferences are permitted under the GATT, and similar preferences have been implemented by

157. THAI CUSTOMS DEP'T, IMPORT & EXPORT CONTROLS 87-88 (1989) (available at the Customs Department at Narong Road, Khlong Toey, Bangkok 10110, Thailand). The list of products specified in Products Under Import Licensing According to the Export & Import Act (1979) is quite lengthy and is available from Thailand's Office of Economic Counselor (Board of Investment).

158. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 25-26.

159. *Id.* at 28.

160. 19 U.S.C.S. § 2510(4)(B) provides:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 U.S.C.S. § 2510(4)(B) (Law. Co-op. 1983 & Supp. 1989). The term "instrumentality" shall not be construed to include an agency or division of the government of a country, but may be construed to include such arrangements as the European Economic Community. *Id.*

the European Economic Community, Japan, and other major industrialized nations with different structure and approach.

Under the U.S. GSP, products are admitted into the United States duty free if both the products and its country of origin meet the statutory criteria.¹⁶¹ If the product is not shipped directly from the beneficiary developing country to the United States, at least 35 percent of the product's value must be added within the developing country.¹⁶² The GSP has two eligibility criteria: a mandatory criterion rendering all communist and OPEC countries ineligible;¹⁶³ and a discretionary criterion authorizing the President to evaluate a country's eligibility by taking into account the country's recognition of workers' rights and intellectual property rights.¹⁶⁴ Specific products from certain countries may be "graduated" from the GSP list to the Most Favored Nation list.¹⁶⁵ The President can, but does not have to, remove sufficiently competitive imports from the GSP list when they reach 25 percent of total U.S. imports of such products, or \$25 million.¹⁶⁶ Products of a particular GSP beneficiary can be added or removed from the list of qualified products by petition of interested parties.¹⁶⁷

In June 1987, the International Intellectual Property Alliance (IIPA), which allegedly lost \$34 million to Thai piracy of musical recordings, movies, books, and software, and the Pharmaceutical Manufacturers Association petitioned under the strengthened provisions of § 301 of the 1974 Trade Act for an unfair trade practices investigation.¹⁶⁸ On January 19, 1989, President Reagan denied Thailand's request for additional duty-free treatment, and revoked four competitive need waivers for failing to honor U.S. intellectual property rights.¹⁶⁹ Although the decision is expected to affect a total of \$165 million of U.S. imports of Thai products, it covers primarily non-manufactured products.¹⁷⁰ Thus, the effect on manufactured goods is minimal. If

161. 19 U.S.C.S. § 2463 (Law. Co-op. 1983 & Supp. 1989).

162. *Id.* at § 2463(b).

163. *Thailand Denied Certain GSP Benefits for Weak Intell. Prop. Laws*, 37 Pat. Trade-mark & Copyright J. (BNA) 279 (Jan. 26, 1989) [hereinafter *Thailand Denied GSP Benefits*].

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Thailand Denied GSP Benefits*, *supra* note 163.

169. *Id.*

170. *Id.* The products effected were wood furniture, mosaic, ceramic floor tile, artificial flowers, jewelry, telegraphic and telephonic connection equipment, rice meal & flour, and dried mung beans. *Id.*

the finished product is construed as originating from Thailand, it should be accorded the GSP treatment by other major industrialized nations as well.

V. FINANCING AND MARKETING IN THE REGION

For exporters from Thailand, especially those selling to Third World countries, the problems presented by the lengthy lists of Products Under Export Licensing Accords¹⁷¹ must be considered along with financing and countertrade. Although a large corporate borrower with a good credit rating will be able to borrow in Thailand at attractive rates, smaller operators will require access to an "old boy network" which gives less importance to a business proposal than personal contacts.¹⁷²

As Thailand is centrally located near South Asia markets and resources,¹⁷³ the investor should consider marketing and exporting throughout the entire South Asia region. Even those Third World countries lacking cash to pay for finished products may be traded with through countertrade.¹⁷⁴ Although some economists argue that such deals add unnecessarily to the cost of doing business, many companies resurrected themselves through countertrade with cashless Third World countries. Singer Sewing Machine Company, for example, closed its U.S. plants and now assembles sewing machines and other products in developing countries. In Malaysia and Thailand, Singer enjoys 80 percent of its revenues by purchasing refrigerators and televisions from local manufacturers and reselling them under the Singer brand name. Seagram's joint venture for wine coolers in Thailand was profitable almost from the start, and it now exports to other Southeast Asian countries.¹⁷⁵

171. Available from Thailand's Office of Economic Counselor (Board of Investment), see *supra* notes 17, 20.

172. DROKER, *OVERSEAS BUSINESS REPORTS*, *supra* note 51, at 21. See BACKGROUND, *supra* note 17, at 4 (The Bangkok Bank Ltd. is the largest bank in Southeast Asia. The Industrial Finance Corporation of Thailand provides long-term (3 to 7 years) financing at favorable interest rates for priority projects).

173. BACKGROUND, *supra* note 17, at 6 (1,100 mi. from Hong Kong, 1,100 mi. from Canton, 2,000 mi. from Manila, 775 mi. from Kuala Lumpur, 1,000 mi. from Singapore, 1,900 mi. from New Delhi, and 1,100 mi. from Dacca). *Id.*

174. About six percent of all U.S. exports are tied to countertrade. Kraar, *How to Sell to Cashless Buyers*, 118 *FORTUNE* 147 (1988) [hereinafter Kraar, *How to Sell*].

175. *Id.* at 147, 150, 154. See P. CHAISENG SUKKUL, *INVESTMENT LAW* 226-305 (1989) (in Thai). Thailand itself encourages trading with and investments in Laos and Vietnam as in the Thai prime minister's words, "to change the battle fields to the trade & investments fields." *Id.*

Even luxury items sell in Asia. As Edward F. McDonnell, Seagram executive vice-president for international business noted, "The wonderful thing about Asians, is that they buy premium brands. Kraar, *How to Sell*, *supra* note 174, at 154.

As Thailand and Laos have almost identical cultures, religion, and language, products which sell in Thailand may be readily sold in Laos.¹⁷⁶ Since the "New Economic Management Mechanism (NEM)," Laos's perestroika, Laos's trade with Thailand and Japan have increased steadily. The countertrade products are primarily electricity, wood, and other raw minerals. Although the NEM is very broad and limits wholly-foreign-owned enterprises to 15 years with a provision for an extension, applications for 68 projects have been submitted with foreign investments totalling some \$40 million as of April 3, 1989.¹⁷⁷ To date, over 27 foreign projects have been authorized. In December 1989, the Thai Military Bank opened the first foreign commercial bank in Laos since the communist takeover in 1975.¹⁷⁸ Other countries also have begun to invest in the region. Mitsui & Co., Japan's largest trading company, has a large office in Vientiane, Laos.¹⁷⁹ The U.S. government mission to Laos also recently recommended that the United States expand trade with that "nominally communist country."¹⁸⁰

A. Thai Government Procurement

The Thai government is Thailand's largest buyer. It owns or controls a substantial sector of the country's economy, including postal services, telephone, telegraph, radio and television communications, railroads, ports, and an airline, and monopolizes the tobacco, alcoholic beverages, playing cards, cigarettes, teak logging, forest products, and munitions industries. The Thai government also has interest in cement, paper, matches, textile piece goods, canned fish products, alum, rubber, footwear, automobile batteries, glass, textiles, and petroleum refining and marketing. It usually buys by tenders issued by end-user agencies and departments. The bidder usually is required to deposit up to 5 percent of the tender.

176. It is not unusual to find a high official of one of the two countries, who has a close relative on the other side of the border. In part for this reason, this author's late father once observed, neither government has been able to stop trade between the two countries completely for a long time even during the state of war between the two countries in the early 1980s. Many Thai firms have set up sister factories, including dummy factories, to evade the import quotas of the countries to which they export their products.

177. Xinhua (New China) News Agency, Apr. 3, 1989 (LEXIS, Intnew library, Xinhua file). This author was informed from a reliable source that Hunt Oil has recently signed an oil production sharing agreement with the Government of Laos.

178. *See id.* (Mar. 22, 1989) However, the bank informed this author in December 1989 that it had not yet been authorized to accept any deposit in Laos.

179. Kyodo News Serv., Mar. 4, 1989 (LEXIS, Nexis/Intnew library, Kyodo file).

180. Asian Wall St. J., Feb. 6, 1989 (LEXIS, Nexis/Intnew library, WSJ file).

B. Gray Market Goods

A U.S. manufacturer which produces its products through an overseas subsidiary, and depends on the protection of U.S. law for its intellectual property, must be aware of the United States Supreme Court's ruling on gray market goods in *K. Mart Corp. v. Cartier, Inc.*¹⁸¹ In addition, the Omnibus Trade and Competitiveness Act of 1988 and legislation pending in the United States Congress must also be considered.¹⁸²

In *K. Mart*, a majority of the Supreme Court upheld the "common-control" exception of the Customs Service regulation, which exempts from the importation ban those goods which are manufactured abroad by either the "same person" who holds the U.S. trademark or by a person who is subject to "common control" by the U.S. trademark holder.¹⁸³ The Supreme Court, however, upheld the "authorized-use" exception, which permits importation of gray-market goods by foreign manufacturers who have been authorized to use the trademark in foreign countries.¹⁸⁴ Consequently, U.S. trademark

181. *K. Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988).

182. *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, 102 Stat. 1107 (1988), reprinted in 28 I.L.M. 31 (1989).

183. *K. Mart*, 486 U.S. at 294. The U.S. Supreme Court classified "gray market" goods into the following categories:

"Case 1": A domestic firm buys from an independent foreign firm the rights to register and use a foreign trademark as a U.S. trademark and to sell its foreign-manufactured products in the United States. The products become gray market goods when a foreign firm imports its foreign-manufactured products into the United States or sold them to a third party who imports them into the United States.

"Case 2": After the U.S. trademark for foreign-manufactured products is registered by a domestic firm which is a subsidiary of, or the parent company of, or the same as the foreign manufacturer, a third party or the foreign manufacturer imports the products to the United States.

"Case 3": A domestic holder of a U.S. trademark authorizes an independent foreign manufacturer to use the trademark on products in a particular foreign location. The products become gray market goods when a foreign manufacturer or a third party imports the foreign-manufactured products into the United States. *Id.* at 286-87.

For further discussions of the case, see Note, *K. Mart Corp. v. Cartier, Inc.: Attention Gray Market Shoppers, The United States Supreme Court Has Saved Your Bargain Prices*, 2 TRANSNAT'L LAW. 303 (1989); Towers, *Copiat v. United States: The Grey Market Gets Greyer*, 14 DEL. J. CORP. L. 107 (1989). *Well Ceramics Glass, Inc. v. Dash*, 878 F.2d 659 (3d Cir. 1989); *Lever Brothers Co. v. United States*, 877 F.2d 101 (D.C. Cir. 1989).

184. *K. Mart*, 486 U.S. at 294-95. *But see* Weicher, *K. Mart Corp. v. Cartier, Inc.: A Black Decision for the Gray Market*, 38 AM. U.L. REV. 463, 482-83 (1989), arguing Supreme Court was incorrect in holding Customs regulation § 133.21 violated § 526 of Tariff Act because: 1) the Court's conclusion that § 526 clearly prohibits the authorized use exception places too much emphasis on the statutory language in light of the context in which Congress enacted the section; 2) even if the language of § 526 was determinative, the Court should have upheld the regulation as a reasonable interpretation of the Tariff Act; 3) the gray market promotes United States economic policies and should be allowed to continue. *Id.*

holders who authorize foreigners to use their trademarks abroad will have to rely on U.S. intellectual property laws to keep gray market goods out of the United States, and not on the Customs Service's regulations. As the Supreme Court's holding was based on the Tariff Act of 1930, the Customs Service is considering whether to retain the regulations based on the alternative authority of the Lanham Act.¹⁸⁵

The new Omnibus Act removed the difficult-to-prove injury test in Section 201 determinations, and now requires only a finding of an unfair act tending "to destroy or substantially injure" an efficiently and economically operating U.S. industry. In cases of infringement on intellectual property rights, all that is required is that a U.S. industry be involved.¹⁸⁶ Thus, a good argument could be made that "gray market" goods now may be excluded under Section 201.¹⁸⁷ In the battle between importers and trademark owners, it remains to be seen whether a House of Representatives bill codifying the Customs Service regulation exceptions or the Senate bill repudiating the exceptions will prevail.¹⁸⁸

185. *Int'l Trade Outlook: Negotiators, Officials Likely To Concentrate This Year on Uruguay Round, Ties With Japan*, 7 Int'l Trade Rep. (BNA) 83 (Special Report, Jan. 17, 1990) [hereinafter *Int'l Trade Outlook*].

186. Section 201 of the Trade Act of 1974 permits U.S. interests to obtain relief from trade imports. Industries may be certified eligible for such relief if the International Trade Commission (ITC) affirmatively determines that increased imports are a "substantial cause of serious injury or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The act defines "substantial cause" as "a cause which is important and not less than any other cause."

Before the 1988 amendment, this "substantial cause" requirement barred most recovery. In *United States International Trade Commission Investigation*, No. TA-201-44 (Dec. 3, 1980), the U.S. I.T.C. held that although the increasing level of imports was an important cause of serious injury to the U.S. automobile and light truck industry, the imports were not a "substantial cause" of injury because the decline in demand for domestic cars was caused in greater part by the economic recession in the U.S. economy.

This aggregation of all other causes is now expressly prohibited. The new § 202(c)(2)(A) provides that the I.T.C. "may not aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury or threat of injury." This ruling effectively reversed the I.T.C.'s prior decisions. Omnibus Trade and Competitiveness Act of 1988, § 201(a), 19 U.S.C.S. § 2251 (Law. Co-op. 1983 & Supp. 1989), reprinted in 28 I.L.M. 31, 90-91 (1989); see also *Introductory Note*, supra note 137; 28 I.L.M. 15, 18, 24-25 (1989).

187. *Introductory Note*, supra note 137; 28 I.L.M. at 25. But see Greguras, *Representing the Growing Technology Company: The Omnibus Trade & Competitiveness Act of 1988*, C364 A.L.I.-ABA 669 (Nov. 3, 1988) (WESTLAW, INT-TP Database) [hereinafter Greguras, *Representing the Growing Technology Company*]. "It is not expected that any of these amendments will significantly change the very stringent injury analysis used by the ITC in Section 201 cases". *Id.*

188. *Int'l Trade Outlook*, supra note 185.

VI. CONCLUSION

In a recent article of Fortune magazine, "The New Powers of Asia," the authors warned that "[i]f the West does sink in the face of the rising East, it will be due more to its own mistakes than to actions of the Pacific countries. One of those mistakes would be failing to participate vigorously in Asian markets."¹⁸⁹ Thailand is one of such Asian markets.

Thailand is an ideal place to manufacture labor-intensive products. The Thai labor force grows twice as fast as the population. Thai wages, at less than \$3 per day, are among the lowest in Asia, and strikes are infrequent. A large majority of American companies are optimistic and enthusiastic about operating in Thailand.¹⁹⁰ Moreover, the Thai economy is expected to grow at a 8 to 9 percent per year. Thailand's BOI provides incentives to foreign investors, including exemptions from corporate income taxes and import duties. "Investment Promotion Zones" offer additional benefits. Moreover, capital now may be raised through public offerings of "limited public company" shares on the SET.

All obstacles to successful operations are minimal and should be corrected in the near future. The repatriation policy is quite reasonable. The Remittance Tax on the transfer of profits overseas, without allowing it as a credit against regular income taxes, should violate the Treaty of Amity and Economic Relations. The infrastructure of Thailand is being improved. As recent Thai history shows, the competent Thai administrators who actually run the country have survived the changes of political leaders. Finally, OPIC is actively insuring Thailand against inconvertibility, expropriation and war.

Thailand's status as a GSP beneficiary in the United States and many other major industrialized countries keeps the tariffs for Thai exports to those countries to a minimum. Although Thailand will eventually lose its duty-free status under the U.S. GSP, its economy likely will reach a level where it will no longer need GSP preferences. Thailand's central location in South Asia will allow businesses to

189. Kraar & Woods, *The New Powers of Asia*, *supra* note 1. See Auerbach, *The 'Tigers': Have They Burned Too Brightly?*, Washington Post, Jan. 21, 1990 (LEXIS, Nexis library, Wpost file). "In 1988, Japanese investment in Thailand reached \$705.6 billion, second only to its investment in the United States, and 10 times higher than U.S. investment in Thailand." *Id.*

190. The survey of the American Chamber of Commerce revealed that 84.4% of American companies in Thailand described their outlook as "optimistic" or "enthusiastic."

market throughout South Asia from Thailand. In short, Thailand is an ideal place to manufacture products and appears to be well on its way to becoming Asia's newest Newly Industrializing Country (NIC), or another "Little Tiger."

PART II: INTELLECTUAL PROPERTY RIGHTS IN THAILAND AND U.S. TRADE-BASED RESPONSES

I. INTRODUCTION TO THAILAND'S INTELLECTUAL PROPERTY RIGHTS

As Thailand probably will give in to pressure from the United States to improve Thailand's weak intellectual property laws,¹⁹¹ the following discussion will cover only the important aspects of the existing Thai laws. The current legal system in Thailand is based on civil law. The Dika Court is the highest court in the country. Although it is thus not bound by its prior decisions, it rarely reverses its own decisions.¹⁹² Unlike the general Thai civil law system, the principal statutory intellectual property laws generally follow the British common law system. The principal statutes are the Patents Act, the Copyright Act, and the Trademarks Act.¹⁹³

The friction between the United States and Thailand over intellectual property rights generally does not stem from Thailand's discrimination against U.S. citizens in favor of Thai citizens. Rather, the friction arises due to Thailand's inadequate protection of intellectual property rights. National Treatment Clauses in several treaties to which Thailand and the United States are parties supposedly offer the same protection in both countries to both Thai and U.S. citizens. In reality, U.S. citizens receive much less protection in Thailand than do Thai citizens in the United States.

A previously classified survey of 193 firms by the International Trade Commission (ITC) estimated worldwide losses from foreign piracy and inadequate protection of U.S. intellectual property rights at \$23.8 billion. If losses to unsurveyed firms were extrapolated using a ratio of only one-quarter to one-half of the rate of the firms

191. See *Intell. Prop.: USTR Official Says 1988 Trade Act's Intell. Prop. Provision Working*, 6 Int'l Trade Rep. (BNA) 511 (Apr. 26, 1989); Statement of Ambassador Carla A. Hills, May 25, 1989 (available at Office of the U.S. Trade Representative, Executive Office of the President, Washington, DC 20506) [hereinafter *Statement of Ambassador Hills*].

192. M. HONGSKRAILERS, *COMMERCIAL, BUSINESS AND TRADE LAWS-THAILAND 1* (1984) [hereinafter *HONGSKRAILERS*].

193. *Investment Climate Statement, Thailand*, *supra* note 3, at 12.

surveyed, a "reasonable loss estimate" would be somewhere between \$13 to \$61 billion. On February 27, 1988, the United States Trade Representative [USTR], Clayton Yeutter, cited Thailand as one of the major offenders.¹⁹⁴

One means of ameliorating the dispute over intellectual protection would be to change the National Treatment Clause to a reciprocity clause.¹⁹⁵ The modified clause would extend to Thai citizens the same protections that Thai laws provide U.S. citizens. However, from the U.S. viewpoint, mere modification or enforcement of National Treatment Clauses would be inadequate because sales by U.S. service industries to Thailand are much larger than sales by Thai businesses to the United States.

II. SURVEY OF INTELLECTUAL PROPERTY RIGHTS IN THAILAND

A. Patents

1. Patent Law in Thailand

Thailand's first patent law, the Patent Act of 1977 (Thai Patent Act), became effective in September 1979.¹⁹⁶ The Thai Patent Act

194. *Intellectual Property: U.S. Firms Lose Billions Annually to Foreign Piracy, ITC Intellectual Property Study Finds*, 5 Int'l Trade Rep. (BNA) 290 (Mar. 2, 1988).

In 1988 the U.S. Government announced that imported products valued at \$1.1 billion in 1987 would no longer be eligible for duty-free treatment under the Generalized System of Preferences after July 1, 1988. 19 U.S.C.S. §§ 2461-2463 (Law. Co-op. 1983 & Supp. 1989), *GSP Imports Worth \$1.1 Billion No Longer Qualify For Duty-Free Entry Under GSP, Official Says*, 5 Int'l Trade Rep. (BNA) 497 (Apr. 6, 1989). Under the GSP, products or countries may also be added to or removed from the preferred list. One cause for removal is severe violations of U.S. intellectual property or worker rights laws. Although U.S. imports from Thailand under the GSP totaled only \$551 million in 1987, Thailand was placed on the review to determine its continued eligibility for GSP preferences. *Id.* On January 19, 1989, President Reagan determined that Thailand did not fully provide adequate and effective intellectual property protection and denied Thailand's request for additional duty-free treatment under the GSP. *Thailand Denied GSP Benefits, supra* note 163, at 279. The "Super 301" retaliatory provisions have caused certain U.S. trading partners to "scrambl[e] to avoid being named priority countries" for retaliation. The South Korean trade delegation recently spent some \$2.1 billion in the U.S. Taiwan announced that it would provide loans to U.S. companies wishing to export there. *Trade Policy: "Super 301" Provision Should Not Be Used to Manage Trade, Former ITC Official Says*, 6 Int'l Trade Rep. (BNA) 529 (Apr. 26, 1989).

195. Oddi, *The Int'l Patent System and Third World Development: Reality or Myth?*, DUKE L.J. (1987) (WESTLAW, TP Database) [hereinafter Oddi, *Reality of Myth?*] (arguing for "reciprocity," rather than "national treatment" in treaties with developing countries with weak intellectual property protection).

196. PATENT ACT B.E. 2522, § 3 (Mar. 11, 1979) [hereinafter THAI PATENT ACT] (available at the Patent & Trademark Division, Department of Commercial Registration, Ministry of Commerce, Maharaj Road, Bangkok 10200, Thailand).

protects inventions and product designs,¹⁹⁷ and closely follows the model patent law which was drafted and recommended for developing countries by the World Intellectual Property Organization (WIPO) of the United Nations.¹⁹⁸ Although Thailand is not a member of WIPO or the Paris Convention¹⁹⁹ for the Protection of Intellectual Property, and is not a party to any international treaty for reciprocal protection of foreign patents, it has numerous bilateral patent treaties with most countries. These bilateral treaties entitle citizens of those countries to file patent applications in Thailand and vice versa.²⁰⁰ For example, The National Treatment Clause under Article V of the Amity and Economic Relations Treaty accords U.S. citizens the same treatment and protection under the Thai Patents Act as those available to Thai citizens.²⁰¹

2. Patentable Inventions

An invention is patentable only if it has novelty, involves an inventive step, and is capable of industrial application.²⁰² In order for the invention to be new, it must not be widely known or used by others in Thailand before the patent application; must not have been publicly disclosed in any country; and must not have been patented before.²⁰³ An invention takes an "inventive step" if it is

197. *Id.* at Preamble.

198. *Id.* The Act provides that a "patent" is "a document issued . . . to grant protection for an invention or a design." *Id.* An "invention" is defined as "any innovation or invention which creates a new product or process, or any improvement of a known product or process." *Id.* A "process" is "any process, art or method of producing, maintaining or improving quality of a product, including the application of such process." *Id.* A "design" means "any form or composition of lines or colors which gives a special appearance to a product and can serve as a pattern for a product of industry or handicraft." *Id.*

199. Even if Thailand had been a member, it did not have to grant patents as the Paris Convention has no such explicit requirement. In fact, Switzerland which was one of the original signatories in 1883, did not enact any patent statute until 1888. Oddi, *Reality of Myth?*, *supra* note 195, at 47.

200. *Investment Climate Statement, Thailand*, *supra* note 3, at 12.

201. Treaty of Amity and Economic Relations, *supra* note 12; 19 U.S.T. at 5848.

202. THAI PATENT ACT, *supra* note 196, at § 5 provides: . . . a patent may be granted only for an invention in respect of which the following conditions are satisfied:

- (1) the invention is new;
- (2) it involves an inventive step; and
- (3) it is capable of industrial application.

Id.

203. *Id.* at § 6 provides: "An invention is new if it does not from [sic] part of the state of the art. The state of the art also includes one of the following inventions:

- (1) an invention which was widely known or used by others in the country before the date of the application for patent;
- (2) an invention the subject matter of which was described in a document or

not obvious to a person ordinarily skilled in the art.²⁰⁴ Section 9 of the Patent Act explicitly prohibits the granting of a patent for several potential “intellectual property inventions,” including pharmaceuticals, computer programs, plants, animals, and biological processes.²⁰⁵

As listed above, Thailand’s Patent Act expressly prohibits the granting of a patent for pharmaceutical products. This resulted in a complaint filed by the Pharmaceutical Manufacturers Association (PMA) under Sections 501 and 502 of the 1984 Trade and Tariff Act on May 28, 1987. The PMA claimed that its member companies were losing \$1 million/month in sales in Thailand. It stated further that Thai firms which did not invent any new pharmaceutical products, controlled 57 percent of the \$270 million market.²⁰⁶

Thailand, like other Third World countries, has justified its denial of patents for pharmaceutical products on public health grounds.²⁰⁷ Thailand also has argued that its exclusion policy is “consistent with international norms as laid down in . . . the Paris and the Berne Conventions that allow individual countries to decide on the coverage of protection to suit their particular situation and needs” and is “in

printed publication, displayed or otherwise disclosed to the public, in this or a foreign country before the date of the application for patent;

(3) an invention which was patented in this or a foreign country before the date of application for patent;

(4) an invention for which a patent was applied for in a foreign country more than twelve months before the date of the application for patent and a patent has not been granted for such invention;

(5) an invention for which a patent was applied for in this country, but the applicant had abandoned such application. This provision shall not affect the rights of the joint venture who did not jointly apply for a patent. . . .

Id.

204. *Id.* at § 7 provides: “An invention shall be taken to involve an inventive step if it is not obvious to a person ordinarily skilled in the art.” *Id.*

205. *Id.* at § 9 provides: “A patent shall not be granted

(1) for food, beverages, a pharmaceutical product or pharmaceutical ingredient;

(2) for any machine particularly made for use in agriculture;

(3) for any variety of animal or plant of any essentially biological process for the production of animals or plants;

(4) for a scientific or mathematical rule of theory;

(5) for a computer program;

(6) for an invention the exploitation or publication of which would be contrary to public order or morality, public health or welfare;

(7) for any invention prescribed in a Royal Decree.

Id.

206. *Intellectual Property: Drug Makers’ Group Files Complaint With USTR For Improved Patent Protection in Thailand*, 4 Int’l Trade Rep. (BNA) 744 (June 3, 1987).

207. R. FOLSOM, M. GORDON & J. SPANOGLE, JR., *TECHNOLOGY TRANSFERS-LICENSING OF INTELLECTUAL PROPERTY, INT’L BUSINESS TRANSACTIONS*, 328-356, 330 (1988)[hereinafter FOLSOM, GORDON & SPANOGLE].

line with the laws of some 50 countries.”²⁰⁸ Thailand’s stance is inherently weak for three reasons. Thailand is no longer a Third World country.²⁰⁹ Thailand provides only weak enforcement of even its own intellectual property laws. Finally, it can hardly be said that allowing Thai businesses to export pirated and copy-cat products is done so with the purpose of protecting any country’s “public health.”

3. *Rights Conferred by Patents*

Unlike a U.S. patent which is valid for 17 years after its issuance by the U.S. Patent Office,²¹⁰ a Thai patent expires at the end of the 15th year from the date of the filing of the application.²¹¹ The patent holder may license or assign her patent.²¹² However, Section 39(1) prohibits any license, condition, or royalty which will hinder or damage industrial or other economic development in Thailand.²¹³ The Director-General may refuse to register a license contract if it appears to him that it is contrary to Section 39.²¹⁴ However, he must register the valid portion of the contract if circumstances indicate that the parties intended that the valid portion be severable and given effect.²¹⁵

208. RTG Policy Statement: Intellectual Property, Incoming Telegram (Unclassified) from U.S. Embassy in Bangkok to Dept. of Commerce 3 (June 1988) (available at Int’l Trade Admin.-Thailand Desk, Dept. of Commerce, Washington, DC 20230).

209. See Kraar & Woods, *The New Powers of Asia*, *supra* note 1. “Thailand is on the verge of becoming a ‘tiger.’” *Id.*

210. FOLSOM, GORDON & SPANOGLE, *supra* note 207, at 231.

211. THAI PATENT ACT, *supra* note 196, at § 35 provides:

A patent shall expire at the end of the fifteenth year from the date of filing the application. Any act done before the grant of the patent, though it constitutes an infringement of the patent in accordance with Section 36, shall not be deemed to constitute an infringement of such patent. . . .

Id.

212. *Id.* at § 38 provides: “The patent [holder] may authorize any other person, by granting a license, to exercise the rights conferred . . . and may assign his patent to any other person.”

Id.

213. *Id.* at § 39(1) provides: “In granting a license under Section 38,

(1) the patentee shall not impose upon the licensee any condition or restriction or any royalty term which tends to damage or hinder the development of the industry, handicraft, agriculture or commerce of the country.

Conditions, restrictions or term which tend to damage or hinder the development of the industry, handicraft agriculture or commerce of the country shall be prescribed in the Ministerial Regulations;

. . . .

Conditions, restrictions or terms concerning royalties which are contrary to the provisions of this Section are null and void.”

Id.

214. *Id.* at § 41.

215. The decision of the Board is final. *Id.* The flow chart of Patent Procedure and Opposition Procedure is available upon request from the Thai Patent and Trademark Division of the Department of Commercial Registration.

Under Section 39(1), prohibitions on restrictive conditions, restrictions, and royalties apply only to a "license."²¹⁶ Therefore Section 39(1) may not apply to an "assignment." Credence is lent to this interpretation by the fact that Sections 40²¹⁷ and 41²¹⁸ refer to both a "license" and an "assignment" in imposing a written and registration requirement. On the other hand, one may reason that an agreement reserving a condition, restriction, or term is not an assignment because it does not transfer all rights under the patent. This reasoning, however, is weakened by the fact that the Thai Patent Act does not prohibit any partial assignment which does not contain the enumerated condition, restriction or term.

4. Compulsory Licenses

The Thai Patent Act, under Section 46, precludes sitting on a patent or using the patent to extract unreasonably high prices.²¹⁹ If there has been no production of the patented product or application of the patent, after 3 years from the grant of a patent any person may apply to the Director-General for a "compulsory license."²²⁰ If it appears that there is no legitimate reason for the nonproduction or nonapplication of the patent, or if the patented product is sold at unreasonably high prices, or production does not meet the public demand, the applicant may obtain a compulsory license.²²¹ These provisions are apparently designed to discourage monopolies, and to

216. THAI PATENT ACT, *supra* note 196, at § 39(1).

217. *Id.* at § 40 provides:

Subject to Section 42 below, in absence of any provision to the contrary between the parties, a joint owner of a patent may, separately, exercise the rights conferred under Section 36 and 37 without the consent of the other joint owner, but he may grant a *license* or *assign the patent* only when it is consented by all joint owners.

Id. (emphasis added).

218. *Id.* at § 41 provides: The *license contract* and the *assignment of a patent* under Section 38 must be in writing and registered in compliance with the requirements and procedures prescribed by the Ministerial Regulations. *Id.* (emphasis added).

219. *Id.* § at 46 provides:

At any time after the expiration of three years from the grant of a patent, any person may apply to the director-General for a compulsory license if it appear at the time when such application is files.

(1) that there is no production of the patented product or application of the patented process in the country without any legitimate reason; or

(2) that there is no product produced under the pantet [sic] for sale in any domestic market, or there are some but they are sold at unreasonably high prices or do not meet the public demand without any legitimate reason.

.....

Id.

220. *Id.*

221. THAI PATENT ACT, *supra* note 196, at § 46.

prevent patent holders from charging artificially high prices and acquiring patents simply to preclude other persons from developing the patented product.

The patent holder who is forced to license the patent is entitled to a royalty.²²² If the patent holder and the licensee do not reach an agreement for the royalty amount and the conditions for the exploitation of the patent within the time prescribed by the Director-General, the Director-General shall fix the royalty and prescribe the conditions as he deems appropriate. The decision is appealable to the Board of Patents for a final decision within 30 days.²²³ During a "state of war or emergency," the Government may exploit any patent "for the defense and security of the country."²²⁴

5. *Cancellation of Patents*

A patent which has been granted but which violates the provisions of the Thai Patent Act²²⁵ may be challenged by the public prosecutor or by any person.²²⁶ Additionally, after six years from the grant of a patent, the Director-General may investigate the use of the patent. As with the compulsory licenses, the Director General may cancel a patent for any of a number of reasons: if there has been no production of the patented product or application of the patented process in Thailand; if there is no product produced under the patent for sale in any domestic market; or if the patented products are sold at unreasonably high prices or do not meet the public demand.²²⁷ After the investigation, the Director-General shall submit his report and request the Board of Patents to cancel the patent if it appears that there is "a good ground" to do so.²²⁸

222. *Id.* at § 48 provides: "Where a compulsory license is granted under Section 46 or 47, the patentee is entitled to a royalty." *Id.*

223. *Id.* at § 50.

224. *Id.* at § 52.

225. THAI PATENT ACT, *supra* note 196, provides:

Any patent granted not in compliance with the provisions of Sections 5, 9, 10, 11 or Section 14 is invalid.

The validity of a patent may be challenged by any person. A petition to cancel an invalid patent may be submitted to the Court by any person who has an interest in the patent or by the public prosecutor.

Id.

226. *Id.*

227. *Id.* at § 55.

228. *Id.*

6. *Annual Fees*

A patent holder is required to pay an annual fee for each patent within 60 days beginning on the first day of the fifth year after the grant of the patent.²²⁹ After the 60 days, a penalty of 30 percent of the unpaid fee is imposed. If the fee still is not paid by the end of the 180th day, the patent lapses.²³⁰ The fee starts at 2,000 Baht for the fifth year and increases by 2,000 Baht for each additional year until the fifteenth year when the fee increases to 30,000 Baht. The detailed List of the Maximum Fees is available upon request from the Thai Patent and Trademark Division of the Department of Commercial Registration.

7. *Remedies of Patent Holder*

Chapter VI of the Patent Act prescribes imprisonment or fines for patent infringement.²³¹ Unlike in the United States, in Thailand either the prosecutor or the patent holder may prosecute a patent infringement. If a public prosecutor institutes the suit, the patent holder may make a motion to join as a joint prosecutor at any stage of the proceedings before the judgment of the court. The prosecutor(s) in the criminal case may ask the court to order the confiscation of the products and any equipment and tools used in the infringement.²³² In contrast, Civil remedies for compensation for damages are usually very time consuming and often result in only nominal damages.²³³

B. *Trademarks*

The Trademark Act of 1931 as amended by the Trademark Act of 1961 [Thai Trademark Act] provides for registration and protection of trademarks. The Penal Code of Thailand also gives protection to owners of trademarks and imposes criminal liabilities on trademark infringers.²³⁴ The classification of goods for trademark purposes is based on the British Trademark Rules of 1938.²³⁵ The international

229. *Id.* at § 43.

230. THAI PATENT ACT, *supra* note 196, at § 44.

231. *Id.* at §§ 81-88.

232. PROTECTING INTELLECTUAL PROPERTY IN ASIA-PACIFIC: THAILAND 97-108 (J. Connors ed. 1988) [hereinafter PROTECTING INTELLECTUAL PROPERTY].

233. *Id.* at 104.

234. PATENTS, TRADEMARKS & COPYRIGHT 78; see DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 36.

235. *Investment Climate Statement, Thailand*, *supra* note 3, at 12.

system of classification of goods and services does not apply.²³⁶ Thailand is not a member of any international convention on trademarks.²³⁷

The Trademark Act defines "trademark" as "a mark used or proposed to be used as a mark for or in connection with goods for the purpose of indicating that they are goods of the owner of such trademark by virtue of manufacture, selection, certification, dealing with or offering for sale."²³⁸ Unlike copyrights, trademarks must be registered to be valid.²³⁹ Registrable trademarks must consist of at least one of the following: a company name; the signature of the applicant or his business predecessor; invented word(s); word(s) having no direct reference to the character or quality of the goods, which do not denote a geographical name or surname; and any distinctive mark(s). Other marks may qualify for registration only after long and extensive use, generally a period of three years, unless found to be "distinctive."²⁴⁰

A foreign individual may apply trademark registration only through a local agent.²⁴¹ The registration is valid for ten years but may be renewed for successive ten-year terms. The renewal application is submitted at least three months prior to the expiration.²⁴² The Trademark Act contains a procedure to oppose a trademark application and to appeal a rejection.²⁴³

If a trademark has been extensively used elsewhere but has not been registered in Thailand, the trademark owner may seek to vacate any application or registration filed in Thailand based on prior usage. The registration of a trademark of which the owner does not have any intention of using may be challenged for good cause. Any trademark transfer must be registered with the Trademark Regis-

236. PROTECTING INTELLECTUAL PROPERTY, *supra* note 232, at 99.

237. *Id.*

238. *Id.* The definition is similar to that of the British Trademark Act of 1905. In general, the amended Trademark Act of 1931 follows the British trademark law and practice. A mark includes "a device, brand, heading, ticket, name, signature, word, letter, numeral or any combination thereof." *Id.*

239. The registration is administered by: The Patent and Trademark Division, Department of Commercial Registration, Maharaj Road, Bangkok 10200, Thailand.

240. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 36.

241. Instruction To Foreign Applicants and List of Trademark Attorneys are available upon request from the Thai Patent And Trademark Division of the Department of Commercial Registration.

242. SUWAN, INT'L TECHNOLOGY JOINT VENTURES IN THE COUNTRIES OF THE PACIFIC RIM, INT'L TECHNOLOGY JOINT VENTURES IN THAILAND 167-84 (1988) [hereinafter SUWAN].

243. The flow chart for the Trademark Registration Process is available upon request from the Thai Patent and Trademark Division of the Department of Commercial Registration.

trar.²⁴⁴ Although the Trademark Act does not provide for any remedy for infringement, the Thai Penal Code provides for criminal sanctions and the “wrongful act” provisions of the Civil and Commercial Code of Thailand include civil remedies.²⁴⁵

C. Copyrights

Unlike patents and trademarks, which are administered by the Department of Commercial Registration, copyrights are under the jurisdiction of the Literature and History Division of the Department of Fine Arts. The Copyright Act of 1978 (Thai Copyright Act) protects literary and artistic works. “Works” is defined to include “literary work, dramatic work, artistic work, musical work, audio-visual material, cinematic film, disseminated sound or disseminated pictures, or any other works in the fields of literature, science or fine arts” and contains extensive further definitions of various types of works.²⁴⁶

Copyrights are not registered.²⁴⁷ They arise automatically upon the creator’s publicizing the work. “Publicize” is defined as to “present to the public by showing, lecturing, praying, playing, presenting by sound and/or picture, constructing, distributing, selling, or by other means, the work done or created.” Publicizing also includes the offering for sale of authorized copies of the artist’s work in a reasonable quantity or number according to the nature of the work.²⁴⁸

Computer software is expressly not patentable under the Thai Patent Act and is not specifically covered by the Copyright Act. As of today, the Dika Court has not made a clear ruling on whether software may be copyrighted.²⁴⁹ One view is that the objectives of the Copyright Act are not applicable to software: whereas copyrights are intended to protect the expression of fixed ideas that can be communicated and appreciated by human beings, software instructions are constantly changing and are utilized by machines.²⁵⁰ Another

244. SUWAN, *supra* note 242, at 180.

245. *Id.* at 181.

246. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 36.

247. PROTECTING INTELLECTUAL PROPERTY, *supra* note 232, at 99.

248. DROKER, OVERSEAS BUSINESS REPORTS, *supra* note 51, at 37.

249. PROTECTING INTELLECTUAL PROPERTY, *supra* note 232, at 100.

250. Suwit Suwan, a Thai lawyer writes:

the preponderant view . . . is that computer software should not receive protection under the Copyright Act of 1978. The objective of the act, as defined by proponents of this position, is to protect the expression of ideas in fixed and discernible audiovisual forms that can be communicated and appreciated by human beings.

view, affirmed by a nonbinding opinion of the Thai Judicial Council, is that computer software should be protected as a "literary work."²⁵¹ Alternatively, computer programs could be protected under a broad interpretation of the term "works"²⁵² or as "other works in the fields of . . . science."²⁵³ Although this latter view appears to be more supportable, the enforcement provisions under the existing intellectual property law are still inadequate.

A foreign national may seek protection under the Thai Copyright Act if she resides in Thailand for at least a substantial portion of the creation period. It does not matter where the work is published. Copyright protection is available even if the author resides outside of Thailand during most of the time taken by the creation of the work as long as she returns to Thailand for the work's initial publication.²⁵⁴ A Thai citizen may seek protection regardless of the creation residence or publishing place.²⁵⁵

A work copyrighted under the Thai Copyright Act is protected internationally in those countries with which Thailand has a reciprocal copyright convention or treaty. Thailand has not adopted the Universal Copyright Convention of which the United States is a member. Thailand has, however, been a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886 since 1931.²⁵⁶

Digitized instructions, which are constantly being changed and developed, would not fall within the scope of the Copyright Act as so defined. Further, it would be impractical to provide software with automatic protection for 50 years.

SUWAN, *supra* note 242, at 182 (of Ukrit Mongkolnavin Law Office in Bangkok, Thailand).

251. Keplinger writes:

In Thailand, most experts agree that computer programs are protected as literary works. This opinion has been affirmed by a non-binding opinion of the Thai Judicial Council. Keplinger, *Int'l Protection for Computer Programs*, 259 P.L. I./Pat. 307 (1988) (WESTLAW, PLI Database), at 46.

252. PROTECTING INTELLECTUAL PROPERTY, *supra* note 232, at 100.

253. See HONGSKRAILERS, *supra* note 191, at 1 (The Dika Court is not bound by its prior decisions).

254. DROKER, OVERSEAS BUSINESS REPORT, *supra* note 51, at 37.

255. *Id.*

256. RTG Policy Statement: Intellectual Property, *supra* note 208, at 1. Although the Treaty of Friendship, Commerce and Navigation of 1937 [Friendship Treaty] with the United States contains many copyright provisions, the provisions are substantially outdated and have been challenged by Thailand. Treaty of Friendship, Commerce and Navigation, Nov. 13, 1937, United States-Thailand, reprinted in COPYRIGHT LAWS AND TREATIES OF THE WORLD, THAILAND (Supp. 1984-86). However, the National Treatment Clause under Article V of the Amity and Economic Relations Treaty accords U.S. citizens the same treatment to acquire intellectual property rights in Thailand as those available to Thai citizens. Treaty of Amity and Economic Relations, *supra* note 12, at art. V; 19 U.S.T. at 5848; see also *id.* at art. IV. In the past, some U.S. copyright holders had also used the "Back-Door" Provision under Article 3(1) of the Berne Convention by first publishing their works simultaneously in another Berne Convention country (e.g., Canada) and the United States. *But see* Spector, *Implications of United*

The Thai Copyright Act protects a copyrighted work for 50 years. International copyrights which originate from a member of the Berne Convention are protected for the period provided under the law of the country of origin, not to exceed the protection under the Thai law. Under the Berne Convention, literature and dramatic works are limited to a ten year protection unless the copyright holder published or permits publication of a Thai version of the Thai work in Thailand.²⁵⁷ Like the Berne Convention, the U.S. Copyright Act extends 50 years after the death of the author.²⁵⁸

The Berne Implementation Act specifically states in Section 2(1) that the Berne Convention is not self-executing and is not enforceable in U.S. courts. In addition to the economic rights in the U.S. Copyright Act, the Berne Convention provides moral rights in Article 6(b). Each author of a copyrighted work "shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." These moral rights survive the transfer of any or all economic rights.²⁵⁹ Thus, colorization of movies such as those done by Ted Turner may be prohibited by the original "authors" in Thailand and other Berne Convention countries. The Thai Copyright Act makes copyright infringement a criminal offense of up to one year imprisonment and a 200,000 *Baht* fine. The Civil and Commercial Code of Thailand provides for civil remedies under the "wrongful act" rules.²⁶⁰

III. THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

The increasing U.S. trade deficit with Thailand, from \$883 million in 1987 to \$1.5 billion in 1988,²⁶¹ has put Thailand in the spotlight along with other countries which have large trade surpluses with the

States Adherence to the Berne Convention, 11 EUR. INTELL. PROP. REV. 5 (1989) [hereinafter Spector] ("Such 'back-door' procedures have proved to be inconvenient and expensive, and, in any event, may be restricted in the future"). When the United States adopted the Berne Convention on November 3, 1988, the disputes over interpreting the Copyright Provisions of the Friendship Treaty and the need to use the "Back-Door" provision were rendered inconsequential.

257. SUWAN, *supra* note 242, at 182.

258. FOLSOM, GORDON & SPANOGLE, *supra* note 207, at 342.

259. Spector, *supra* note 256, at 163.

260. SUWAN, *supra* note 242, at 182.

261. Country Section for 1989 National Trade Estimate Report: Thailand, Incoming Telegram (Unclassified) from the U.S. Embassy in Bangkok to Dept. of Commerce 1 (Apr. 1989).

United States. Moreover, since trade in services now comprises nearly three-fourths of the U.S. GNP,²⁶² intellectual property rights are vital to U.S. competitiveness.²⁶³ In part as a response to the growing trade deficit, and to protect U.S. intellectual property, President Reagan, on August 23, 1988, signed into law the Omnibus Trade and Competitiveness Act of 1988 (The Omnibus Act).²⁶⁴ The Omnibus Act is the most important U.S. legislation that responds to piracy and weak enforcement of intellectual property rights. It also provides the United States with greater negotiating leverage in the Uruguay Round of the Multilateral Trade Negotiations (MTN).

A. "Special 301"—Protection of Intellectual Property Rights

1. The "Special 301" Provisions

Section 1303, or "Special 301",²⁶⁵ of the Omnibus Act requires the USTR to identify within "30 days after the date on which the annual report is submitted to Congressional Committees" those countries that deny "adequate and effective protection of intellectual property rights" or "fair and equitable market access to United States persons that rely upon intellectual property protection."²⁶⁶ In order to avoid being singled out under "Special 301," a country must ensure that U.S. nationals will be able to exercise and enforce

262. *Intellectual Property: U.S. Trading Partners Must Step Up Efforts to Protect Goods From Piracy, ITC Head Says*, 5 Int'l Trade Rep. (BNA) 509 (Apr. 6, 1989) (ITC Chairperson Susan Liebler's Speech on Mar. 31, 1989).

263. *Fact Sheet for "Special 301" on Intell. Prop.* 2 (May 25, 1989)[hereinafter "*Special 301" Fact Sheet*] (available at Office of the U.S. Trade Representative, Executive Office of the President, Washington, DC 20506), *reprinted in* 38 Pat. Trademark & Copyright J. (BNA) 131 (June 1, 1989).

264. Omnibus Trade And Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), *reprinted in* 28 I.L.M. 31 (1989); *see* Bradley, *Amendments to Section 301 of the Trade Act of 1974*, 482 P.L.I. Comm. 131 (Dec. 15, 1988) (WESTLAW, INT-TP Database); For summary overview of key sections, *see* Greguras, *Representing the Growing Technology Company*, *supra* note 187. The Act also provides the U.S. representatives with the tools necessary to negotiate more effectively in the Uruguay Round of Multilateral Trade Negotiations (MTN). "Super 301" is the most celebrated provision of the Omnibus Act. Although it is sometimes used incorrectly to include "Special 301," it refers to different provisions of the Act. "Special 301 differs from Super 301 in that it addresses only intellectual property protection." *Unfair Trade Practices: U.S. Special 301 Process Undermining GATT, Hurts U.S. Credibility, Brazil Official Says*, 6 Int'l Trade Rep. (BNA) 845 (June 28, 1989) [hereinafter *Unfair Trade Practices*].

265. Although the term "Special 301" itself does not appear anywhere in the Act, it refers to Section 182 of the Trade Act, as amended, or Section 1303 of the Omnibus Act. 102 Stat. at 1179-81 (1988); 19 U.S.C.S. § 2242 (Law. Co-op. Supp. 1989). *See "Special 301" Fact Sheet*, *supra* note 263, at 12.

266. 19 U.S.C.S. § 2242(a) (Law. Co-op. Supp. 1989).

their intellectual property rights in that country.²⁶⁷ Although the USTR has unlimited discretion in deciding whether to retaliate for a denial of intellectual property rights,²⁶⁸ only those countries whose egregious policies of not protecting intellectual property cause the United States especial harm and who are not making significant progress in trade negotiations will incur sanctions as a “priority foreign country.”²⁶⁹ The list of such countries is to be published in the Federal Register.²⁷⁰

Although the USTR Office must review the intellectual property records of U.S. trading partners on an annual basis,²⁷¹ it may identify or revoke a priority country at any time.²⁷² The USTR Office must include in its semiannual report to Congress a detailed explanation of the reasons for any revocation.²⁷³ Investigations begun under the “Special 301” provision are on a six-month fast-track rather than the 12- or 18-month schedule for Super 301 probes.²⁷⁴ The investigations may be extended up to nine months if complicated issues are involved or if substantial progress is being made.

2. Implementation of Special 301

In May, 1988, after extensive review, the USTR concluded that no foreign country currently meets every standard for “adequate and

267. *Id.* § 2241(d)(3) provides:

A foreign country denies fair and equitable market access if [it] effectively denies access to a market for a product protected by a copyright, patent, or process patent through the use of laws, procedures, practices, or regulations which - (A) violate provisions of international law or international agreements to which both the United States and the foreign country are parties, or (B) constitute discriminatory nontariff rate barriers.

Id.

Such country may be so identified by the USTR only after a factual finding. *Id.* at § 2242(b)(3) (Law. Co-op. Supp. 1989). In determining such adequacy and effectiveness of the protection, the USTR is required to consult with the Register of Copyrights, the Commissioner of Patents and Trademarks, other appropriate officers of the Federal Government, and consider other available information including petitions. 19 U.S.C.S. § 2242(b)(2) (Law. Co-op. Supp. 1989).

268. “Special 301” *Fact Sheet*, *supra* note 263, at 12.

269. In identifying “priority foreign countries,” the USTR shall identify only those foreign countries that have “the most onerous or egregious acts, policies, or practices”; “whose acts, policies, or practices . . . have the greatest adverse impact (actual or potential) on the relevant United States products”; and that are not entering into nor “making significant progress” in “good faith negotiations.” 19 U.S.C.S. § 2242(b)(1) (Law. Co-op. Supp. 1989).

270. 19 U.S.C.S. § 2242(e) (Law. Co-op. Supp. 1989).

271. *Unfair Trade Practices*, *supra* note 194; 19 U.S.C.S. § 2242(c) (Law. Co-op. Supp. 1989).

272. “Special 301” *Fact Sheet*, *supra* note 263, at 13.

273. 19 U.S.C.S. §§ 2242(c) (Law. Co-op. Supp. 1989).

274. *Unfair Trade Practices*, *supra* note 194; 19 U.S.C.S. § 2242(c) (Law. Co-op. Supp. 1989).

effective" intellectual protection as set forth in the U.S. proposal in the Uruguay Round.²⁷⁵ Although the USTR has thus determined that every country may be identified as a "priority country" under "Special 301,"²⁷⁶ it decided not to name any country and established a "Watch List" and a "Priority Watch List."²⁷⁷ Perhaps this restraint was only prudent politics, since the United States does not itself meet its own standard. In November, 1989, a GATT panel found that Section 337, the cornerstone of the U.S. intellectual property protection law, is inconsistent with GATT.²⁷⁸

Nonetheless, in May 1989, Thailand was placed on the "Priority Watch List" with seven other countries.²⁷⁹ The USTR emphasized four areas for Thailand to improve: 1) provide adequate protection for all classes of inventions; 2) provide effective copyright protection for U.S. works including software; 3) improve protection of foreign trademarks in Thailand; and 4) participate constructively in multi-lateral intellectual property negotiations.²⁸⁰ As Thailand was placed on the "Priority Watch List" and was not named a "priority foreign country," it would not be formally investigated but only closely monitored.²⁸¹ As of March 1, 1990, Thailand was still on the Priority Watch List.²⁸² The IIPA alleges that piracy in Thailand has further deteriorated since Thailand was first placed on the list in May 1989. The current situation reflects the most blatant abuse which the IIPA has encountered in 20 years of its anti-piracy efforts in Southeast Asia.²⁸³

"Special 301" does not affect the USTR's authority to initiate regular Section 301 investigations at any time, either in response to a petition or by self-initiation.²⁸⁴

275. *Special "301" Fact Sheet*, *supra* note 263, at 2.

276. *"Special 301" Fact Sheet*, *supra* note 263, at 2.

277. *Statement of Ambassador Hills*, *supra* note 191, at 6.

278. *Int'l Trade Outlook*, *supra* note 185. By giving infringing imports less favorable treatment than that given to U.S. products accused of infringing the same intellectual property rights. *Id.*

279. *Id.*

280. *"Special 301" Fact Sheet*, *supra* note 263, at 8.

281. *Unfair Trade Practices: U.S. Formally Initiates "Super 301" Probes Into Trade Practices of Japan, India, Brazil*, 6 *Int'l Trade Rep. (BNA)* 797 (June 21, 1989) [hereinafter *Unfair Trade Practices*]. Although Ambassador Carla A. Hills initially said that Thailand's status would be reviewed by November 1, 1989, she has since extended the date to April 30, 1990. *Statement of Ambassador Hills*, *supra* note 191, at 6.

282. *Foreign Trade: USTR Receives Comments on Special 301 Provisions*, 39 *Pat. Trade-mark & Copyright J.* 347 (Mar. 1, 1990).

283. *Intell. Prop.: Six Parties Comment on 17 Countries in Second Round Under Special 301 Provision*, 7 *Int'l Trade Rep. (BNA)* 300 (Feb. 28, 1990).

284. *"Special 301" Fact Sheet*, *supra* note 263, at 13. The USTR's hotline with recorded

B. "Super 301"

1. Section 301 of The Trade Act of 1974

Section 301 of the Trade Act of 1974 authorizes the President to act to assure foreign market access by withdrawing trade concessions or imposing tariffs or other import restrictions on products and services from countries which maintain unjustifiable, unreasonable, or discriminatory restrictions which harm the U.S. commerce.²⁸⁵ The new amendment shifted the authority from the President to the USTR. Although the USTR officially determines if a foreign country is being unjustifiable, unreasonable, or discriminatory, the USTR still serves at the pleasure of the President.²⁸⁶ Although Congress intended to strip the President of Section 301 authority and to force the USTR to retaliate against blatant illegal foreign restrictions, the act still leaves the USTR a lot of "wiggle" room to avoid retaliation.²⁸⁷

For example, under Section 301(a)(2) the USTR is not required to take action if doing so would harm either U.S. national security or the U.S. economy, or if the country is granting the United States its trade agreement rights.²⁸⁸ The new amendment requires the USTR to make determinations on cases involving trade agreements within 24 months even if it has not been adjudicated by that time. Consequently, if no action is taken within 24 months by the GATT, the USTR is required to proceed unilaterally,²⁸⁹ which causes resentment by other GATT members.²⁹⁰

information about pending section 301 investigation is (202) 395-3871. Bello & Holmer, *The New Trade Law: Omnibus Trade and Competitiveness Act of 1988*, 482 P.L.I./Comm. 318 (Dec. 5, 1988) (WESTLAW, INT-TP Database), at 13.

285. Barton & Fisher, *Introductory Note Act of 1988*, *supra* note 186, at 25.

286. *Id.* at 26. See Greguras, *Representing the Growing Technology Company*, *supra* note 187. USTR Clayton Yeutter remarked that "USTR 'reports to the President and won't go against him.'" *Id.*

287. Greguras, *Representing the Growing Technology Company*, *supra* note 187.

288. § 301(a)(2) provides that the USTR need not take action when: 1) there is a GATT finding that the United States is not being treated illegally by the foreign country; 2) the USTR finds that the foreign country is taking satisfactory measures to solve the problem; 3) the foreign country is compensating the United States; 4) the USTR finds that there would be an "adverse impact on the United States economy substantially out of proportion to the benefits of such action"; and 5) the USTR finds that "the taking of action . . . would cause serious harm to the national security of the United States." 19 U.S.C. §§ 2411, 1301, *reprinted in* 28 I.L.M. at 59; see Barton & Fisher, *Introductory Note Act of 1988*, *supra* note 186, 28 I.L.M. at 26.

289. *Id.* at 27.

290. The USTR is also required to decide whether or not to initiate an investigation under Section 301 within 45 days from the filing of the petition. *Id.*

2. "Super 301"

Section 310 of the Omnibus Act of 1988 added a new "Super 301" section, "so named because of the added strength it gives to Section 301 of the 1974 Trade Act."²⁹¹ Under "Super 301" the USTR is required to identify "trade liberalization priorities," including "priority practices" and "priority foreign countries."²⁹² After preliminary identification, the USTR initiates investigations.²⁹³ Although the USTR recently initiated its investigations against Japan, Brazil, and India under the "Super 301" provision,²⁹⁴ Thailand has not yet been named "priority foreign country." Ambassador Carla A. Hills stated on May 25, 1989, "the identification of Super 301 priorities in no way weakens our resolve to otherwise use Section 301 authority where appropriate, including the self-initiation of new investigations or the acceptance of petitions by private parties."²⁹⁵

C. Other Considerations

1. Different Perspectives On Intellectual Property Protection

The most common argument for protecting intellectual property is that the economic incentive arising from protection is needed to transfer technology. Without adequate protection, patent holders would be unwilling to transfer trade secrets or technology. One

291. *Unfair Trade Practices: Wide Range of Trade Barriers to U.S. Exports Cited by Industries Urging Super 301 Probes*, 6 Int'l Trade Rep. (BNA) 412 (Apr. 5, 1989).

292. Omnibus Trade and Competitiveness Act of 1988, § 310(a)(1), 19 U.S.C. § 2420 (Law. Co-op. Supp. 1989); 28 I.L.M. at 65, 66.

293. *Id.* at § 310(b); 28 I.L.M. at 66.

294. 6 Int'l Trade Rep. (BNA) 797 (June 21, 1989). See *Int'l Trade Outlook*, *supra* note 185. The U.S. has yet to take action in response to GATT panel reports finding fault with Section 337 of the 1930 Tariff Act (Dec. 1988), the U.S. sugar import quota program (June 1989), and the U.S. customs user fee (Feb. 1988). *Id.*

295. *Statement of Ambassador Hills*, *supra* note 191, at 5. Under "Fast-Track" Procedures, the President may, until May 31, 1991, five months after the Uruguay Round of the Multilateral Trade Negotiations is scheduled to conclude, negotiate and promptly implement trade agreements with foreign countries. If he certifies to Congress that more time is needed despite progress in negotiations, his delegated authority may be extended to May 31, 1993. *Introductory Note*, *supra* note 137, at 16.

One tool the President may use is manipulation of duties. Under Section 1102(a)(2), the President may increase or reduce completely any rate of duty up to 5% *ad valorem*, and up to 50% any rate of duty over 5% *ad valorem*, on the date of the enactment of the act. Duty reductions must be staged over a period of time at an annual rate of not more than the greater of 3% *ad valorem* or one-tenth of the total reduction. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902 (Law. Co-op. Supp. 1989); 28 I.L.M. at 40.

commentator believes that this latter reasoning is a “bootstrap argument”²⁹⁶ and that protection actually retards technology transfer to developing countries.²⁹⁷ Foreign patent holders may have little incentive to transfer technical information if they can derive profits from import monopolies of their inventions.²⁹⁸ This reasoning however, fails to consider the importance of cheap labor in developing countries. Importing would make little economic sense if local labor is substantially cheaper. In fact, it may be more cost-effective for a patent holder to manufacture its labor-intensive patented product wholly in developing nations even without adequate patent protection.²⁹⁹

The IIPA³⁰⁰ points out that countries without adequate protection for intellectual property rights also injure themselves by allowing “an underground economy immune from taxes and other regulatory controls” to flourish.³⁰¹ This reasoning presupposes not only that people who evade taxes would not do so with adequate intellectual property laws, but also that no widespread corruption exists.

Despite all the supposed benefits of extending intellectual property protection, Thailand cannot summarily conclude that it would benefit more than the United States from stronger protection of intellectual property rights in Thailand. Even with weak Thai laws, U.S. citizens still hold far more patents, trademarks, and copyrights than Thai persons both in number and per capita. In 1978, U.S. interests paid

296. Oddi, *Reality or Myth?*, *supra* note 195, at 25-26.

297. *Id.* “Indeed, the granting of patents may actually retard the transfer of technology.” *Id.*

298. *Id.*

299. Another argument is that developing countries need to establish their own intellectual property laws to protect “intellectual flight” of their own inventors to industrialized nations offering better protection. 5 Int’l Trade Rep. (BNA) 509 (Apr. 6, 1989). Although this is apparently intended to be the same type of reasoning as the “brain-drain” argument, it is based on the not-necessarily-true assumptions that the intellectual flight resulted solely from economic reasons and that an inventor in a developing country can not otherwise protect her invention in an industrialized country through various methods such as trade secret agreements, reciprocal treaties, and “back-door” registration.

300. The IIPA consists of 8 trade associations: the Computer Science & Software Industry, the American Film Marketing Ass’n (AFMA), the Ass’n of American Publishers, the Computer & Business Equipment Manufacturing Ass’n, the Int’l Anticounterfeiting Ass’n, the Motion Picture Ass’n of America (MPAA), the National Music Publishers’ Ass’n, and the Recording Industry Ass’n of America. Note, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 Geo. L.J. 417, 425 (1987) [hereinafter Note, *A Trade-Based Response*]. It represents over 1,600 companies. *Intell. Prop.: Six Parties Comment on 17 Countries in Second Round Under Special 301 Provision*, 7 Int’l Trade Rep. (BNA) 300 (Feb. 28, 1990).

301. Note, *A Trade-Based Response*, *supra* note 300, at 425 (quoting USTR (citations omitted)).

\$565 million in royalties for use of imported technology but received over \$5 billion in royalties from technology sent abroad.³⁰² As the import/export ratio of technology between the U.S. and Thailand probably will not be much different, it is understandable that Thailand, like the "Group of 77" nations,³⁰³ is reluctant to pass and enforce stronger intellectual property laws if the main beneficiary will be the United States. Many international studies have concluded that "it is economically unsound for such countries to have a patent system if an overwhelming majority of patents are granted to foreigners."³⁰⁴

2. General Agreement on Tariffs and Trade (GATT)

Trade retaliation which seeks to change the internal policies of member countries of GATT may violate the unconditional most favored nation doctrine of GATT. Brazil has maintained that using Special 301 to "extract compliance to U.S. laws is GATT-illegal" because it violates the standstill commitment of Punta Del Este.³⁰⁵ Even though the GATT prohibits the selective implementation of tariff and nontariff barriers, articles XX and XXIII allow retaliation against member countries who violate GATT's letter and spirit. The denial of fair market access and inadequate intellectual property protection should justify retaliation and, therefore, comply with the GATT.³⁰⁶ Despite U.S. shortcomings and peccadilloes, the United States retains policies that rank among the most open and liberal in the world.³⁰⁷

In any case, even after the Uruguay Round concludes, the resulting intellectual property provisions will be binding only on those GATT

302. FOLSOM, GORDON & SPANOGLE, *supra* note 207, at 330-31.

303. "Group of 77" refers to a group of developing nations which currently number more than 77. *Id.* at 329.

304. Oddi, *Reality or Myth?*, *supra* note 195, at 3.

305. In the September 1986 Punta Del Este declaration which launched the four-year Uruguay Round of GATT negotiations. *Unfair Trade Practices*, *supra* note 281. Speech of Celso Marcos Souza, general minister to the Brazilian Embassy, at a forum sponsored by the D.C. Bar Ass'n on June 21, 1989. The U.S. could respond that its self-help counter-measure using the Omnibus Act including "Special 301" is merely a retorsion permitted by the GATT and international law.

306. Note, *A Trade-Based Response*, *supra* note 300, at 444-45. As the USTR's General Counsel Judith Hippler Bello and the Deputy USTR Alan F. Holmer wrote: "Those who persist in claiming that the act is protectionist should be condemned to read it." Bello & Holmer, *The New Trade Law: Omnibus Trade and Competitiveness Act of 1988*, 482 P.L.I./Comm. 317 (Dec. 5, 1988) (WESTLAW, INT-TP Database) [hereinafter *New Trade Law*]. However, a GATT panel on U.S. trade policies found differently. *GATT Review Criticizes Washington Trade Policies*, *Asian Wall St. J.*, Dec. 16, 1989, at 2, col. 1.

307. *Asian Wall St. J.*, Dec. 16, 1989, at 2, col. 1.

members who choose to adopt them. Moreover, the GATT dispute resolution mechanisms may not be sensitive to the technicalities of intellectual property disputes.³⁰⁸ Therefore, the United States should not wait to implement "Special 301," as Brazil suggested, until the Uruguay Round concludes.

3. *Implementation*

Even if trade actions under the Omnibus Act do not violate the GATT or any other treaty with Thailand,³⁰⁹ the United States should use such actions "to liberalize international trade, rather than attempt to manage it from Washington."³¹⁰ As Susan Lieberler, the former chairperson of the U.S. ITC warned, "Super 301" is likely to cause "enormous resentment" abroad for the following reasons: It requires countries to change long-established national practices and restructure their economies to suit the U.S. demands; with its emphasis on sectoral reciprocity, it allows the United States to decide on its own whether U.S. treatment of a trading partner is fairer than that partner's treatment of the United States; the United States may ignore those sectors where the U.S. markets are less open to foreign competition. Finally, use of the Act may be "captured" by export interests.³¹¹

For reasons of international comity, the United States should avoid "bold unilateral efforts" to bully her trading partners to change their internal laws. Although the Section 301 review of South Korea, initiated on November 4, 1985, resulted in South Korea's enactment of a comprehensive copyright law in 1987, another Section 301 review of Taiwan's trading practices, initiated on January 30, 1984, only created an embarrassment for the United States.³¹² Based on the mixed results of Section 301 review, it appears that using Section 301 to police the trading practices of our partners is a double-edged sword.

The built-in "last resort" approaches of the Omnibus Act which require fact finding by the USTR and the lesson from the Taiwanese

308. Note, *A Trade-Based Response*, *supra* note 300, at 459.

309. 6 Int'l Trade Rep. (BNA) 511 (Apr. 26, 1989).

310. *Id.* at 529.

311. *Id.* (luncheon sponsored by Southern California Foreign Trade Association on Apr. 20, 1989).

312. The Motion Picture Association of America (MPAA) alleged that Taiwan discriminated against foreign film distributors when in fact it was the American companies' fault for not knowing the intricacy of the Taiwanese film distribution system. Note, *A Trade-Based Response*, *supra* note 300, at 446.

film distribution case should make the United States more cautious and avoid additional embarrassing situations. The "fairness" approach to implementation of the Act should help to avoid offending any true ally of the United States. As the USTR's "Special 301" Fact Sheet puts it, "[t]he Administration's plan reflects an understanding that countries may be at different stages in recognizing the importance of adequate and effective intellectual property protection. The economic interests of the United States also require it to attach greater priority to certain foreign markets."³¹³

The United States should emphasize, as the current USTR, Carla Hills, suggested, that "America is not trying to open markets for itself, but to expand the system" of international trade. For instance, the effort by the United States to open Japan's beef market also benefits Australia.³¹⁴ However, this "opening" of the market may result in merely opening the Thai market to the rest of the world, without any corresponding benefit to Thailand. If the size of world-wide trade does not increase, or if Thailand cannot participate in this increase, then Thailand may not perceive any benefit to opening its domestic markets to foreign competition.

In summary, the best arguments that the United States could use to pressure Thailand into providing adequate protection for intellectual property rights would be that new protections are both necessary and fair. The United States became the world's largest international debtor by 1988, having been the world's largest international creditors as recently as 1974.³¹⁵ Thailand's trade surplus with the United States in 1989 jumped 77 percent to \$2.1 billion from 1988.³¹⁶ Although Thailand may respond that its trade deficit is also large, its earning from tourism alone more than covers the deficit.³¹⁷ Considering Thailand's position as an old reliable political ally, the USTR and the Bush Administration should use its "unlimited discretion" under the Act³¹⁸ to refrain from using all of its legal leverage against

313. "Special 301" Fact Sheet, *supra* note 263, at 2. By "economic interests," the USTR probably referred to the large U.S. trade deficit. Reading between the lines, the USTR, which has the unlimited discretion in deciding whether to retaliate for denial of intellectual property rights, would probably retaliate only against those countries which have a large surplus with the U.S., and not against those allies which need the United States to survive economically.

314. *Unfair Trade Practices: USTR Defends Administration's Naming of Japan, India, Brazil Under Super 301*, 6 Int'l Trade Rep. (BNA) 681 (May 31, 1989).

315. *The New Trade Law: Omnibus Trade and Competitiveness Act of 1988*, *supra* note 306, at 30.

316. Asian Wall St. J., Mar. 5, 1990 (LEXIS, Nexis library, WSJ file).

317. FOREIGN ECONOMIC TRENDS, *supra* note 3, at 2.

318. See "Special 301" Fact Sheet, *supra* note 263, at 1.

Thailand. However, unless the Bush Administration tries harder, Thailand probably will “drag its feet” as long as possible, as the Omnibus Act does not provide for compensation for past damages.³¹⁹ As the U.S. Embassy in Thailand reported in April 1989, Thailand “thus far has not provided adequate assurances that it will amend its patent law to meet U.S. concerns.”³²⁰

IV. CONCLUSION

The recent unclassified telegram from the U.S. Embassy in Bangkok to the Department of Commerce summed up best the current status of Thai intellectual property laws: “Thailand’s patent law . . . denies . . . protection for food, beverages, pharmaceuticals, . . . and agricultural machinery. Other deficiencies include an insufficient term, overly broad compulsory licensing provisions and a requirement that the patent holder work the invention in Thailand to avoid compulsory licensing or patent cancellation.”³²¹ Moreover, the Thai Trademark Act does not protect service, certification, and well-known marks because penalties for infringement are too low to serve as a deterrent.³²² Although Thailand has assured that “preexisting” U.S. works still under copyright protection in the United States will be protected under Thai laws, Thailand has not provided any explicit protection for computer software. The penalties for copyright infringement on software are likewise inadequate.³²³ Thailand’s public health justification for denying patents for pharmaceutical products is out-dated. Thailand must realize that it is no longer a Third World country and that the exportation of pirated products to other countries cannot be justified on a “public health” basis.

The National Treatment Clauses in various bilateral and multilateral treaties offer inadequate protection to U.S. citizens.³²⁴ However, The Omnibus Trade & Competitiveness Act of 1988 provides the USTR with necessary tools to pressure Thailand into providing adequate intellectual property protection. “Special 301” with its 6-

319. See Greguras, *Representing the Growing Technology Company*, *supra* note 187.

320. Country Section for 1989 National Trade Estimate Report: Thailand, *supra* note 118, at 2.

321. *Id.*

322. *Id.*

323. The public performance exception, the 10-year limitation on translation rights, and enforcement remains a problem. *Id.*

324. As the U.S. probably would benefit more from a stronger protection, a Reciprocity Clause limiting protection under U.S. laws to the same extent of the Thai laws, would not be sufficient from the U.S. perspectives.

to 9-month "fast-track" procedures are the most effective.

Although "Special 301," "Super 301" and other provisions of the Omnibus Act are working effectively, they should be used with extreme caution. Appropriate caution was exhibited recently when, even though no foreign country currently meets every standard for "adequate and effective" intellectual protection, the USTR used its "unlimited discretion" properly by not immediately naming "priority countries." The USTR instead created a "watch list" and a "priority watch list." Although the "Special 301" powers and other Omnibus provisions are available to pressure our trading partners into adequately protecting U.S. intellectual property, the USTR should continue to emphasize its last-resort and fairness approach when considering the trade practices of Thailand, an old reliable ally in Southeast Asia.

Into Bo Champon