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U.S.-THAILAND TRADE DISPUTES:
APPLYING SECTION 301 TO CIGARETTES
AND INTELLECTUAL PROPERTY

Ted L. McDorman*

INTRODUCTION

In the last few years there have been a number of trade irritants between Thailand and the United States, but the disputes respecting Thailand's allegedly lax intellectual property protection and import ban on cigarettes have been the most interesting and heated. In the middle of these two disputes have been U.S. trade law Section 301 and the threat of U.S. trade retaliation unless Thailand mends its ways to the satisfaction of the United States.

In the dispute over cigarettes, the United States' use of Section 301 resulted in the United States and Thailand utilizing the third party procedures.

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1. Other prominent disputes between the United States and Thailand occurring recently have involved textiles and rice. Textiles are a major component of Thailand's exports to the United States. Only after 30 months of sometimes acrimonious negotiations were the two countries able to reach a new textile trade agreement to replace the previous deal, which expired in 1988. See Thai-U.S. Textile Pact Finalized, BANGKOK POST WkLY. REV., Sept. 13, 1991, at 11; Ratchapol Laovanitch, New Textile Pact Signed at 11th Hour, BANGKOK POST WkLY. REV., July 5, 1991, at 20. See generally Surakiart Sathirathai, THAILAND AND INTERNATIONAL TRADE LAW 31-38 (1987).


It is convenient to identify three separate 301 processes: "Section 301," "Super 301," and "Special 301." Using Section 301, U.S. petitioners can make complaints about other countries' unreasonable trade practices which hurt their trade prospects. If these complaints are found to be justified, the United States can retaliate against the offending country. Super 301 required the United States Trade Representative (USTR) to prepare an inventory of foreign trade barriers and attempt to negotiate their removal with the possibility of trade retaliation if the negotiations were ultimately unsuccessful. Special 301 is similar to Super 301 in its approach, but relates to intellectual property and is a continuing threat. See text accompanying notes 21-76.
dispute resolution mechanism of the General Agreement on Tariffs and Trade (GATT). It was the first time since Thailand became a member of GATT in 1982 that Thailand was directly involved in the formal dispute settlement process. The GATT panel formed to look into the U.S. complaint took the view that Thailand’s import restrictions on cigarettes were inconsistent with Thailand’s GATT obligations. Thailand accepted the decision and, despite some reticence, has moved to alter its laws.

Regarding the intellectual property issue, use of Section 301 and Special 301 has put pressure on Thailand to alter its laws and practices to provide greater protection for the intellectual property rights of U.S. citizens. While Thailand appears to be attempting to accommodate U.S. interests (and demands), it has not yet achieved the results sought by the United States. In May 1991, Thailand was listed under Special 301 as a priority country. It remains uncertain whether Thailand can move far enough and fast enough to appease U.S. interests and to avoid retaliatory trade action by the U.S. government.

Underlying the current trade disputes between Thailand and the United States are the overall trade and investment patterns between the two countries, the geopolitical relationship of the two countries, the history of these relationships, and the internal political situation in Thailand.


5. The GATT Council adopted the Thai-U.S. Panel Report, which makes the Report’s conclusions binding on both countries. As a member of the GATT council, Thailand could have delayed the adoption of the Report or effectively vetoed its adoption. Thailand chose not to do so. Panel Reports on Thai Cigarette Restrictions, 76 FOCUS: GATT NEWSLETTER, at 1, 4 (1990).


Trade disputes now overshadow other bilateral issues between the two countries. The rice
The United States is the largest foreign investor in Thailand, with approximately $4 billion dollars worth of investment, although Japan and Taiwan have been investing larger amounts than the United States in recent years. In the last few years, the United States has become Thailand’s top export market, accounting for about twenty percent of Thai exports in 1990. The United States had a trade deficit with Thailand in 1990 of $2.3 billion. In 1989, the Thai company Unicord acquired the U.S. company Bumble Bee from the Pilsbury group of companies for $285 million, making Unicord the world’s largest tuna canner. This was the first major Thai takeover of a U.S. company. The Thai economic growth rate has been phenomenal in the last decade and the seventh five year plan launched in late 1991 confidently predicts an average annual growth rate of 8.2 percent.

The geopolitical relationship between Thailand and the United States has been close since the Second World War. During the Vietnam conflict, the United States stationed forces in Thailand and liberally provided military and non-military aid. In the intervening period, U.S. disengagement has cooled the relationship, and U.S. foreign policy shifts have caused Thailand to reassess its strategic position and friends. However, the strategic relationship between the United States and Thailand is a continuing fact in the overall relations between the two countries.

bill provision of the Farm Act, the removal of certain GSP privileges, the threat of Section 301 sanctions due to IPR issues, Countervailing Duty (CVD) assessments on Thai manufactured mini ball bearings, and market access limitations for U.S. cigarettes have significantly strained Thai-U.S. economic relations.

15. Id. at 223-31. The author comments at 229: The current security linkage between the United States and Thailand appears firmly rooted in the domestic political realities of both countries and so has achieved greater political sustainability. While the Thais continue to seek the strongest possible security guarantee from the United States, a working recognition now exists that the U.S. role must remain limited. American respect for Thai nationalism has increased, and the U.S. Embassy’s range of contacts in the Thai government and society has been significantly broadened. . . .

Trade and economic relations, though still clearly secondary to security and political issues, have assumed new importance in the Thai-American relationship, as Thailand’s sustained record of economic growth (together with that of ASEAN as a whole) in the 1970s
The internal political situation in Thailand has come to involve a subtle balance between elected politicians, the military, business and educated elites in Bangkok, government bureaucracy, public opinion, and the constitutional monarchy.\(^1\) The 1980s were characterized by Thai-style democracy, with increased civilian involvement in the direct ruling of Thailand. However, in early 1991 a military coup removed the civilian government.\(^2\) The action of the military received little condemnation within Thailand and did not involve significant repression.\(^3\) The military leaders moved quickly to install a highly respected and competent civilian government.\(^4\) However, following the March 1992 elections, the majority coalition selected coup-leader General Suchinda Kraprayoon as prime minister. This continuing and direct military involvement in civilian politics proved unacceptable to the Bangkok populace. Widespread demonstrations and a bloody military confrontation forced General Suchinda from office. The interim Prime Minister, pending September elections, is again Anand Panyarachun.\(^5\)

and early 1980s has propelled it toward the ranks of the middle-income countries. Average GNP growth through this period has exceeded 7 percent. He concludes at 231: "[T]he partnership that exists today is an increasingly balanced and mature one, premised on a realistic appraisal of domestic and international conditions and on an enduring heritage of friendship and shared national interests."


18. As one journalist wrote "...this coup proved to be different from the military power grabs of the past — it was widely accepted, almost popular." Popular Putsch, supra note 17, at 17.

The perception was that Prime Minister Chatichai Choonhavan's government had become too corrupt and that a campaign was underway to discredit the military leadership. The military coup leaders provided these and several other justifications for their action. See The Day of the Generals, supra note 17, at 43-47; Seventeenth Time Unlucky, supra note 17, at 33-34.

19. The military selected Anand Panyarachun, businessman and former high-ranking diplomat, as Prime Minister. This choice, as well as the composition of the cabinet, was designed to show the good faith of the military in restoring civilian rule. The choice of Anand proved to be a shrewd move. See Rodney Tasker, Under Licence, FAR E. ECON. REV., Mar. 21, 1991, at 13; Junta's Choice, But His Own Man, ASIAWEEK, Mar. 15, 1991, at 32.

20. Concerning the post-March 1992 events, see Election To Be Held On Sept. 13, BANGKOK POST WKLY. REV., July 10, 1992, at 1; Rodney Tasker, The Ringmaster Returns, FAR E. ECON. REV., June 25, 1992, at 8; Paul Handley, Rainbow Coalition, FAR E. ECON. REV., June 4, 1992,
Irrespective of the close economic and strategic relationship between Thailand and the United States, the United States has utilized Section 301 (and Special 301), and the consequent threat of trade retaliation, in its relations with the Land of Smiles. The purpose of this article is to examine the operation of Section 301 and Special 301 regarding trade in cigarettes and intellectual property.

**SECTION 301**

**Overview**

In simple terms, Title III, Chapter 1, of the Trade Act of 1974\(^\text{21}\) (commonly referred to as Section 301) provides that when a foreign country denies rights owed to the United States under a trade agreement, or when a foreign country is unfairly restricting U.S. foreign commerce, irrespective of a breach of an international treaty, the United States can, or even must, take retaliatory trade action against that foreign country.\(^\text{22}\)

On its face, Section 301 does not appear to be inherently unreasonable. However, the United States can take retaliatory action under Section 301 even when a foreign country is fully complying with its international obligations, since Section 301 gives the United States sole discretion to determine what measures are unfair. Section 301 permits action even when the foreign action in question is not a breach of an international obligation.\(^\text{23}\)

Moreover, Section 301 can have the effect of usurping the role of independent international dispute settlement through the GATT by permitting U.S. retaliatory action when the GATT is breached without the necessity of international approval.\(^\text{24}\) One leading authority has described Section 301 as "aggressive unilateralism" because its employment or threatened employment is designed to make foreign countries yield unreciprocated trade concessions.\(^\text{25}\) Not surprisingly, Section 301 has attracted considerable negative international reaction because it allows the United States to make a unilateral determination.

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\(^{23}\) JACKSON, supra note 3, at 106.

\(^{24}\) Id. at 105-06.

of what is unfair, and because of the perceived damage that unilateralism could have on the international trading system, specifically the GATT legal framework.

The recognized purpose of Section 301, which has not changed in the years since it was originally enacted, was for the United States to use the retaliatory authority of Section 301 vigorously as leverage on foreign countries to eliminate unfair trade practices affecting U.S. commerce. Despite changes made to the original Section 301 through the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984, deep dissatisfaction existed within Congress with the failure of Section 301, as used by the President, to gain access for U.S. goods and services in foreign markets where barriers allegedly existed. Coupled with this dissatisfaction were the United States' growing trade deficit and the perception that while the U.S. market was open to all, foreign markets, particularly Japan, remained relatively closed to U.S. goods and services. The result was significant change to Section 301 with the enactment of the Omnibus Trade and Competitiveness Act of 1988.

The 1988 changes to Section 301 address several areas. They attempt to circumscribe the discretion the President had to undertake retaliatory action, and expand and clarify the trade practices that will be considered unwarranted and that will lead to possible Section

26. Bhagwati writes: "It is the exercise of 301 actions...using the threat of trade retaliation against other countries to accept trade practices that the United States has unilaterally decided to consider unreasonable and hence unacceptable, that America's trading partners resent and reject." Id. at 4.

27. See Elizabeth K. King, The Omnibus Trade Bill of 1988: "Super 301" and Its Effects on the Multilateral Trade System Under the GATT, 12 U. PA. J. INT'L BUS. L. 245 (1991); Unilateral Measures Under Fire, 63 FOCUS: GATT NEWSLETTER, at 6-8 (1989). It is argued, however, that use of Section 301 can lead to a strengthening of GATT since a flawed international regime is ineffective and Section 301 actions can assist in correcting the flaws. See Robert E. Hudec, Thinking About the New Section 301: Beyond Good and Evil, in AGGRESSIVE UNILATERALISM, supra note 25, at 151-53.


33. § 1301, 102 Stat. 1107, 1164-76.
34. 19 U.S.C. §§ 2411(a)(1)-(2) (1988). See The Heart of the 1988 Trade Act, supra note 31, at 57-65. For a general discussion of Presidential discretion under Section 301, see Kevin C.
301 action. The new Super 301 required the USTR to identify and initiate Section 301 actions against foreign countries that used unfair trade practices to inhibit U.S. trade. Finally, Special 301 required the United States Trade Representative (USTR), on a yearly basis, to identify and initiate Section 301 actions against foreign countries that deny adequate and effective protection of intellectual property rights to U.S. persons and products.

**Detailed Operation**

**Section 301**

The Section 301 process can be started by a petition from a U.S. person or entity who claims: (i) to have been unfairly denied access to a foreign market; (ii) that the foreign country is not abiding by an international agreement; or (iii) that their intellectual property rights are not being adequately protected. The USTR can also start the Section 301 process on her own initiative. Moreover, following any naming of priority countries under Super 301 or Special 301, the USTR is also required to commence the Section 301 process. Once the USTR agrees to commence, or is required to commence, the Section 301 process, she must investigate and determine whether the rights to which the United States, or any U.S. person or entity, is entitled under any trade agreement are being denied. She must also determine if any act, policy, or practice exists which is "unjustifiable," "unreasonable," or "discriminatory," and which burdens or restricts U.S. commerce.

An "unjustifiable" act, policy, or practice is one which includes the denial of national treatment, most favored nation (MFN) treatment, the right of establishment, the protection of intellectual property rights, or any other action inconsistent with the international legal

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rights of the United States. 42 A "discriminatory" act, policy, or practice is one that denies national treatment or MFN treatment to U.S. goods, services, or investment. 43 An "unreasonable" act, policy, or practice is one that, "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable." 44 Included in unreasonable acts, policies, and practices are those which deny fair and equitable market opportunities and the provision of adequate and effective protection of intellectual property rights; 45 those which constitute export targeting; 46 and those which constitute a denial of workers' rights and standards for minimum workers' wages, health, and safety. 47

When the USTR finds that a trade agreement is being breached or an act, policy, or practice is unjustifiable, unreasonable, or discriminatory, she is to determine what action to take. 48 Remedies available include withdrawing benefits the identified foreign country enjoys pursuant to a trade agreement with the United States; 49 entering into agreements with the foreign country to eliminate the offending action; 50 or imposing duties or other import restrictions against any goods or economic sector of the foreign country irrespective of the goods or sector affected by the foreign country's offensive action. 51 The latter situation is clearly nothing more than trade retaliation against a foreign country.

When the USTR's investigation finds that the rights of the United States under a trade agreement are being denied, she is not required to take action if a panel of experts established pursuant to the GATT or the Canada-U.S. Free Trade Agreement 52 finds to the contrary. 53

However, when the USTR finds that a foreign country's act, policy, or practice is "unjustifiable," or the measure is determined to be inconsistent with a trade agreement, she is required to withdraw trade concessions, to enter into trade agreements, or to take retaliatory trade action. This is the mandatory action that the Congress sought to impose in 1988. However, this mandatory action is qualified in a number of ways. Any action to be taken by the USTR is "subject to the specific direction, if any, of the President." Moreover, no action need be taken if the USTR finds that the foreign country "is taking satisfactory measures" to grant the United States rights under a trade agreement; that the foreign country has agreed to eliminate the offending measure; or that the retaliatory action "would cause serious harm to the national security of the United States." When the USTR finds that the foreign country's action is "unreasonable" or "discriminatory," she is to take all appropriate and feasible action to obtain the elimination of the offending act, policy, or practice, but no mandatory action is called for.

The above process has existed, with some modification, since 1974. Despite the potentially powerful nature of Section 301, it was infrequently employed until 1985. Commencing in 1985, the Reagan Administration vigorously applied Section 301 primarily to forestall congressional change to the provision. Between 1985 and 1989, trade retaliation pursuant to Section 301 was employed in nine cases. In a further four cases, trade retaliation was avoided at the last moment when negotiating progress justified delay. It should be noted that Section 301 was designed to be used for negotiating leverage. The threat of Section 301 is often enough to effect the desired behavior. Hence, its relatively infrequent use is not indicative of its power as a bargaining chip.

Super 301

In 1988, Congress added to Section 301 the processes known as

61. Only 18 petitions were filed between 1975 and 1979. This number jumped to 35 between 1980 and 1985. Milner, supra note 28, at 166.
63. Hudec, supra note 27, at 121-22, 153-56.
Super 301 and Special 301. Under Super 301, as part of her annual report to Congress in 1989 and 1990, the USTR was to identify "priority" practices "the elimination of which [were] likely to have the most significant potential to increase United States exports," and "priority" countries, which had in place significant barriers to U.S. exports of goods or services and foreign direct investment. When a priority country was identified in the annual report (and it appeared that the USTR had a significant discretion in identifying such a priority country) the USTR was to initiate a Section 301 investigation of the trade measure identified as a priority practice. The USTR was required to attempt to negotiate an agreement with the named priority country to eliminate the offending practice, and if such an agreement was reached before the completion of the Section 301 process, the process was to be suspended. The Super 301 process did not require the United States to take retaliatory trade action against a named priority country.

In 1989, the first year of Super 301, Japan, Brazil, and India were named as priority countries. Japan and Brazil were able to satisfy the USTR and were removed from the priority list. However, the 1990 priority list continued to include India and its insurance and investment practices.

Special 301

Like Super 301, Special 301 requires the USTR to identify, on a yearly basis, priority countries. The difference is Special 301 is aimed at countries which "have the most onerous or egregious" policies that deny adequate and effective intellectual property rights or deny fair market access to U.S. persons which rely upon intellectual property protection. The USTR is to initiate an investigation under the Sec-

The Special 301 process requires the USTR to monitor all foreign intellectual property laws and practices and report on them yearly. In the first year of Special 301, the USTR declined to name any priority countries, although the USTR created a “priority watch list” and a “watch list” naming countries that were, according to the USTR, lax in the protection of intellectual property rights. India, Thailand, and the People’s Republic of China (PRC) were designated as priority countries in 1991.

THE CIGARETTE CASE

Using Section 301

In April 1989, as part of a well-organized campaign to increase tobacco exports, the U.S. Cigarette Exporters Association (CEA) filed a Section 301 petition with the USTR against Thailand and the Thailand Tobacco Monopoly. On the basis of the petition, the USTR initiated an investigation of the Thai practices which allegedly discriminated against U.S. cigarettes and were unfair barriers to trade. The principal complaint was that Thai law, in particular the 1966 Tobacco Act, prohibited the importation of tobacco except under an import license; only on three occasions had import licenses been granted. The CEA also complained that Thai taxes were not applied fairly, that U.S. companies should be allowed to advertise despite the

80. Id. See also Thai-U.S. GATT Panel, supra note 4, at 201; Thaveechaiyagarn, supra note 78, at 369; Pedley, supra note 44, at 299.
advertising ban put in place in January 1989, and that U.S. exports should not have to go through the Thai government or the existing Thailand Tobacco Monopoly. Significant opposition to the potential U.S. retaliatory action existed in Thailand from the Thai tobacco industry, labor unions, and health authorities. Opposition also existed in the United States, where some perceived the CEA as trying to force smoking upon Third World countries at a time when the anti-smoking campaign was having success in the United States. Former U.S. Surgeon-General C. Everett Koop called the efforts of the CEA "the height of hypocrisy."

Direct negotiations between the two countries, as required under section 301, made little headway. Because it was clear that some of the allegations against Thailand involved potential violations of the GATT, and because the negotiations were unproductive, the USTR was required to proceed under the GATT dispute settlement process. The decision of the USTR to utilize the GATT was seen, however, as a victory for the anti-smoking groups in the United States and Thailand since it supposedly moved the dispute from a U.S.-controlled process to one that was more objective.

Consultations, as required under GATT Article XXIII(1), between Thailand and the United States were unsuccessful and the United States requested a dispute settlement panel. Thailand acceded to the request and in the spring of 1990 a panel was established to examine the GATT consistency of Thailand's import restrictions and internal taxes on cigarettes.

While the GATT process proceeded, the United States continued to pressure Thailand and threatened retaliatory measures under Section 301 by indicating which products might be hit by a retaliatory import embargo. Thailand's response was to await the report of the

81. See Thai-U.S. GATT Panel, supra note 4, at 201. See also Pedley, supra note 44, at 299; Thaveechaiyagarn, supra note 78, at 374-75.
82. Thaveechaiyagarn, supra note 78, at 374-75.
83. See id. at 372.
84. Id. at 370-71.
85. Id. at 371.
87. Thaveechaiyagarn, supra note 78, at 370.
89. See Thaveechaiyagarn, supra note 78, at 380-81.
90. ThaiL-U.S. GATT Panel, supra note 4, at 200.
91. Id.
92. Thailand To Lodge Protest With GATT Over U.S. Retaliation, BANGKOK POST WKLY. REV., Sept. 28, 1990, at 11 [hereinafter Thailand To Lodge Protest]. Similar tactics had been
GATT panel before entering into serious negotiations\textsuperscript{93} and to indicate that if the United States proceeded unilaterally that Thailand would complain to the GATT.\textsuperscript{94}

\textit{The GATT Panel Report}

The two issues with which the panel had to deal were the GATT consistency of: (i) Thailand's application of its excise, business and municipal tax; and (ii) Thailand's restriction on the import of tobacco products.\textsuperscript{95}

On the excise tax issue, the 1966 Thai Tobacco Act established that the ceiling rate of excise tax for domestic cigarettes was sixty percent of the retail price and for imported cigarettes the ceiling rate was eighty percent of the retail price.\textsuperscript{96} The United States argued that the possibility of a higher tax being placed on imported cigarettes than on domestic cigarettes was inconsistent with the GATT obligation of national treatment under Article III(1) and (2).\textsuperscript{97} In July 1990, while the GATT process was underway, the Thai Ministry of Finance issued a regulation that set the excise rate for all cigarettes, regardless of origin, at fifty-five percent \textit{ad valorem}.\textsuperscript{98} The GATT panel held, consistent with previous decisions,\textsuperscript{99} that the legislative possibility of a higher excise tax rate on foreign cigarettes would not, by itself, constitute a violation of the national treatment provision.\textsuperscript{100}

Concerning business and municipal taxes, the Tobacco Act had exempted domestic tobacco products from the taxes\textsuperscript{101} and the United States argued that this also amounted to a breach of the national treatment obligation.\textsuperscript{102} Again while the GATT process was in motion, the Thai government, through a Royal Decree, explicitly exempted all im-

\begin{thebibliography}{99}
\bibitem{93} \textit{Thailand To Lodge Protest}, supra note 92, at 11.
\bibitem{94} \textit{Thailand To Lodge Protest}, supra note 92, at 11. It is highly probable that U.S. retaliation under Section 301 would be GATT-inconsistent. \textit{See} Bhagwati, \textit{ supra} note 25, at 34-35, 38; Hudec, \textit{ supra} note 27, at 118-25; King, \textit{ supra} note 27, at 262-68.
\bibitem{95} \textit{Thail.-U.S. GATT Panel}, \textit{ supra} note 4, at 201-03.
\bibitem{96} \textit{Id.} at 202.
\bibitem{97} \textit{Id.} at 202-03, 214-15.
\bibitem{98} \textit{Id.} at 202, 214.
\bibitem{100} \textit{Thail.-U.S. GATT Panel}, \textit{ supra} note 4, at 227.
\bibitem{101} \textit{Id.} at 202.
\bibitem{102} \textit{Id.} at 202-03, 215.
\end{thebibliography}
ported cigarettes from payment of the business and municipal taxes.\textsuperscript{103} The GATT panel took the view that the action by the Thai government removed any discrimination, and the mere fact that the Tobacco Act continued to enable the government to levy discriminatory taxes was not sufficient to constitute a breach of national treatment.\textsuperscript{104}

On the import restriction issue, cigarettes could not be imported into Thailand except under an import license. On only three occasions in 25 years had an import license been issued.\textsuperscript{105} It was largely uncontested by Thailand that its law and practice regarding import licensing for cigarettes were inconsistent with GATT Article XI(1), which explicitly prohibits the use of licensing to restrict imports.\textsuperscript{106} Thailand’s principal arguments were that the inconsistency with GATT Article XI(1) was justified by: (i) GATT Article XI(2)(c), which permits import restrictions to enforce domestic marketing or product restrictions for agricultural products;\textsuperscript{107} (ii) Thailand’s 1982 Protocol of Accession to the GATT,\textsuperscript{108} which grandfathered legislation of a mandatory nature inconsistent with the GATT;\textsuperscript{109} and (iii) GATT Article XX(b), which allows derogation from GATT rules when the measures are necessary to protect human life or health.\textsuperscript{110}

The GATT panel rejected all three of the justifications put forward by Thailand for the import restrictions on cigarettes. Respecting Article XI(2)(c), the panel, relying on previous panel findings and the drafting history of the provision, determined that the marketing exception only applied to fresh produce and not to products to which further processing was intended.\textsuperscript{111} Cigarettes were neither fresh produce nor products to which further processing was intended.\textsuperscript{112} The grandfathering argument under the Protocol of Accession was dismissed because only legislation of a “mandatory character”\textsuperscript{113} was to

\begin{footnotesize}
\begin{itemize}
\item 103. Id. at 202.
\item 104. Id. at 227.
\item 105. Id. at 201.
\item 106. Id. at 204, 221.
\item 107. Id. at 203.
\item 109. ThaiL-US. GATT Panel, supra note 4, at 203, 212-13.
\item 110. Id. at 203, 206.
\item 111. Id. at 222. The previous panel report was Japan: Restrictions on the Import of Certain Agricultural Products, GATT Doc. L/6253 (Mar. 22, 1988), reprinted in BISD, supra note 3, at 163 (35th supp. 1989).
\item 112. Id.
\end{itemize}
\end{footnotesize}
be included; the Tobacco Act did not impose a requirement to restrict imports, rather the legislation explicitly allowed for the issuing of import licenses.\footnote{Thail.-U.S. GATT Panel, supra note 4, at 226-27.} The GATT panel accepted that smoking constituted a serious risk to human health and that measures designed to reduce cigarette consumption fell within Article XX(b), the health exception.\footnote{Id. at 222-23.} The panel noted, however, that Article XX(b) required that a measure, in order to fit the exception, be \textit{necessary} to protect human life or health.\footnote{Id. The question of this criterion of "necessary" was elaborated upon at 223.} The panel concluded that "Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not 'necessary' within the meaning of Article XX(b)."\footnote{Id. at 226.}

The panel report was adopted by the GATT Council in November 1990, with Thailand deciding not to delay or veto adoption of the report.\footnote{US/Thailand: Thai Restrictions on Importation of and Internal Taxes on Cigarettes, 76 Focus: GATT NEWSLETTER 7 (1990).} In fact, in October 1990, the Thai Cabinet announced that it would be lifting the import ban on cigarettes.\footnote{U.S. Reacts Positively After Favourable GATT Ruling, BANGKOK POST WKLY. REV., Oct. 19, 1990, at 11.}

\textit{Post-GATT Panel Discussions}

Thai-U.S. negotiators met following the release of the GATT panel report to discuss its implementation and other issues raised in the Section 301 investigation. The United States continued to threaten retaliatory action under Section 301 regarding issues of cigarette distribution, advertising,\footnote{Pressure From U.S. Sparks New Cigarette Row, BANGKOK POST WKLY. REV., Oct. 26, 1990, at 16.} and tariffs.\footnote{Gov't Grants U.S. Free Hand on Cigarette Distribution, BANGKOK POST WKLY. REV., Nov. 2, 1990, at 11.} The GATT panel did not deal with these issues directly. However, at one point the panel noted that a ban on advertising of all cigarettes, both of domestic and foreign origins, would be consistent with the GATT.\footnote{Thail.-U.S. GATT Panel, supra note 4, at 224-25.} The panel further noted that nothing in the GATT prohibited the use of government monopolies, such as the Thai Tobacco Monopoly, so long as no favorable treatment was provided.\footnote{Id. at 225.} As long as the thirty percent Thai tariff on imported cigarettes applied to all imports, there was lit-
In November 1990, the USTR terminated its Section 301 case against Thailand, being satisfied that Thailand was implementing the GATT panel decision. Moreover, an arrangement for the establishment of private distributorships was concluded. Thailand made no concessions respecting the ban on cigarette advertising or the thirty percent tariff. It is interesting to note that when U.S. cigarettes began entering Thailand in 1991, there were complaints from the Thai Tobacco Monopoly that the U.S. cigarettes were being dumped at prices below cost. No investigation of the alleged dumping has yet been initiated.

**Intellectual Property**

*Thailand's Intellectual Property Laws*

In 1931, Thailand became a party to the Berne Convention for the Protection of Literary and Artistic Works and took that opportunity to evaluate its position regarding trademark, copyrights, and patent law. New copyright legislation was put in place, replacing the old copyright legislation. A new trademark law was enacted and the first draft of a patent law was considered.

The 1931 Trademark Act was based on English trademark legislation and subsequent interpretation and construction of the Thai Act has generally followed English law. Thailand, unlike the United States, is not a member of the 1883 Paris Convention on Industrial

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124. If the tariff applied to all incoming cigarettes, the tariff would be consistent with the most favored nation principle. Thailand's position on the tariff was to let the United States complain to GATT if it was unhappy. *U.S. To End Cigarette Action Against Thailand*, BANGKOK POST WKLY. REV., Nov. 30, 1990, at 16.

125. *Id.*


131. Trademark Act, B.E. 2474 (1931) (Thail.).


Property, which deals with trademarks. The 1931 Trademark Act was revised in 1961, but remained as the principal piece of trademark legislation for sixty years. In late 1991, a new trademark law passed through the Thai National Legislative Assembly. The legislation came into force in February 1992. The 1931 Copyright Law, enacted to implement the Berne Convention to which the United States was not a party, was revised and updated through the Copyright Act of 1978.

Despite having first drafted a patent law in 1931, it was not until 1979 that Thailand finally enacted a patent law. The Thai patent law is based on the model proposed by the World Intellectual Property Organization (WIPO), an organization to which Thailand only became a member in September 1990.


The main advantage of the Paris Convention remains essentially that it enables foreign nationals by the rule of national treatment and the right of priority to obtain and claim protection of their industrial property rights in other countries. . . .


The effect of non-membership, therefore, is that Thailand is not obliged to offer the same trademark protection to foreigners as it does to its own citizens. See Lewmanonont, supra note 133, at 96; SEuI NAYA ET AL., ASEAN-U.S. INITIATIVE: ASSESSMENT AND RECOMMENDATIONS FOR IMPROVED ECONOMIC RELATIONS 83-84, 90 (1989).


137. Copyright Act, B.E. 2521 (1978) (Thail.). See Hemarajata, supra note 130, at 88; Anek, supra note 135, at 183-86. Concerning the issue of protection of foreign copyright, see Sukonthapan, supra note 129, at 71-79; Champon, supra note 135, at 323-25.


139. NAYA, supra note 134, at 89. Concerning Thai patent law, see Anek, supra note 135, at 174-178; Champon, supra note 135, at 315-21; Srisanit, supra note 132, at 89-95. See also Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3. WIPO was organized in 1963 to oversee the major international agreements on intellectual property, including both the Berne and Paris Conventions. WIPO also has as an objective the promotion of intellectual property rights protection through technical assistance and educational support. See R. Michael Gadbaw, Intellectual Property and International Trade: Merger or Marriage of Convenience, 22 Vand. J. Transnat'L L. 223 (1989).

140. Rebecca Runsgang, Thailand Accedes to WIPO Convention, IP Asia, Feb. 8, 1990, at 15.
In the last decade the United States has been aggressively pursuing the international protection of intellectual property rights owned by U.S. citizens.\textsuperscript{141} The U.S. policy has been one of simultaneously moving multilaterally and bilaterally to achieve greater protection.\textsuperscript{142} Multilaterally, the United States is pushing at the current Uruguay Round of Negotiations to have as part of the GATT an international regime for the protection of intellectual property rights.\textsuperscript{143} Changes made in U.S. law in 1984\textsuperscript{144} and 1988 have increased the weapons the United States can employ against countries that it feels are not adequately protecting U.S. intellectual property rights.

In bilateral relations, the U.S. strategy has been one of trying to persuade targeted countries to alter their intellectual property laws through education, training seminars, and persuasion.\textsuperscript{145} When this is unsuccessful, the U.S. strategy has been to employ economic coercion through the threatened revocation of benefits under the Generalized


The U.S. aggressiveness is further fueled by the perceived need for protection rights on technology to enhance or maintain U.S. competitiveness. This aggressiveness and resort to trade law is elaborated upon by Gadbaw, supra note 139, at 226-35.

142. The interaction between the multilateral and bilateral approach is succinctly commented upon by Robert W. Kastenmeier & David Beier, \textit{International Trade and Intellectual Property: Promise, Risks, and Reality}, 22 \textit{VAND. J. TRANSNAT'L L.} 285, 288-90 (1989). The thrust of their comments is that the bilateral approach of "threat/negotiation" would not be useful on some U.S. trading partners and therefore the use of GATT was necessary. Moreover, the use of GATT might energize the existing intellectual property fora such as WIPO. \textit{See also} Marshall A. Leaffer, \textit{Protecting United States Intellectual Property Abroad: Toward a New Multilateralism}, 76 \textit{IOWA L. REV.} 273, 292-97 (1991).


144. Section 301 was amended in 1984 to include inadequate intellectual property protection within the scope of unjustifiable and unreasonable trade practices. \textit{Trade and Tariff Act of 1984}, Pub. L. No. 98-573, § 104A(c), 98 Stat. 2948, 3007.


145. SATHIRATHAI, supra note 1, at 23; O'Neill, supra note 135, at 612-13.
System of Preferences (GSP) program and employment of Section 301 trade retaliation. It has even been suggested that part of the U.S. strategy is the vetoing of International Monetary Fund and World Bank loans to targeted countries.

Until relatively recently, Thailand had not been singled out for attention by the United States. Numerous other Asian and non-Asian countries have been subject to bilateral pressure from the United States on intellectual property issues. However, in the last few years, U.S. pressure on Thailand has been slowly escalating. In January 1989, U.S. unhappiness with the slow progress of talks with Thailand and the alleged failure of Thailand to protect U.S. intellectual property rights adequately led the U.S. government to significantly reduce the coverage provided by the GSP to Thai products entering the United States. Continuing U.S. unhappiness respecting patent and copyright protection resulted in two Section 301 investigations being commenced by the USTR in early 1991. Finally, as previously noted, Thailand was named as a priority country under Special 301 in May 1991.

Using Section 301

U.S. pressure on Thailand has resulted in some change. A new Trademark Act has been enacted which updates its 1931 predecessor and which has broader coverage and more significant penalties for infringement of trademark rights. U.S. complaints about Thailand’s

147. Id.; Sathirathai, supra note 1, at 23.
149. The countries have included Brazil, China, Colombia, India, Indonesia, Korea, Malaysia, Mexico, Saudi Arabia, Singapore, and Taiwan. See generally “Special 301”: Its Requirements, supra note 37, at 265-72; Berliner, supra note 75, at 735-39.
Copyright Law had been that the law did not protect works under copyright in the United States. Since the United States was not a party to the Berne Convention, Thailand’s legislation did not provide for reciprocal rights and Thai courts had not interpreted the relevant Thai-U.S. friendship treaty as granting reciprocal rights to U.S. copyrighted material.\(^{154}\) U.S. accession to the Berne Convention on January 1, 1989\(^{155}\) has removed much of the cause of the dispute.\(^{156}\)

However, the difficult issue of copyright protection for computer software remains unsolved. The Thai Copyright Act is silent on this question.\(^{157}\) While the United States argues strongly that the copyright law should be amended to cover computer software,\(^{158}\) the Thais respond that it would be more appropriate to await a court decision on the matter\(^{159}\) and that the best judicial opinion seems to be that computer software would be included in the Copyright Act.\(^{160}\) Despite its initial insistence, the United States has apparently agreed with Thailand’s approach to this issue,\(^{161}\) perhaps assured by the willingness of the Thai government to explicitly provide copyright protection for computer software when the Copyright Act is amended.\(^{162}\)

Copyright Enforcement

In November 1990, after years of complaining, a coalition of U.S. copyright industries filed a petition under Section 301 alleging that Thailand’s failure to enforce its copyright law against manufacturers

\(^{154}\) The details of the dispute are discussed in SATHIRATHAI, supra note 1, at 24-26; O’Neill, supra note 135, at 610-11.


\(^{156}\) The issue of retroactive protection has apparently been worked out. 1991 NAT’L TRADE ESTIMATES, supra note 10, at 216; Thailand Copyright, IP ASIA, Apr. 19, 1990, at 20.

\(^{157}\) SATHIRATHAI, supra note 1, at 27; Champon, supra note 135, at 323; O’Neill, supra note 135, at 618.

\(^{158}\) O’Neill, supra note 135, at 619.

\(^{159}\) SATHIRATHAI, supra note 1, at 25.

\(^{160}\) See id. at 27. See also U.S. Pressure Beginning To Show Results, IP ASIA, Oct. 18, 1990, at 9-10.


\(^{162}\) 1991 NAT’L TRADE ESTIMATES, supra note 10, at 216. A subcommittee has been formed to examine including software within the Copyright Act. Thailand-Computer Software and Trademark Protection, IP ASIA, May 24, 1990, at 26. However, there has been opposition within Thailand to software being protected. U.S. Pressure Beginning To Show Results, supra note 160, at 9-10.
of pirated audio and video cassettes was resulting in annual losses of between $70 and $100 million.\textsuperscript{163} The thrust of the petition was that the Thai Copyright Act was acceptable, but enforcement was lacking. It has been reported that between 1986 and 1990, Thai authorities had obtained 1,000 convictions for criminal infringement of the Copyright Act, although in these cases the fines were small and no jail time was served.\textsuperscript{164} Despite this, spokespersons for the U.S. coalition claimed that Thailand had stopped enforcing its copyright laws when foreign rights were involved and that personal threats had been made against those trying to enforce the laws.\textsuperscript{165} They also argued that the procedures for obtaining search warrants and convictions were cumbersome and did not operate efficiently.\textsuperscript{166} In late 1990, the USTR announced they had accepted the petition and had opened a formal investigation.\textsuperscript{167} At that time Deputy USTR Julius L. Katz was quoted as saying: "There appears to be a persistent failure on the part of the authorities of Thailand to enforce its own laws with respect to copyrights."\textsuperscript{168} Since the commencement of the USTR investigation, there has been "an aggressive campaign" enforcing copyright laws against music and video pirates.\textsuperscript{169} The affected Thai businesses complained that the crackdown was too aggressive and that the government should resist U.S. pressure.\textsuperscript{170}

Negotiation between the enforcement arm of the foreign tape producers operating in Thailand and several of the prominent Thai copiers has resulted in an agreement to cease copying in exchange for


\textsuperscript{164} USTR Initiates Section 301 Investigation, IP ASIA, Jan. 10, 1991, at 38-40.

\textsuperscript{165} See U.S. Copyright Coalition Announces Intention to File Section 301 Complaint Against Thailand, 7 Int'l Trade Rep. (BNA) 1645 (Oct. 31, 1990); Senators, Copyright Industries Criticize Thailand’s Alleged Failure to Stop Piracy, 7 Int'l Trade Rep. (BNA) 854 (June 13, 1990); Intellectual Property: Hills, Citing Significant Progress, Declines to Name Countries Under Special 301 Provision, 7 Int'l Trade Rep. (BNA) 616 (May 2, 1990).

\textsuperscript{166} These procedures are described in USTR Initiates Section 301 Investigation, IP ASIA, Jan. 10, 1991, at 38-40. See also Rebecca Runsgang, IIPA Lobbies For Trade Sanctions, IP ASIA, Feb. 8, 1990, at 15-17.


\textsuperscript{168} U.S. Launches Investigation of Thailand’s Weak Enforcement of Copyright Legislation, supra note 167.


\textsuperscript{170} Tape Producers Protest Crackdown, supra note 169, at 13.
dropping the existing charges and a grace period.\textsuperscript{171} In late 1991, the USTR announced that it was ending its Section 301 investigation of Thai enforcement of copyrights, although it was going to continue to monitor Thai enforcement practices.\textsuperscript{172} USTR Carla Hills indicated that while Thailand's copyright enforcement was inadequate, she believed that Thailand was willing to reform its practices and was satisfied that Thailand would take the necessary steps to protect U.S. copyright holders.\textsuperscript{173} The U.S. announcement followed a series of meetings from which it had been reported that the United States was "satisfied" with the progress being made on enforcement issues.\textsuperscript{174} Perhaps more significantly, the termination of the Section 301 investigation came at the end of a brief visit to the United States by Thai Prime Minister Anand Panyarachun.\textsuperscript{175} The coalition of U.S. industries that originally filed the Section 301 petition indicated that they were disappointed with the USTR decision and that they felt the Thai government had yet to take effective action to eliminate the alleged piracy.\textsuperscript{176}

**Patent Law and Pharmaceuticals**

In early 1991, the Pharmaceutical Manufacturers Association (PMA) filed a petition under Section 301\textsuperscript{177} to examine the patent law of Thailand as it related to pharmaceuticals. The USTR agreed to

\textsuperscript{171}. Top Thai Tape Pirates Agree To End Practice, BANGKOK POST WKLY. REV., Dec. 13, 1991, at 14. This agreement followed an extensive period of negotiation. See Audio And Video Pirates Don't Want To Face The Music, supra note 169, at 44; Raid On Pirates Signals Crackdown, supra note 169, at 14; Tape Producers Protest Crackdown, supra note 169, at 13.


\textsuperscript{173}. USTR's 301 Copyright Investigation Against Thailand Over, Hills Says, supra note 172.


\textsuperscript{175}. USTR Halts Probe Into Copyright Violations, supra note 172, at 1; U.S. Ends Probe of Thai Enforcement of Copyrights, but Continues Monitoring, supra note 172, at 5. See also Pornpimol Kanchanalak, Bush, Anand to Discuss Probe on Copyright Issue, BANGKOK POST WKLY. REV., Dec. 20, 1991, at 20.

\textsuperscript{176}. USTR's 301 Copyright Investigation Against Thailand Over, Hills Says, supra note 172.

\textsuperscript{177}. Section 301 Complaint Filed Over Drug Patent Protection, IP ASIA, Mar. 21, 1991, at 24; Pharmaceutical Industry Files Petition Against Thailand Over Patent Protection, 8 Int'l Trade Rep. (BNA) 200 (Feb. 6, 1991). This petition is part of a worldwide strategy used by drug companies to increase patent protection and combat generic drugs. See Julio Nogués, Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries, J. WORLD TRADE, Dec. 1990, at 81.
initiate an investigation.\textsuperscript{178} The PMA complained in its petition\textsuperscript{179} that the existing Thai Patent Act specifically excluded pharmaceutical products;\textsuperscript{180} that the patent term of fifteen years was too short; that the compulsory licensing provisions were excessively broad; and that the Thai law contained unsatisfactory working requirements.\textsuperscript{181} The U.S.-based PMA companies estimated that they suffered losses of between $16 and 24 million in 1988 alone because of inadequate patent protection in Thailand.\textsuperscript{182} The Section 301 complaint followed a similar complaint made in 1987 that had resulted in the reduction of benefits available to Thailand under the GSP program.\textsuperscript{183}

Thailand's basic position on pharmaceuticals was that new legislation would be introduced to amend the Patent Act, but that the new legislation would reflect the standards adopted at the Uruguay Round of negotiations.\textsuperscript{184} However, the Thais agreed to implement temporary measures to ease U.S. concerns, pending finalization of the Uruguay Round.\textsuperscript{185} The United States found the proposed interim protection unacceptable.\textsuperscript{186}

In February 1992, revisions to the Patent Act, designed to meet some of the U.S. complaints, were enacted.\textsuperscript{187} The revisions provide that the Patent Act will include pharmaceuticals and that the length of protection will be extended to twenty years.\textsuperscript{188} The proposed revisions include a grace period of 180 days before the legislation takes effect.


\textsuperscript{179} \textit{Id.} \textit{See Pharmaceutical Industry Files Petition Against Thailand Over Patent Protection, supra note 177.}


\textsuperscript{181} \textit{See} O'Neill, \textit{supra} note 135, at 609. For a general discussion of compulsory licensing and working requirements, see W. R. Cornish, \textit{Intellectual Property} 205-07 (2d ed. 1989).


\textsuperscript{185} O'Neill, \textit{supra} note 135, at 619.

\textsuperscript{186} O'Neill, \textit{supra} note 135, at 619.


although there are significant feelings in Thailand that the grace period should be four years.\textsuperscript{189}

U.S. reaction to the proposed Patent Act amendments has been one of disappointment.\textsuperscript{190} In March 1992, the USTR concluded its Section 301 investigation of Thai patent protection for pharmaceutical products, determining that Thai patent protection was deficient and created a burden or restriction on U.S. commerce. However, considering the then-pending Thai election, punitive action or negotiations were to be delayed.\textsuperscript{191}

Special 301

In 1991, Thailand became one of three countries identified as a priority country under Special 301 for its failure to enforce copyrights and for deficient patent protection for pharmaceuticals.\textsuperscript{192} Given that the USTR was already conducting two investigations under Section 301, no new investigation was launched.\textsuperscript{193} The effects of the designation were to extend the time for negotiation and to highlight the impatience of the USTR with Thailand's slow pace of change.

The Thai government reaction was reserved.\textsuperscript{194} Then Prime Min-


\textsuperscript{190} U.S. TRADE REPRESENTATIVE, 1992 NAT'L TRADE ESTIMATES REPORT ON FOREIGN TRADE BARRIERS 241-43 (1992) [hereinafter 1992 NAT'L TRADE ESTIMATES]; U.S. to Press New Gov't to Amend Patent Law, BANGKOK POST WKLY. REV., Mar. 27, 1992, at 4; USTR Finds Against Thailand on Patents, Delays Action Until After Thai Election, 9 Int'l Trade Rep. (BNA) 478 (Mar. 18, 1992). Thai Deputy Public Health Minister Athasith Vejjajiva has indicated that the patent law revisions should be satisfactory to the United States since they comply with international standards "such as those imposed by Canada which were recently passed in bills." Ministry Urges Delay In Patent Act Protection, BANGKOK POST WKLY. REV., Nov. 1, 1991, at 12.

\textsuperscript{191} 1992 NAT'L TRADE ESTIMATES, supra note 190, at 242; USTR Finds Against Thailand On Patents, Delays Action Until After Thai Election, supra note 190; U.S. To Press New Government To Amend Patent Law, supra note 190.


\textsuperscript{193} USTR Designates China, India and Thailand Most Egregious Violators Under Special 301, supra note 192; USTR Names India, Thailand and PRC as Priority Foreign Countries, IP Asia, May 30, 1991, at 10-11.

\textsuperscript{194} Alerts and Updates, IP Asia, July 6, 1989, at 14. The article states: "Thailand has taken strong objection to what it sees as U.S. bullying tactics on the issue of intellectual property rights;
ister Chatichai Choonhavan was unconcerned about U.S. threats, taking the view that what the United States did not buy, Japan would.\textsuperscript{195} Current Prime Minister Anand Panyarachun's more circumspect stance has been to recognize that the United States is now Thailand's largest export market and a world economic power, while at the same time indicating that the national interest must come first.\textsuperscript{196}

While it is difficult to compare how discussions have progressed between the United States and the priority countries identified in 1991 under Special 301, it seems apparent that talks with Thailand have been more fruitful than talks with India. India and the United States were reportedly near a compromise on patent protection,\textsuperscript{197} although India has continued as a priority country in 1992 and recent talks have not been fruitful.\textsuperscript{198} The United States was considering trade sanctions against the People's Republic of China (PRC), the other 1991 priority State, following a breakdown of talks on improving the intellectual property protection for U.S. products in China;\textsuperscript{199} however, a last minute compromise has apparently been worked out.\textsuperscript{200} The PRC was not listed as a priority country in 1992, although Taiwan was.\textsuperscript{201} Taiwan and the United States have recently reached an agreement on the protection of intellectual property rights.\textsuperscript{202}

In 1992, Thailand continued to be identified as a “priority foreign country” under Special 301.\textsuperscript{203} However, with the political uncertainty following the short-lived Suchinda administration, many aspects of Thai-U.S. relations, including trade law, are on hold. A

far from having the desired effect, the threat of trade sanctions appears to be encouraging a mood of defiance."\textsuperscript{9} Id.


\textsuperscript{196} \textit{USTR Names India, Thailand and PRC as Priority Foreign Countries}, supra note 193, at 10-11.

\textsuperscript{197} Hamish McDonald, \textit{The Late Convert}, FAR E. ECON. REV., Dec. 5, 1991, at 64-65.


\textsuperscript{201} \textit{USTR Cites India, Taiwan, Thailand as Worst Intellectual Property Offenders}, 9 Int'l Trade Rep. (BNA) 784 (May 6, 1992).

\textsuperscript{202} \textit{U.S., Taiwan Reach Key Agreement on Patent, Trademarks, Copyright}, 9 Int'l Trade Rep. (BNA) 1001 (June 10, 1992).

\textsuperscript{203} \textit{USTR Cites India, Taiwan, Thailand as Worst Intellectual Property Offenders}, supra note 201.
deadline of October 1992 has been established by the USTR to review progress on the pharmaceutical patent protection issue.204

**Opposition to Changing Thailand’s Intellectual Property Law**

In 1987, the Thai government responded to U.S. pressure to provide for stronger copyright enforcement and penalties by putting amendments to the Copyright Act before the legislature. However, significant opposition arose to the proposed legislation with a political intensity that resulted in an election, a new coalition government, and a reexamination of the entire copyright issue.205 The strongest opposition came from those arguing that change to Thailand’s intellectual property laws amounted to capitulation to U.S. bullying.206 Two years later Prime Minister Chatichai’s defiance of the United States on the GSP issue was widely supported in Thailand. Thailand accepted cuts in GSP benefits from the United States rather than altering its intellectual property laws.207

The prevailing view in Thailand is that the government should not yield to U.S. pressure on intellectual property rights. For example, the government minister responsible for negotiating with the United States during 1991 was referred to as a “traitor” for allegedly yielding to U.S. demands.208

In the pharmaceutical area, those opposed to change in the Patent Act, such as the Thai Pharmaceutical Manufacturers Association (TPMA), argue that foreign drug monopolies will take over the Thai market and this will lead to higher prices and a reduction in the availability of drugs to the poor.209 Other arguments against the Patent Act amendments can be raised, such as questioning the necessity of increasing intellectual property protection for U.S. nationals when they already hold more patents, trademarks, and copyrights in Thailand than Thais, and bemoaning the increased outflow of royalties to be

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205. See SATHIRATHAI, supra note 1, at 25; O’Neill, supra note 135, at 617-22. Following a change in government there was an unwillingness to reintroduce the revised copyright law. *Impasse On IP Protection, supra* note 195.

206. See O’Neill, supra note 135, at 621.

207. *See supra* note 151.


expected with enhanced intellectual property protection, but these are not significant positions taken by opponents to change in Thailand.

EVALUATING THE SECTION 301 EXPERIENCE

It is tempting to evaluate the Section 301 experience by determining whether its use has led to changes that benefit the United States. However, it is more appropriate to evaluate the Section 301 experience by looking from both the Thai and U.S. point of view. Four specific criteria can be used: short term economics; long term economics; impact on the international regime (GATT); and short term political impact.

Short-Term Economics

From the U.S. point of view, the operation of Section 301 and its threat of embargoes has had an immediate positive economic effect. The Thai cigarette embargo was removed and Thailand's intellectual property laws and practices are being altered to comply with the U.S. demands. U.S. companies can anticipate an immediate economic return. The immediate economic effect in Thailand of changes forced upon it by U.S. use of Section 301 is one of expected increased cost for certain pharmaceutical drugs, increased government expenditures on enforcement of intellectual property law, and loss of monopoly control over cigarettes. There will also be an increase in royalty payments made to the United States because of increased intellectual property protection. The Thais will derive little short-term economic benefit from the changes made in response to Section 301 action.

Moreover, there exists resentment about the one-sided nature of the U.S. Section 301 policy. The United States uses economic coercion to force change on Thailand, yet Thailand can expect no reciprocity from the United States when internal U.S. policies are in question, such as subsidized rice exports that unfairly disadvantage Thai rice producers.

Long-Term Economics

In the long-term, Thailand may be able to see some positive economic impacts from adopting the U.S. recommendations. Free trade, even in cigarettes, from the traditional economic point of view will lead to a more efficient resource allocation.

211. See generally Bhagwati, supra note 25, at 1, 15-28 and text accompanying note 25.
212. See supra note 1.
As an economic matter, some conclude that the protection of intellectual property rights, including patent protection for pharmaceuticals, should lead to substantial long-term benefits in the form of increased investment and developing technology. Moreover, it can be argued that if Thailand is to emerge as one of the newly industrialized countries, its intellectual property laws and practice must be brought into line with those of industrialized countries. The problem is that it is unclear whether industrialization precedes, or follows, intellectual property protection. The prevailing view appears to be that increased intellectual property protection leads to increased investment and economic development. However, it is difficult to reconcile this approach with the experiences of Japan, Taiwan, and Hong Kong. For example, Japan did not recognize certain types of patents until 1975, although today it is one of the strongest supporters of U.S. efforts. As one author has commented:

Though apparently it cost them international respect at the time, the Japanese policy of tolerating the copying of imports appears to have benefitted their economy in the early period of development without producing long-term negative effects. Looking at the Japanese experience, a country presently in the early stages of development might choose a similar course.

It is worth noting that one study determined that the degree of intellectual property rights protection afforded by Thailand matches its current stage of economic development.

Impact on the International Regime

Where the international trading system is weak, as it allegedly is in intellectual property protection and trade dispute resolution, it can be argued that U.S. unilateralism will lead the way in developing new and necessary responses to these issues. Section 301 results in pressure to agree in areas where a lack of international discipline is, in the long term, capable of undermining the entire international trading system.


216. Mackley, supra note 215, at 165.

217. See Rapp & Rozek, supra note 213, at 82.

218. See Hudec, supra note 27, at 151-53.
As evidenced in the U.S.-Thai cigarette dispute, Section 301 forces a foreign country to utilize the GATT dispute settlement process or face U.S. retaliation. While increased use of the GATT dispute settlement process is not inherently bad, the deadlines on GATT adjudication and compliance imposed under the U.S. law are unrealistic.

More importantly, the United States itself does not comply with the standards, nor does it easily accept adverse GATT rulings. Regarding intellectual property, it is argued that a new approach is necessary to increase standards of protection. However, the United States is clearly unhappy with the results that are emerging from the Uruguay Round of negotiations and has shown less interest in an international approach, having realized that certain U.S. laws and practices may have to be altered.

Moreover, the perceived success of U.S. bilateralism has removed some of the urgency for an international solution. Thailand may be able to see the argument that weaknesses in the international trading system, as identified by the United States, must be corrected to strengthen the system. This may be particularly important regarding the rules of GATT, rules which benefit Thailand in securing market access in countries like the United States. Alternatively, Thailand may view the U.S. employment of Section 301 as "aggressive unilateralism" such that use of Section 301 will embolden the United States to disregard the international trade law system whenever it is inconvenient.

**Short-Term Political Impact**

U.S. pressure on Thailand regarding intellectual property protection may have created significant short-term political costs in Thailand. As previously noted, there is significant opposition to Thailand's perceived capitulation to U.S. pressure. The current unelected Thai government is in a position of not having to respond directly to such pressures.

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219. See id. at 138-44. This author notes: "The serious discrepancy between the standards of Regular 301 and the actual legal behavior of the United States..." particularly respecting the implementation of GATT rulings. Id. at 142. He concludes: "The heart of the problem is the tendency of Congress to regard itself as immune from rules it writes for others." Id.


221. See Cottier, supra note 143, at 389.

222. One commentator has noted:

The United States... used to consider a comprehensive deal on TRIPs as one of its priorities. The current U.S. position is perhaps less enthusiastic as Washington increasingly solves many pressing TRIPs issues through bilateral channels.

pressure. With elections coming, a politician’s stance on standing up to U.S. pressure could be important. Moreover, former military leader General Suchinda Kraprayoon expressed irritation with the U.S. government’s perceived meddling in Thai internal matters and has been quoted as saying that the United States was not the “world’s big boss,” and that “if I were the Thai Government, I would not allow the U.S. to treat me this way.” It has been speculated that the United States has softened its stand on Thai intellectual property issues because of the fear that resentment of any U.S. action could lead to greater political instability.

**CONCLUSION**

The United States has relied upon the notorious Section 301 trade remedy in its relations with Thailand on cigarettes and intellectual property. With cigarettes, the threat of trade retaliation was used to obtain the agreement of Thailand to utilize the third party dispute settlement procedures of the GATT to resolve the bilateral dispute respecting Thai import restrictions. The result of the GATT process was a removal of the import barriers to foreign cigarettes. Regarding intellectual property, the threat of trade retaliation has been employed to pressure the Thai government to change its domestic intellectual property laws and practices to benefit U.S. interests.

From the U.S. perspective, Section 301 has been successfully utilized to further its short and long term economic and international interests. However, it is clear that utilization of Section 301 against Thailand has not been without its costs. Resentment of U.S. pressure tactics has created an anti-U.S. political constituency in Thailand where none had existed and has created significant problems for the civilian government as Thailand seeks to regain democratic processes. The resentment is increased because of the one-sided nature of the U.S. action—demanding changes from Thailand without rectifying U.S. inadequacies and GATT inconsistencies that are detrimental to Thai interests. The unilateral nature of the U.S. action does not create confidence in international rules upon which Thailand is dependent.

The perception in Thailand, regardless of how the dispute is portrayed by the United States, is of a stronger, more powerful friend publicly bullying its smaller, more vulnerable partner into complying with unwanted laws and practices. It is a perception that will not be readily forgotten in The Land of Smiles.

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