

The Political Economy of the TRIPS Agreement: Lessons from Asian Countries*

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Intellectual property protection has become one of the most controversial issues in recent years directly reflecting the growing importance of international trade. International protection of intellectual property was a priority topic for negotiation in the Uruguay Round of world trade talks that were concluded on December 15 1993, when parties to the General Agreement on Tariffs and Trade (GATT) signed the "Final Act" embodying the results of their negotiations. The multilateral agreement establishes a new World Trade Organization (WTO) to administer the new multilateral trade system that emerged from the Uruguay Round, and to oversee the implementation of the substantive agreements reached in the Round.

One of these multilateral agreements was the "Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPS). The TRIPS Agreement, which entered into force on 1 January 1995, requires all member states to provide protection for patents, copyright and related rights, trademarks, geographical indications, industrial designs, lay-out designs of integrated circuits, and undisclosed information. As for patent protection, WTO members must accord full protection for any inventions, whether products or process, in all field of technology, including foods, pharmaceuticals, chemicals, microorganisms, etc. However, diagnostic, therapeutic and surgical methods for the treatment of human and animal bodies, animals and plants, and essentially biological processes are explicitly excluded.¹

The main objective of this paper is to provide an overview of the politico-economic implications surrounding the TRIPs Agreement with particular reference to the experience of Thailand.

1. Historical Development of the International Patent System

It is interesting to note that the historical development of intellectual property law, particularly the patent system, is a long one. The first patent statute was enacted by the Venetian State in 1474.²

In England, the Crown issued a monopoly right in the form of "letters patent" for the first time in 1331 to foreigners who wished to practice their craft in the country. The patent system was introduced to encourage the transfer of new technologies and the establishment of new industries. The monopoly right was provided on condition that the holder work his imported invention in the country for a specific time and that the patentee teach the invention to others.³

Subsequently, the monopoly right was abused by the Crown, becoming a source of patronage and revenue rather than an encourage to invent. The 1623 Statute of Monopolies was enacted in order to curb such practices. The Statute declared all monopolies void but with an exception:

"... any declaration before mentioned shall not extend to any letters patent and grants of privilege, for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and

* in Meléndez-Ortiz, R. *et al* (eds.), *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability*, Earthscan, London, 2003, pp.45-56.

¹ TRIPS Agreement, Art. 27.

² Mandich, G. "Venetian Patents (1450-1550)," *Journal of the Patent Office Society*, Vol.30, 1948.

³ Greenstreet, *op.cit.*, at p.6.

first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use ..."

The Statute of Monopolies or the so-called "Magna Carta of the rights of inventors"⁴ is regarded as a landmark of the modern patent system. The basic objectives of the Statute were to encourage industrial activity, employment and economic growth, rather than to reward the "true and first inventor" for his effort. In the early days of the English patent system, the patent-holder was obliged to introduce new trades and to teach the details of his invention to indigenous tradesmen. Until the early eighteenth century, the condition for disclosure changed from the working of the invention to describing it by a written specification. This disclosure was what society gained in exchange for granting the patent to the inventor.⁵

In the United States and France, the first patent laws were enacted in 1790 and 1791 respectively. Apart from the recognition of the inventor's right, the first US patent Act was intended to promote inventive activities for the progress of science and useful arts in accordance with the Constitution.⁶

The 1791 French patent law was passed to respond to "the backwardness of French industry, the threats posed to the French economy by the penetration of English products, and the desire of the French Government to ameliorate the situation of the French industrial worker."⁷ The first French patent law was enacted on the basis that an inventor has "a property right in his invention", and the right of the inventor over his invention was regarded as "one of the fundamental rights of man".⁸

After the Statute of Monopolies was adopted in England, the systematic use of monopoly privileges for inventors gradually spread to other countries and by the end of the nineteenth century several of the present developed countries established their own national patent laws to encourage and reward the invention of new technology.⁹

Although national patent laws became widespread in Europe and North America,¹⁰ legal protection under the patent system was limited to national boundaries. Moreover, the detailed provisions of national patent laws varied considerably in many respects. There was no international treaty establishing common standards of patent protection, and the protection of foreign inventions therefore depended on reciprocity principles under bilateral agreements between nations. This led to uncertainty and insufficiency in protecting foreign intellectual property rights (IPRs).

As industry and commerce among nations increased and became closer, the need was felt for countries to establish international rules setting minimum standards for national patent laws in order to facilitate the acquisition and maintenance of patent protection in different countries.

⁴ Penrose, E.T., *The Economics of the International Patent System*, John Hopkins Press, Baltimore, 1951, p.7.

⁵ Dutton, H.I., *The Patent System and Inventive Activity during the Industrial Revolution 1750-1852*, Manchester University Press, Manchester, 1984, p.22.

⁶ The US Constitution, Art.1, s.8, declares that:

"The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

⁷ UNCTAD, *The Role of the Patent System in the Transfer of Technology to Developing Countries*, TD/B/AC.11/19/Rev.19, 1975, para.228.

⁸ Greenstreet, *op.cit.*, at pp.12-13.

⁹ UNCTAD, *op.cit.*, at para.232.

¹⁰ A patent law was adopted in Russia in 1812; Prussia in 1815; Belgium and the Netherlands in 1817; Spain in 1820; Bavaria in 1825; Sweden in 1834; and Portugal in 1837.

This need was a consequence of two developments. The first was the increasing importance of international trade and investment to the economies of the major industrialised countries. The limitation of patent protection within national boundaries was "an obstacle to the expansion of international economic relations."¹¹ The second was the unsatisfactory situation caused by differences between the patent laws of different countries and the attendant disadvantage at which foreign inventors were placed.¹² For instance, the laws of some countries contained provisions that discriminated against foreigners. Foreign applicants for patents were unable to obtain the same rights and obligations provided in the patent law as the nationals of those countries. The lack of uniformity between national patent laws and the discrimination against foreigners caused problems for economic enterprises operating in several countries.

In 1883, the first international agreement in this area was adopted. The Paris Convention for the Protection of Industrial Property was adopted in 1883 and came into force the following year.¹³

Since then, the Paris Convention has been revised six times, most recently in 1967.¹⁴ The Paris Convention is a multilateral arrangement that continues to serve as a systematic framework for the international protection of industrial property. It is indeed the precursor of modern international protection system for industrial property protection.

2. The Development of Patent Law in Asia

In Asia, the legal systems of many countries were heavily influenced by colonisation. With the exception of Japan and Thailand, most Asian countries were colonized by Western countries and this led to the import of legal culture from the West during the colonial era. The Philippines, for example, established laws to protect IPRs under Spanish rule and overhauled its intellectual property systems after its colonisation by the US. Indonesia introduced intellectual property laws whilst a colony of the Netherlands. In Singapore and Malaysia, intellectual property laws were largely modeled on the British system, and common law still has a major influence on the legal systems of both countries. China and Taiwan set up their intellectual property systems from scratch and have recently tried to improve them to comply with TRIPs.¹⁵

Unlike other Asian countries, Japan and Thailand never endured colonial rule, and their intellectual property laws were not imposed by colonial powers. Both countries designed their patent systems to accelerate industrial production and trade expansion. Japan, among other Asian countries, has the longest tradition of patent protection. The introduction of the patent system in 1885 was a component of its economic development strategy. Since then, industrial property rights have become a vehicle for industrial policy and become the driving force behind Japan's remarkable economic success.¹⁶

Thailand has experienced a relatively short period of legal development in the field of industrial property compared to Japan and many developed countries. Although establishing a patent system was first considered in 1913, there was no legal protection for inventions until 1979. The first Thai patent law, called the "Patent Act B.E. 2522", came into effect on 12 September 1979.

¹¹ Anderfelt, U., *International Patent-legislation and Developing Countries*, Martinus Nijhoff, The Hague, 1971, p.65.

¹² Yankey, G.S., *International Patents and Technology Transfer to Less Developed Countries*, Gower, Aldershot, 1987, p.60.

¹³ Ladas, *op.cit.*, at pp.60-84; Penrose, *op.cit.*, at pp.45-48.

¹⁴ For a history of these revisions see Anderfelt, *op.cit.*, at pp.72-92.

¹⁵ Heath, C. "Intellectual Property Rights in Asia – An Overview," 28 IIC 305 (1997).

¹⁶ *Ibid.*

The reason for the enactment of a patent law in 1979 was to enhance industrial and economic development, and facilitate the transfer of technology from overseas.

In the post-colonial period, many countries in Asia decided to replace their existing laws with new patent rules in order to reduce dependence on their former colonial masters. After the TRIPS Agreement, many countries again completely overhauled their intellectual property laws in compliance with the requirements of TRIPS. As this article explains, this was triggered by external influences, especially intensive Western and US pressure.

3. The Negotiating History of the TRIPs Agreement

Intellectual property was incorporated into the Uruguay Round of GATT talks because some advanced member nations, in particular the US, held that the protection of IPRs was an essential component of their international trading interests and a vital element in their economic success. Developed countries became more and more concerned that IPRs owned by their enterprises, such as patents, copyrights, and trademarks, were being widely infringed in foreign countries, particularly in the Third World. The growth of counterfeit products both at home and foreign markets created problems for the developed countries' industries. The main industries affected by IPR violations generally were those dealing in high technology, luxury goods, and the entertainment industry.

It was also contended that the lack of adequate protection and enforcement of IPRs in the Third World had led to serious distortions and increasing damage to world trade.¹⁷ For example, it was estimated by the US International Trade Commission that the percentage of international trade involving IPRs had grown dramatically, and had more than doubled since the Second World War. It was also claimed that the US had lost between \$US 43 to \$US 61 billion in 1986 due to foreign counterfeiting and product piracy.¹⁸

This situation led enterprises, whose competitiveness directly depended on IPR protection, to put considerable pressure on their governments. They called for the improvement of international standards and the enhanced protection of IPRs worldwide.

The enforcement of intellectual property laws is basically limited to each national jurisdiction. This territorial limitation renders the domestic laws of states inadequate to protect innovators from unauthorised imitation in a foreign country. The basic inadequacy of these international conventions lies in the lack of national enforcement of intellectual property protection and the absence of dispute settlement mechanisms.¹⁹

In addition, the substantive standards of protection in the existing agreements are too narrow to deal with some crucial areas of modern technological advances such as biotechnology, computer software, and semiconductor chips. The Paris Convention, for example, contains no specific requirement for its member parties to provide patent protection.²⁰ The members, therefore, are free to determine their own level of protection according to the level of national development.

¹⁷ GATT, Report on the Group of Experts on Trade in Counterfeit Goods, L/5878, 9 October 1985, p.3.

¹⁸ USITC, Foreign Protection of Intellectual Property Rights and the Effect on US Trade and Industry, Pub.2065, Inv. No.332-TA-245, 1988; Slaughter, J. "TRIPS: The GATT Intellectual Property Negotiations Approach their Conclusion," [1990] 11 EIPR 418.

¹⁹ It is, however, argued by Kunz-Hallstein that the Paris Convention does have a dispute settlement mechanism. That is the enforcement procedure under the general rules and principles of international law. See Kunz-Hallstein, H.P. "The US Proposal for a GATT-Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property," in Beier, F. and G. Schricker (eds.), GATT or WIPO?: New Ways in the International Protection of Intellectual Property, IIC Studies, VCH, Weinheim, 1989, p.91.

²⁰ *Ibid.*, at p.90.

It is worth noting that in the 1973-79 Tokyo Round of multilateral trade negotiations, there was an attempt to adopt a code on trade in counterfeit goods, but it failed. The proposal was rejected because there was widespread belief among then GATT members that intellectual property issues should not come under the jurisdiction of GATT which had till then basically dealt with freeing up international trade in goods. It was argued that IPR protection was not directly concerned with international trade, and there was no evidence of the trade implications of the counterfeiting. Developed countries led by the US, attempted to counter this response by arguing that technology and intellectual property had now become international in character, and were now directly involved in many aspects of international business transactions, in particular trade in counterfeit products.

Bringing IPRs into GATT would provide a vehicle for the international enforcement of IPRs by increasing the scope for imposing meaningful sanctions, and resolving disputes through the GATT dispute settlement mechanism. Developed countries firmly maintained that strengthening international and national protection of IPRs would help governments to reduce the widespread circulation of copied goods, which seriously distorts legitimate trade.²¹ For this reason, the intellectual property issues should be brought into the ambit of GATT, so that international efforts could be targeted at the trade-related aspects of IPRs, not on intellectual property *per se*.²²

During the TRIPs negotiations, the US maintained principally that effective and adequate protection must be given to inventions in any technological field including some particular products which were often excluded from protection in many of the developing countries' patent laws.²³ These included foods, chemicals, biotechnology, and pharmaceutical products. However, the EC proposal in this respect was less stringent than that of the US, as it excluded the patenting of plants and animal varieties, and essentially biological processes for the production of plants or animals.²⁴

The particular concern of many developing countries is that these products, particularly pharmaceuticals and crop seeds, are basic requirements for their deprived populations. Stricter IPR protection would increase monopoly power of the right holders, generally foreign firms, and this might lead to overpricing and restricted supply of those essential products in their countries.²⁵ In addition, because the Third World nations view scientific and technological advancement as the vehicle for industrialisation and economic development, the improvement of international standards and the strengthened national protection of IPRs, in their view, might increase the cost of modern technologies because of the inherent monopoly feature of the IPRs and the possible abusive practices of the patent-holder.

Developing countries maintained that the TRIPS negotiations should come up with proposals to achieve developmental goals, by promoting long-term economic and industrial development and technology transfer in each individual country to a greater extent than providing exclusive privileges as a reward to the creator.

²¹ Mossinghoff, G.J. "The Importance of Intellectual Property Protection in International Trade," Boston College International & Comparative Law Review, Vol.7 No.2, 1984, p.236.

²² Deardorff, A.V. "Should Patent Protection be Extended to all Developing Countries?," The World Economy, Vol.13 No.4, 1990, p.498.

²³ GATT, Suggestion by the United States for Achieving the Negotiating Objective - Revision, Doc. MTN.GNG/NG11/W/14 Rev.1, 1988.

²⁴ GATT, Guidelines and Objectives Proposed by the EC for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights, Doc. MTN. GNG/NG11/W/26, 1988.

²⁵ Kosteci, M.M. "Sharing Intellectual Property between the Rich and the Poor," [1991] 8 EIPR 271-274.

Apart from their national economic sovereignty, another concern of developing countries is directed at their socio-economic development. Developing countries have often suffered from the weakening prices of raw materials, foods and semi-manufactured products, which are their main foreign exchange earners. The acceleration of the development of their economies, therefore, depends on industrial and technological progress, which has been the driving force behind the developed countries' economic success, in order to diversify their exports. However, it should be accepted that the current economic imbalance between the two parties is the main obstacle to the developing nations' development in science and technology. Strengthening legal protection of IPRs, regardless of specific needs and social priorities of each country, may sharply reduce the developing countries' industrial and technological competitiveness and will give rise to stronger dependencies on the more powerful economies.

4. The United States' trade laws and intellectual property protection

The United States Trade Representative (USTR)²⁶ had requested consultations with some developing countries in Asia and Latin America on IPR issues before and during the Uruguay Round. On the bilateral level, the US demanded a higher degree of IPR protection from its trading partners. This strategy, it was hoped, would improve the possibility of achieving favourable results in the multilateral trade negotiations.

The US employed (and continues to employ) such bilateral strategies as placing tremendous pressure on certain foreign governments to give greater respect to the protection of IPRs by withdrawing, or threatening to withdraw, trade preferences under the Generalised System of Preferences (GSP). Moreover, the US trade legislation, Special 301 of the Omnibus Trade and Competitiveness Act of 1988, has been used as a coercive economic measure for the fulfillment of demands on IPR protection. The relevant legislations are now discussed in detail.

4.1 The generalised system of preferences

The GSP is a scheme established under the GATT umbrella. It is designed to assist industrial and economic development of developing nations. Generally speaking, the GSP allows advanced industrial countries to accord priority to reducing or eliminating duties and other barriers for certain products from eligible developing countries with a view to ensuring that developing countries expand access to world markets and to markets of granting nations.²⁷

The US implemented its own scheme of generalised and non-reciprocal treatment in favour of developing countries.²⁸ The GSP programme was adopted as part of US domestic legislation in 1974,²⁹ which was subsequently amended by the Trade and Tariff Act of 1984.³⁰ The Trade Act confers authority on US President, under the guidelines provided in the Act, to designate whether a country will be classified as a "beneficiary developing country" to receive GSP benefits, what products are eligible, and what conditions should be attached. However, a

²⁶ The USTR is a central organ of the U.S. whose responsibility is to implement the US trade policy. The USTR, which is appointed by the President on the approval of the Senate, is conferred a right to enter into international negotiations with all trading partners. See Mesevage, T. "The Carrot and the Stick: Protecting U.S. Intellectual Property in Developing Countries", *Rutgers Computer & Technology Law Journal*, Vol.17, 1991, p.428 footnote 37.

²⁷ Agarwala, P.N., *The New International Economic Order*, Pergamon Press, New York, 1983, p.175. For additional discussion of the GSP concept see Nicolaidis, P. "Preferences for Developing Countries: A Critique", *J.W.T.L.*, Vol.19, 1985, pp.373-386.

²⁸ For reasons of the US Government in implementing the GSP scheme see Hirsch, F.A. "Renewal of the GSP: An Explanation of the Program and Changes made by the 1984 Legislation", *Vanderbilt Journal of Transnational Law*, Vol.18 No.3, 1985, pp.629-634.

²⁹ Trade Act 1974, Title V, Pub. L. No.93-618, 88 Stat.1978.

³⁰ Pub. L. No.98-573, 98 Stat.2948.

developing country that fails to reach the US standards on intellectual property protection may be deemed ineligible for US duty-free benefits. The withdrawal of Thailand's GSP status is a good example of US practice.

In January 1989, as recommended by the USTR, President Reagan decided to withdraw the 1989 GSP benefits from Thailand's 8 export items on the ground of failure to provide an adequate and effective protection of IPRs. Again, in May 1991, the USTR used the GSP to combat Thai government IPR policies by removing preferential status from 17 export items. It is interesting to note that Thailand's GSP privileges in the US market are quite considerable. For example, in 1989, 23 per cent of its total exports to the US gained GSP benefits or equivalent to \$US 1,200 million.³¹ Therefore, the suspension of GSP status generated significant negative economic impacts.

From the foregoing, it can be argued that although the GSP programme was designed to encourage the economic and industrial development of developing countries by introducing the "non-reciprocity" standard, its application has produced the opposite effect. Legal features of the GSP and its economic significance are now examined.

First, the main feature of the GSP is "permissive and not mandatory".³² This means that the donor country is not subject to any binding obligation, and that it may withdraw trading privileges at any time. Developed nations may introduce the scheme if they wish. The preferential benefits are unilateral concessions of the granting country. In withdrawing the concessions, the granting nation, therefore, is not liable to pay any compensation or any retaliatory measure.³³

Secondly, since the term "least developed countries", which can enjoy GSP benefits, is not clearly defined, the donor nation may lay down its own criteria to identify whether a country should be qualified for preferential treatment, and what condition should be attached. For example, the US trade law provides a "minimum competitive needs limit" principle. The idea of the minimum competitive needs limit is to impose a ceiling on imports from a particular country. This means that an exporting country can be easily excluded from the US preferential scheme when its total exports reach the ceiling stipulated by the law.

Thirdly, according to the graduation concept introduced in the Tokyo Round of GATT negotiations, when developing countries reach a certain level of economic development, trade preferences granted to them will be terminated. This means that after a developing country has reached the stage where it is no longer ranked as a least developed country, it should not be entitled to preferential treatment and it must be subject to the same obligations as other developed nations.³⁴ However, as for the possibility that developing countries can make reciprocal concessions by abandoning preferences, there are no criteria to evaluate the economic development of the developing countries.³⁵ The solution to the problem, therefore, seems to be a decision taken by the donor. This could be seen when the US decided to unilaterally withdraw the GSP status from Singaporean exports on the ground of graduation. Although Singapore had yielded to the US demand by enacting its Copyright Act in 1987, its GSP was still revoked.

³¹ Official Statistic of U.S. Department of Commerce, 1990.

³² Hudec, *op.cit.*, at p.64; and Kofele-Kale, N. "The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System", *California Western International Law Journal*, Vol.18, 1988, pp.303-304.

³³ Hudec, *ibid.*

³⁴ For details of the graduation concept see *ibid.*, 196-198, and Frank, I. "The 'Graduation Issue' for LDCs", *J.W.T.L.*, Vol.13, 1979, pp.289-302.

³⁵ Hudec, *op.cit.*, at p.64.

Fourthly, since the structure of GSP is based on the unilateral discretion of the donors, it is obvious that the superior position of the granting country will serve the interests of the more economically powerful countries by allowing them to press another condition on a recipient in exchange for the GSP. This is seen in the US Trade Act which links the GSP not only with intellectual property but also with other issues such as foreign investment, international terrorism, trade in narcotics, etc.³⁶ Even though the recipient country yields to the US demand by modifying its intellectual property law, it is possible that the US may demand some further condition for retaining GSP status.

Fifthly, the GSP seems to be designed to assure the technically, uninterrupted supply of cheap products to advanced nations. This is reflected in the unilaterally discretionary power of granting states to select a recipient country. Why should there be such a preference for eligible countries if there is truly equality amongst trading nations?

The above discussion demonstrates the febleness of the GSP, which has often been used politically as a bargaining tool rather than to promote economic development. Although developing countries want to gain benefits from trade preferences, in order to accelerate their economic development, this expectation is still doubtful. For this reason, increased national protection of IPRs should be made on the basis of its contribution to national technological and economic development, rather than in exchange for the uncertain benefits of the GSP.

4.2 The US Omnibus Trade and Competitiveness Act of 1988

The key mechanism to combat the infringement of US IPRs is established under a special provision of the Omnibus Trade and Competitiveness Act of 1988 called “Special 301”.³⁷ The 1988 Act was passed by US Congress to modify the Trade Act of 1974 to strengthen US retaliatory power. Congress believed that the new trade legislation would reduce foreign unfair trade barriers and persuade foreign governments to reform their intellectual property laws for the benefits of US commerce.

According to the procedures under Special 301, the USTR is required to investigate cases on an annual basis against those countries that “deny adequate and effective protection of intellectual property rights”. Annually, the USTR is required to submit a report called the National Trade Estimate Report to the Congress as to foreign acts, policies, or practices that are significant barriers to or distortions of trade, including the estimation of their economic impact on US commerce. Within 30 days after the submission of the National Trade Estimate Report to the Congress, the USTR has an obligation to assess the adequacy and effectiveness of foreign nations’ laws to protect IPRs. In addition, the USTR must identify “priority foreign countries” that fail to provide adequate and effective protection of IPRs or deny market access to US exports. The identification must be conducted on the initiation of the USTR, but may be exempted if the USTR considers that the identification would be detrimental to US economic interests.³⁸

Since the 1988 Trade Act became law, the USTR has created three lists for those foreign countries which fail to meet the US standards on intellectual property protection. The lists are, (a) priority foreign countries, (b) a priority watch list, and (c) a watch list. The countries put on the lists are subject to trade retaliation from the US.

³⁶ See Trade and Tariff Act 1984, ss.501 and 502.

³⁷ Omnibus Trade and Competitiveness Act 1988, 102 Stat. 1164-76, 1179-81, 1988.

³⁸ Bliss, J.C. “The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response”, Law & Policy in International Business, Vol.20, 1989, p.523.

The 1988 Trade Act allows the USTR to identify those countries whose practices are deemed to constitute barriers to US commerce, as well as to conduct an investigation concerning the practices. The USTR also enjoys a full authority to take any action it deems appropriate to retaliate against the foreign country concerned. This means that in considering each case the USTR will act as investigator, prosecutor, judge, and executioner all at the same time. There is no doubt that nothing guarantees other countries' rights when they are charged under the US Trade Act. The final solution to a dispute, therefore, seems to depend on the bargaining power of the parties concerned.

It is clear from the foregoing discussion that the US trade law is designed as a powerful tool to enable the US administration to enforce US rights and to scale down foreign trade barriers. However, the imposition of trade leverage is incompatible with WTO's substantial provisions for settlement of dispute among parties, which requires a Contracting Party to request consultations with the other party concerned to resolve the dispute before trade concessions can be suspended.

The use of economic coercion by the US under whatever guise amounts to a clear contradiction of WTO principles. In practice, US restrictive trade practices constitute more of a distortion to free trade than the purely domestic policies of many developing countries trying to participate in the international trading system. Undoubtedly, national laws are only operational within a country's territorial jurisdiction, but when such laws violate internationally acceptable conventions and treaties, they debase the sense and spirit of international co-operation. This is a more accurate interpretation of the provision of Section 301 in the present circumstances.

4. Protection of IPRs in Asian Countries

It is worth noting that distrust of IPRs is still deep-rooted in many Asian countries. They view them with suspicion and believe that their introduction on the basis of high standards of protection would include a fairly high risk. In addition, the protection of IPRs seems to clash with the traditional social or religious beliefs of those countries. According to their cultural traditions, most Asian countries consider intellectual property as a communal good. For example, according to the Confucian ethic, "copying is widely practiced, as a legitimate means of learning and sharing."³⁹ Because of these different ideologies, Asian countries provided a lower level of IPRs protection. For example, India, Korea and Thailand did not protect pharmaceutical products. In India, process patents for pharmaceuticals only lasted for five years.

The US responded to the problem posed by the apparent loss of revenues due to counterfeit goods by imposing considerable governmental pressure on a number of countries in Asia. Several Asian countries, including Thailand, Indonesia, Malaysia, the Philippines, Singapore, Taiwan, and the Republic of Korea, were viewed by the US as primary sources of IPR piracy.

The USTR, due to the lobbying of certain national industries, demanded the tightening of domestic legislation in Asian countries through bilateral consultations.⁴⁰ It also placed tremendous pressure on these countries by withdrawal, or threatening to withdraw trade preferences under the Generalised System of Preferences (GSP) from imports of those countries. Special 301 of the Omnibus Trade and Competitiveness Act of 1988 was also used as a coercive

³⁹ Wineburg, A. "Why the US Shouldn't Expect China to Honor Intellectual Property Rights Agreements," Chicago Tribune, 13 March 1995, Cited in Rosen, S. and C. Husisian "The Ascent of the Intellectual: How the US Moved to Protect American Intellectual Property Rights in China," [1995] 2 INT.TLR 55.

⁴⁰ Gadbow, R.M. "Intellectual Property and International Trade: Merges or Marriage of Convention?," Vanderbilt Journal of Transnational Law, Vol.22, 1989, pp.227-230. Note that the European Community also used its GSP benefits to encourage some countries to provide adequate IPRs protection, e.g. the withdrawal of Korea's GSP status and privileges in 1987.

economic measure. In the early 1990s, the USTR put several Asian countries on its watch list for trade retaliation.

The USTR requested consultations with countries in Asia on IPR issues before and during the Uruguay Round.⁴¹ The use of bilateral trade pressure against such countries helped the US to achieve the aim of IPR protection. For example, many Asian countries introduced legislation to bring their intellectual property laws into conformity with the norms and standards demanded by the US even before the conclusion of the Uruguay Round. This strategy also led to the establishment of an acceptable framework within the multilateral trade negotiations of an agreement on minimum IPR standards that became the TRIPS Agreement.

Although many Asian countries had identical experiences, the case of Thailand will be discussed in detail as an illustration. From the late 1980s, Thailand's exports had experienced rapid and sustained expansion. The performance of Thai products in international markets was highly successful. Thailand enjoyed the distinction of being the world's fastest growing economy until it faced economic crisis in 1997. Thailand's major trading partners are the US, Japan, the EU, and the countries of the Association of Southeast Asian Nations (ASEAN). Among those countries, the US is Thailand's most significant trading partner.

Thailand's trade balance with the US was regularly in deficit. It was not until 1985, that Thailand succeeded in transforming a visible trade deficit with the US into a favourable balance of trade with the US.

The loss of trade balance raised concerns in the US. In order to achieve a reduction of its foreign trade deficit, the US Administration decided to use trade leverage against Thailand along with other Asian countries. In 1989 and 1991 the US removed GSP privileges from some Thai export products on the grounds of alleged inadequate protection for copyrights and pharmaceutical patents.

Due to Thailand's lack of effective enforcement, it was claimed that in 1988 US copyright owners had lost revenues estimated at \$US 61 million due to piracy.⁴² In the case of patents, the failure of Thailand to provide patent protection for pharmaceutical products had, it was claimed, severely affected US drug producers. As estimated by Mossinghoff, patent and trademark infringements in Thailand added up to huge losses of trade and income, almost \$US 2,000 million, for 10 US pharmaceutical companies.⁴³

The USTR called for consultations with Thailand on this matter. A meeting between the two countries was held in Amsterdam on 22-24 April 1991, in which the US made three demands. First, Thailand must modify its copyright, trademark and patent laws, in order to protect some particular products such as pharmaceuticals, computer software, living organisms, etc. Secondly, the term of patent protection must be longer than that provided in the existing law. This included the extension of the protection period from 15 years to 20 years and backdated protection for drugs already invented but not yet licensed for use in Thailand (this is known as 'pipeline protection'). Finally, the US called for tighter penalties and elimination of provisions designed to prevent abuse of monopoly power arising from patent protection, particularly compulsory licensing.

⁴¹ This led to the adoption of bilateral agreements on IPRs between US and some Asian countries, such as US-China Agreement on Protection of Intellectual Property of 1995.

⁴² International Intellectual Property Alliance, *Trade Losses Due to Piracy and Other Market Access Barriers Affecting the US Copyright Industries*, 1988, p.97. Cited in Lepp, A.W. "Intellectual Property Rights Regimes in Southeast Asia," *Journal of Southeast Asia Business*, Vol.6 No.4, 1990, pp.32-33.

⁴³ Mossinghoff, G.J. "Drug Trade Seeks Leverage on Patents," 238 *Chem. Marketing Report (IAC)*, Oct.1990, p.5.

Thailand, along with India and China, was named by USTR as a priority foreign country under Section 301 of US Omnibus Trade and Competitiveness Act of 1988, subject to trade retaliation. This led the Thai Government to meet US demands in the hope of avoiding retaliation because it was realised that the US market is an essential part of Thailand's economic success.

As to copyrights, Thailand and the US could reach a compromise on the computer software issue by deferring the legal ambiguity of such protection under the Thai Copyright Act to be tested in Thai courts.⁴⁴ However, under great pressure from the US, Thailand then decided to amend its copyright law in 1997 by adopting Copyright Act B.E. 2537. The new law provides protection for computer programs and databases in line with the TRIPS standards. In addition, the Thai Government has enforced the Copyright Act more vigorously. A large number of copyright cases were successfully prosecuted, and the average penalties for such illegal practices have substantially increased.

In the cases of trademarks and patents, Thailand decided to adopt two laws, Trademark Act B.E. 2534 and Patent Act B.E. 2535. The new Thai Patent Act extends patent coverage to pharmaceutical products, microorganisms, biotechnological processes, food, drink, and agricultural machinery. The new law also provides a longer period of protection than the previous law by extending the patent term from 15 years to 20 years.

It is worth noting that the attempts to amend the patent law were attacked by many domestic interest groups, and academicians, on the grounds that the law yielded too much to the US demands, and that the amendments would cause adverse effects on indigenous industries and the well-being of the poor.

The above discussion demonstrates the US determination to tighten its trade policy to combat what it considers to be foreign trade barriers, including a lack of adequate IPRs protection, viewed as the main source of the trade balance crisis. The US Trade Act, including its well-known Special 301, is often used to influence domestic legislation in foreign countries to comply with its policy. Due to the economic dominance of the US, such countries have no option but to surrender, in order to avoid serious retaliatory trade actions if the US decides to invoke the full weight of Section 301.

5. Appraisal

The introduction of TRIPS into the Uruguay Round of global trade talks, combined with the use of GSP benefits and Section 301 of the trade Act to coerce developing countries, indicates the attempts of world economic superpowers, like the US, to shield their national interests, regardless of the international rules and the resulting damage to the economies of other countries.

In an attempt to impose a high level of IPR protection on other countries' statutes, it is clear that the US intends to use its own standards as the international minimum standards for other countries' intellectual property laws. This approach is wrong, unreasonable and impracticable because it ignores fundamental elements of the greatly differing socio-economic environment in other countries. It should not be forgotten that countries differ in their social values, cultures, philosophy, and level of economic growth and industrial development. The perceptions of countries as to the violation and protection of individual properties cannot always be identical. Any international framework must, of necessity, take these differences into consideration.

⁴⁴ Sathirathai, S., *Thailand and International Trade Law*, Swicharn Press, Bangkok, 1987, p.25.

In accordance with the self-determination principle of international law, every state has a right to choose its political, economic, social and cultural systems.⁴⁵ This notion has been recognised by the Paris Convention as it grants participants considerable discretion in determining criteria and degree of industrial property protection in accordance with their stage of development and public policy.⁴⁶

It may be noted that the GATT operation is based on the policy of expansion of world trade through negotiations to reduce tariffs and other non-tariff barriers, and the countries cannot apply any safeguard measures to protect their own domestic industries, except in particular circumstances.⁴⁷ The inclusion of IPRs, which is basically based on protectionism, seems to be inconsistent with the spirit of the international trade regime.⁴⁸

Given the negotiating history of the TRIPs Agreement, it is doubtful as to the possibility of complete and absolute liberalisation as many nations, including developed countries, are advocating, especially when TRIPS became part of the international trade rules. The two are incongruent. Liberalisation means non-protectionism, while IPRs presuppose protectionism. Undoubtedly, the attempt to include IPRs in GATT/WTO underscored the desire of the advanced economies to have, at the same time, an open option between the two contrasting ideas whichever suit their interest.

While technologically advanced economies are calling for the increased protection of IPRs, the poorer countries seem to prefer negotiations towards domestic development objectives. These two opposite philosophies regarding the free trading system, technological development and moral rights are fundamental. It seems most likely that a satisfactory solution to this problem will never be attained.

The position adopted by the US, especially as regards GATT/WTO and the USTR, will in the long run affect free trade among nations. This is not only going to be between developing countries and the US, but also between developed countries. This may partly explain the difficulties with the French farm subsidies during the Uruguay Round negotiations. While the US may be relying on its domestic laws, the spirit of the international trading system is gradually being eroded as a result. The linkage between international trade and IPRs protection if strongly canvassed by the US, will no doubt further erode the very principles of GATT/WTO. While they may be related, WTO and IPRs protection should be accorded special treatments for the prevalence of better world trading system, rather than solely protecting national interests of particular states.

⁴⁵ Dhanjee, R. and L.B. Chazournes "Trade Related Aspects of Intellectual Property (TRIPS): Objectives, Approaches and Basic Principles of GATT and of Intellectual Property Conventions," J.W.T., Vol.24 No.5, 1990, p.6.

⁴⁶ The US policy on copyright was also based on this principle. For a century, the US was the largest source of copied books and artistic works, as it declined to join the Berne Convention. One of the reasons for US refusal was that American creators had already been able to enjoy a high degree of protection in foreign countries, without offering reciprocal protection to foreigners. Despite the lack of US participation in international agreements, its nationals obtained copyright protection abroad through the "back door" by publishing their works first or simultaneously in a member-state of the Berne Convention such as Canada. (Benko, R.P., *Protecting Intellectual Property Rights: Issues and Controversies*, American Enterprise Institute for Public Policy Research, Washington D.C., 1987, pp.5-7) To date, while it continues to call for foreign improvement of intellectual property protection, the US has just decided to join the Berne Convention to provide a high level of protection to alien authors in their literary and artistic works in the late 1980s. (Reichman, J.H. "Intellectual Property in International Trade: Opportunities and Risks of GATT Connection," *Vanderbilt Journal of Transnational Law*, Vol.22, 1989, p.865)

⁴⁷ For example see GATT, Art.XIX.

⁴⁸ Deardorff, *op.cit.*, at p.498.