THE INTERNATIONAL MOVEMENT ON PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND GATT: AN ANALYSIS OF THAILAND'S POSITION*

This article surveys the current international movement on the protection of intellectual property rights and its impact on developing countries, in particular Thailand.

THIS paper presents an overview of the international movement on the protection of intellectual property rights particularly as related to the General Agreement on Tariffs and Trade (GATT). This paper is divided into four sections, namely, the development of intellectual property (IP) issues in GATT; the trend in bilateral negotiations on IP, factors to be considered in formulating Thailand's position and a conclusion. The first section analyses the present GATT provision on IP rights and discusses the reasons which led to the inclusion of IP issues in the agenda of the Uruguay Round of GATT Multilateral Trade Negotiations. The next section analyses the trend in bilateral negotiations with an emphasis on the protection of patent rights. Sections I and II raise points which are applicable both to Thailand and other developing countries at large. Section III analyses factors and strategies which are necessary to establish the basis of policy formulation in Thailand for the IP protection negotiations.

I. DEVELOPMENT OF INTELLECTUAL PROPERTY ISSUES IN GATT

In the General Agreement on Tariffs and Trade, there is at present only Article 20 (d)[1] which prescribes the most explicit rules relating to

* This article has its roots in a paper entitled "Some Aspects of International Movement on Intellectual Property and GATT", presented at the *Seminar on Pharmaceutical Patents for Developing Countries*. The Seminar was organised jointly by the International Organization of Consumers Unions, Regional Office, Penang, the Chulalongkorn University Social Research Institute Bangkok, the Co-ordinating Committee for Primary Health Care of Thai NGOs and the Drug Study Group, Bangkok. The Seminar was held at the Chulalongkorn University Social Research Institute on April 1, 1987.

1 Article 20 (d) of GATT reads:

"General Exceptions

Subject to the requirement that such measures are not applied in a manner which would institute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) ...
(b) ...
(c) ...
(d) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the protection of patents, trade marks and copyrights, and the prevention of deceptive practice;"

protection of IP rights. Article 20 (d) empowers a contracting party to adopt or enforce any measures necessary to secure compliance with laws and regulations relating to patents, trade marks and copyrights, and the prevention of deceptive practices, provided that those measures are not applied arbitrarily or discriminatorily, and that those laws and regulations are not inconsistent with the provisions of GATT. This Article lays down no detailed rules concerning the level or standard of protection and it does not provide for any mechanism to enforce protection. The Article does not intend to establish any regime of international protection of IP rights. IP is listed therein as one of numerous "General Exceptions" prescribed in the Article.[2]

During the Tokyo Round of Multilateral Trade Negotiations (1973–1979),[3] an attempt was made, with major support from the U.S., to draft and seek an agreement on a code concerning trade in counterfeit goods. That attempt failed to receive support from the contracting parties negotiating in the Tokyo Round. The issue was taken up again 1982, which led to a provision concerning IP as a part of the GATT Ministerial Declaration of 1982.[4] That Declaration led to several meetings of the GATT Council, a commissioning of an expert group to study trade related IP issues, a contemplated joint action to be taken in GATT,[5] and discussions of IP as an agenda to be included in the New Round (or the Uruguay Round) of Multilateral Trade Negotiations (MTN)[6] to be held sometime this year (1987). One of the major issues discussed and debated during 1982–1986 was whether IP should be a subject of negotiations under GATT, or should it best be left to the World Intellectual Property Organization (WIPO) to consider the issue of international protection of IP rights (hereinafter the IP protection issue).[7]

Generally, one can contrast the position taken by a group of developing countries with the one taken by a group of developed countries. In summary, a group of developing countries opined that the IP protection issue should be under the direct responsibility of WIPO rather than GATT. Although the group agreed that action on an international level is called for, it was argued that GATT itself was not competent to deal with the IP protection issue because, for example it had no expertise to determine whether a certain item was counterfeited or not. The group contended that WIPO has an existing mechanism to deal with the IP protection issue, for example the Paris Convention has a provision empowering an importing country to seize

2 *Ibid.*

3 A major feature of GATT is the multilateral trade negotiations where contracting parties get together to exchange concessions or enter into agreements concerning trade and trade related issues. There has, so far, been seven rounds of such negotiations. The Tokyo Round was the seventh round. The eight is to commence this year (1987) and will probably be named "the Uruguay Round".

4 GATT Ministerial Declaration of 29 November 1982, 2/5424 29 November 1982, CONTRACTING PARTIES, 38th Session, BISD 295/19.

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

6 Hereinafter referred to as "MTN". This eighth round is called the Uruguay Round or the New Round. See full text in GATT, Ministerial Declaration on the Uruguay Round, GATT/1396, 25 September, 1986.

7 *Supra,* note 5 and for example, Minutes of the Meeting (5-7 May 1986) in Prep. Com (86) SR/6, 16 July 1986, pp. 28-30.

at its border imported items which constitutes patent infringement. The group argued that if such mechanism was insufficient to protect IP rights, then further attempts should be made in WIPO to strengthen it.[8] A group of developed countries, however, felt that it was imperative to include the IP issue in the agenda of negotiations under GATT because the existing international framework provides insufficient measures to handle the problem. The latter group argued that GATT was competent because GATT would handle only trade related IP issues. This group stressed the need to have a multilateral agreement before the occurrence of increased unilateral retaliation against infringement of IP rights. It was emphasized that the U.S. for example, had prepared legislation empowering the Administration to respond to countries which had infringed upon U.S. IP rights. The group also attempted to convince developing countries that the technological and investment benefits will increase if protection of IP rights is effectively enforced.[9]

Such basic differences were reflected in the two draft proposals of a declaration to launch the GATT New Round of MTN submitted to the Ministerial Meeting in Punta-del Este, Uruguay, in September of 1986. The first draft was submitted by Switzerland and Colombia.[10] They had, among many other issues bracketed the IP issues, which meant that the issue was not accepted nor rejected outright. The Brazilian draft,[11] on the other hand, had omitted the IP issue from the agenda of the MTN. It is noted that a number of developing countries also supported the drafts submitted by Colombia and Switzerland. The compromise for the negotiating agenda in the Uruguay meeting was along the lines of the Switzerland and Colombia draft.

It is interesting to observe that a group of developing countries has shown a desire that the IP protection issue be discussed only in WIPO because a one country one vote system which prevails in WIPO would prove advantageous as the developing countries form the majority in WIPO. They would of course be able to air their opinions and influence any movement and changes within the WIPO framework to respond to the needs of their respective economic and social development. Furthermore, since WIPO will deal exclusively with the IP protection issue, cross-sectoral exchanges (or less euphemistically horse-trading) will not play a major role. Unlike the discussions in WIPO, the GATT New Round of MTN will involve many issues, for instance agriculture, textiles, trade in services, subsidies and countervailing duties, and safeguard measures.[12] In all of these issues, the developing countries themselves have diversified interests and positions. Such diversification makes them vulnerable to concede to cross-sectoral exchanges, for example a reduction of agricultural export subsidies in exchange for an adoption of a protection standard for IP rights.

It should also be noted that the coverage of trade related IP rights can be interpreted broader than what is stated in the letter of the law.

8 *Ibid.*
9 *Ibid.* and Minutes of Meeting (17–20 March 1986) in Prep. Com (86) SR/3, 11 April 1986, pp. 9–14.
10 Draft Ministerial Declaration, Prep. Com (86) W/47, 17 July 1986.
11 Draft Ministerial Declaration, Prep. Com (86) W/41/Rev. 1, 16 July 1986.
12 *Supra,* note 6.

Although the initial movements in GATT before 1979 and 1982 emphasized the issue of trade in counterfeit goods, that issue in fact covers all patents, trademarks and copyrights. Furthermore any discussion on a reduction of trade in counterfeit goods has to address various questions such as the type of rights to be protected, the extent of the protection, the beneficiaries of such protection and the remedies available. All of these questions involve fundamental issues which are implicit in any discussion aimed at the elimination of trade in counterfeit goods or trade related IP rights protection. Furthermore, as the Ministerial Declaration launching the Uruguay Round also contained a provision on trade related investment, it is likely that investment related IP rights would be treated as an aspect of trade related IP rights as well.

II. The Trend in Bilateral Negotiations on IP

Despite the movement in the GATT framework, the bilateral approach has been adopted by developed countries to negotiate for better IP protection in developing countries. The bilateral talks have been conducted in both formal and informal sessions, and at both the high policy making level and the functional level.[13] The U.S. approach to protection of IP rights is a good example of this. It has a policy of 'carrots and sticks'. The former involves arranging seminars to disseminate information regarding the importance and benefits of protection of IP rights to the developing countries and providing financial support to local officials and academicians in field trips and studies related to the protection of IP rights. The latter involves the threats of withdrawing rights under the Generalized System of Preferences (GSP) Scheme, trade retaliation against a country which exports goods infringing U.S. IP rights, or even a policy of having the U.S. representative in the International Monetary Fund (IMF) and the World Bank veto loans that are intended to be extended to the said country.[14] The bilateral approach could also be accompanied by some other political pressures. The bilateral approach has been used, for example, in the case of Korea in the modification of its laws for the protection of IP rights, and in the case of Thailand in the amendment of its copyright law.

It is also important to note the informal bilateral approach as used by interested private entities from abroad, and even within the developing countries themselves.[15] For example, a strict application of copyright protection legislation is also likely to benefit copyright holders as well as local importers. Informal talks with the government officials are conducted by private entities and these talks can exert a strong pressure, though the pressure exerted may not be as great as the

[13] See the events chronicled in *Patent and the Policy of Thailand* (in Thai), a collection of papers for the seminar organized by Chulalongkorn University Social Research Institute (CUSRI) and the Faculty of Economics, Chulalongkorn University, 4 March 1986 at Multipurpose Room, Faculty of Economics, C.U. This document was later translated into English and supplemented the papers presented at the same seminar.

[14] Office of the United States Trade Representative, Administration Statement on the Protection of U.S. Intellectual Property Rights Abroad, April 7, 1986 and Summary of the Phase II, Recommendations of the Task Force on Intellectual Property to the Advisory Committee for Trade Negotiations, March 1986.

[15] *Supra*, note 13.

pressure that may be exerted by the foreign government. Especially in the case of patents on Pharmaceuticals, lobbying pressure from foreign pharmaceutical companies can be seen in the increasing frequency of meetings with the officials concerned. Furthermore, foreign foundations which normally extend research and development grants could play an important role in the 'carrots and sticks' policies.

The bilateral approach is one that is adopted by developed countries. While developed contracting parties to GATT have committed themselves by joining in the Ministerial Declaration launching the Uruguay Round of MTN to negotiate the issue of protection of IP rights multilaterally, they have approached governments of developing countries bilaterally to exert pressure on them to amend their laws relating to the protection of IP rights. In fact, the U.S. has enacted a series of legislation aimed at putting pressure on foreign governments to amend their laws.[16] Another key issue is that any amendment of laws and regulations suggested seem to be in line only with western conception of IP protection, without any due regard paid to the differences that obtain in the economic and social development of on the one hand, the developed countries and on the other hand, of the developing countries.

III. FACTORS TO BE CONSIDERED IN FORMULATING THAILAND'S POSITION

As far as the issue of patent rights is concerned, although the pressure is not yet on a formal governmental level, there have been discussions on the question of whether an amendment should be made to Section 9 of the Thai Patent Act of 1979 which contains an exclusionary list for non-patentable items including pharmaceutical products.[17] Various studies seem to indicate that the patentability of pharmaceutical products at present is likely to prove detrimental to the country.[18] Accordingly, the following are important factors and strategies which are to be considered in formulating a position for Thailand in negotiations relating to the protection of IP rights.

16 For example, section 502(c) of the Trade and Tariff Act of 1984 empowers the Administration to take into account the level of protection for U.S.. I.P. in the G.S.P. recipient countries before a decision to extend G.S.P. to those Countries is made.

17 Section 9 also raises interpretative problems as to whether "process" of producing pharmaceutical products is also excluded. One interpretation is that section 9 imposes exceptions on both the production and process of production because the term "invention" is defined in the law to mean both the "new" product and process. The other interpretation is that Section 9 imposes exceptions only on production (invention) of pharmaceutical products because the term "process" does not appear in Section 9(1) on pharmaceutical products as it does in Section 9(3) on animal and plant. See also Dhajjai Suphapolsiri, *Summary of Patent Act of 1979* (in Thai), reproduced in a collection of papers in *supra*, note 13.

Section 9 of the Patent Act of 1979 reads in part:

"The following inventions are not patentable:

(1) food, beverage or pharmaceutical products;
(2) machinery used directly in agriculture;
(3) animal, plant or biological process in producing animals or plants;
(4) scientific and mathematical principle and theory;
(5) data system for computer;
(6) an invention contrary to public order, good morals, public health or welfare;
(7) an invention specified by the Royal Decree."

18 See for example, Dr. Vaivudhi Thanesvorakul's, *TPMA Position on Intellectual Property Right*, a paper presented at a seminar held at Siam Intercontinental Hotel, Bangkok on January 23, 1987.

(1) Since developed countries have attempted to bilateralize the issue of protection of IP rights, Thailand (and probably other developing countries as well may desire to seek all possibilities to multilateralize the same. Multilateral fora like WIPO or the GATT New Round of MTN should be the forum for a discussion of protection of IP rights. In GATT, although there could be cross-sectoral exchanges during the negotiations, the participation of a large number of countries (a majority of which are developing countries) will prevent the hasty conclusion of any scheme for the protection of IP rights and will expand the horizon of issues to be included in the IP protection negotiations in GATT. The time-consuming process of negotiations will assist a developing country to reflect and conduct studies on the proposed scheme of protecting IP rights especially patent rights related to Pharmaceuticals and its impact on the society. The time consumed in negotiations will provide the time for the developing countries to formulate rational policies relating to the economic and technological aspects of patent rights protection. Further the expansion of issues to be considered in the GATT New Round of MTN will alleviate the problems associated with the enforcement of a regime for the protection of patent rights. The same benefit would be obtained in commencing and pursuing the discussion of the protection of IP rights in WIPO. With a number of participating developing countries and the fact that WIPO concentrates on only IP issues, cross-sectoral exchanges may be less than if GATT were to be chosen as the forum to deal with the protection of IP rights.

Accordingly, bilateralization must be avoided because it reduces drastically the bargaining power of a developing country which negotiates with a developed country. It is conceivable that the less powerful country (in economic terms) will, in the end change almost all its laws and regulations on the protection of IP rights if 'requested' by the more powerful partner in exchange for items offered by the latter. The point is that a developing country would have no real right to choose whether or not the offer is truly attractive. Instead, often an offer (like the extension of the benefits under the G.S.P. Scheme) is rather a threat.

(2) If a bilateral confrontation can not be avoided, an attempt should be made to defer any commitment in bilateral negotiations. Developing countries should stress their commitment to negotiate the issue of protection of IP right in a multilateral forum. Their participation in and support of the Ministerial Declaration launching the GATT New Round of MTN is a clear manifestation of that commitment.

(3) It is important to stress the obligation under the provision in the aforesaid Ministerial Declaration that the negotiations to seek the protection of IP rights shall not in itself become obstacles to legitimate trade.

(4) It must be noted that protection of patent rights must correspond to stages of economic and social development. At one time in the past, the U.S. itself did not provide protection of pharmaceutical products. Nowadays, each country has adopted diversified measures and levels of protection in accordance with the needs of the country. For example, some countries have imposed different time

periods on the expiry of protection for patent rights; other countries have laid down broad nationalistic policies for instance, a policy that the patentability of any product is subject to the authority's determination that such technology is in keeping with the economic and social development.

(5) As far as patent rights on pharmaceutical products is concerned, a study has shown that such protection does not induce real transfer of (appropriate) technology to developing countries.

(6) Since the G.S.P. Scheme has been used as a 'stick' to pressure the governments of developing countries (including Thailand) to amend their laws on the protection of IP, a rethinking of the benefits flowing from the G.S.P. Scheme is needed. First, the G.S.P. Scheme is a unilateral extension of benefits which imposes no legal obligation on the countries extending it. Secondly, a granting country can attach any conditions to the G.S.P. benefits. For example, a recipient country must remain a developing country and the criteria used to classify a country as 'developing' are, in many cases, arbitrary. Furthermore, a granting country, like in the case of the U.S., can also set minimum competitive need limits, *i.e.* an item would be deleted from the G.S.P. list if the total export of the product to the U.S. in the previous year has exceeded 50% of the total U.S. import of the product.[19] Worse yet, if this minimum competition need limit is reduced to 25% (and there is every likelihood of such a reduction), many G.S.P. items will be excluded from the list. Thirdly, the data shows that approximately 80% of exports from Thailand to the U.S. do not utilize the G.S.P. scheme.[20] It has been reported that Thai exporters faced difficulties in reporting the quantum of raw materials and labour used in production. Often Thai exporters view the U.S. import duties as low, and thus are willing to pay the duties rather than go through the complicated procedure of claiming the G.S.P. benefit. It suffices to say that claiming the G.S.P. benefit results in a high transaction cost to the Thai exporter. Furthermore, the U.S. importers often agree to pay import duties for the Thai products even though the products qualify for the G.S.P. benefits. The U.S. importers are willing to pay the import duties because their doing so will avoid the time-consuming process involved in the presentation of documents indicating the origin of the products — a process which is required under the G.S.P. Scheme.[21]

Finally, the most important reason is the oft-made statement that the G.S.P. benefits which Thailand has received from the U.S. amounts to approximately $235 million.[22] This figure is misleading because it shows the total volume of trade under the G.S.P. but not benefits from the G.S.P. margin. In other words, if the G.S.P. Scheme is withdrawn on product A (*i.e.* for example, the tariff of 0% is increased to 10%), that does not mean that product A can not be sold at all in the U.S.. It is evident that the imposition of a ten percent im-

19 Export Promotion Division, Department of Foreign Trade, Ministry of Commerce, Assessment of Impact on Thai Export if the U.S. Withdraws G.S.P., 2 May 1986.

20 Somyos Chamchoy, *Intellectual Property: Problems of National Interests* (in Thai), Academic Affairs Division, Thai Farmers Bank Ltd. at p. 10.

21 *Ibid.*

22 *Supra*, note 19.

port duty will definitely increase the export price, but whether or not the demand for the product is affected depends on so many other factors such as the demand of that product in the U.S., competition from other exporters and the ability of the Thai exporters to reduce their costs of production. Looking at the issue in totality, even if the G.S.P. Scheme for all items were withdrawn, the $235 million trade does not totally disappear because a slight increase of tariff (withdrawal of G.S.P. benefits) does not wipe out the total volume of trade in those products.

The above discussion does not suggest that G.S.P. benefits are not important or useless, yet, the benefits should not be overestimated. Such an estimate misleads policy makers in their comparison of the costs and benefits flowing from the loss of the G.S.P. benefits and the amendment of the municipal laws to protect I.P. rights. Furthermore, the Mexican experience provides a timely reminder to policy makers of the pitfalls involved in negotiating for the G.S.P. benefits in return for amendments to municipal laws aimed at protecting I.P. rights. The U.S. exerted pressure on Mexico to amend its I.P. law on pain of withdrawal of the G.S.P. benefits extended to Mexico. After the amendment to the Mexican I.P. laws, the U.S. remained dissatisfied with the Mexican action and withdrew the G.S.P. benefits.

IV. CONCLUSION

This paper has surveyed briefly the international movement on the protection of I.P. rights in GATT and in bilateral negotiations. The analysis shows that developed countries have a policy of utilizing both multilateral and bilateral approaches alternately and simultaneously to achieve their policy objectives on I.P. rights protection. Furthermore, when one looks at pressures from a foreign country one has to look at the interest of private groups both within and outside that country. Developing countries must understand negotiating tactics and strategies of developed countries and should conduct studies on the costs and benefits of all issues arising from the protection of I.P. rights. Developing countries are well-advised to formulate policies and negotiating plans to lead the negotiations and to enable them to unravel the complexities of negotiating techniques adopted by developed countries.

SURAKIART SATHIRATHAI*

* LL.B. (Hons) (Chulalongkorn), M.A.L.D. (The Fletcher School of Law and Diplomacy, Tufts University), LL.M., S.J.D. (Harvard Law School). Lecturer-in-law, Faculty of Law, Chulalongkorn University, Bangkok, Thailand.