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## Trips to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court

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# Trips to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court

Andrea Morgan

## **Abstract**

This Comment examines the extent to which the Intellectual Property and International Trade Court (IPIT) satisfies the intellectual property enforcement provisions of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Part I presents the legal environment of intellectual property in Thailand before TRIPs, the background of TRIPs, and the enforcement requirements of TRIPs. Part II discusses the legislation creating the IPIT Court, and assesses the enforcement procedures as prescribed by the legislation that created the IPIT Court and as employed by the IPIT Court. Part III argues that the IPIT Court is a positive development because it reduces conflict between Western ideas of intellectual property protection and Thai standards of protection, and because it promotes Thai compliance with TRIPs. This Comment concludes that the establishment of a separate court with exclusive jurisdiction and unique procedures follows historical and cultural traditions in Thailand, even though the IPIT Court was created at the behest of the United States and the European Union.

## COMMENTS

### TRIPS TO THAILAND: THE ACT FOR THE ESTABLISHMENT OF AND PROCEDURE FOR INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE COURT

*Andrea Morgan\**

#### INTRODUCTION

Intellectual property rights,<sup>1</sup> without enforcement, are worthless according to experts and scholars.<sup>2</sup> The intangible nature of intellectual property, which allows it to flow relatively freely across borders, presents a need for international enforcement of intellectual property rights.<sup>3</sup> There is, however, no in-

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\* J.D. Candidate, 2001, Fordham University School of Law. This Comment is dedicated to my husband, Su Keun Chun, my family, and my grandmother, Clara Morgan, who taught me how to read. I wish to thank Chandler & Thong-Ek, Chief Justice Akarawit Sumawong, Dr. Suthiphon Thaveechaiyagarn, and Ms. Sae Sujintaya, for their assistance in Thailand. I also wish to thank the MCI-Worldcom International Law Fellowship.

1. See PAUL MARETT, MARETT: INTELLECTUAL PROPERTY LAW 1 (1996) (defining intellectual property as intangible products or creations of human intellect). According to Paul Marett, intellectual property is intangible property, and is similar to shares in a company, which may be transferred. *Id.* The three dominant forms of intellectual property are copyright, patents, and trademarks. *Id.* at 2.

2. See Renato Ruggiero, *Message from the Director-General of the World Trade Organization*, in THE INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE LAW FORUM: SPECIAL ISSUE 1998 XV (1998) ("Laws for the protection of intellectual property rights are of no account if intellectual property rights cannot be effectively enforced."); Michael L. Doane, *TRIPs and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U.J. INT'L L. & POL'Y 465, 482 (1994) (stating that "[i]ntellectual property rights are useless without adequate enforcement provisions."); Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BALT. INTELL. PROP. L.J. 25, 27 (1997) (stating that enforcement of intellectual property laws is intractable problem); Arthur Wineburg & Edmund H. Mantell, *Managing Intellectual Property—An International Capital Asset*, 99 COM. L.J. 366, 368 (1994) ("The value of intellectual property depends upon the extent of one's rights to it are recognized and enforceable.").

3. See MARETT, *supra* note 1, at 18 (claiming that because intellectual property can rarely be confined within national borders, right-holders may need to invoke laws of another country, where counterfeiting takes place, to protect his or her intellectual property); Edwin C. Hettinger, *Justifying Intellectual Property*, in INTELLECTUAL PROPERTY: MORAL, LEGAL, & INTERNATIONAL DILEMMAS 19 (Adam D. Moore ed. 1997) (asserting that intellectual objects are non-exclusive and thus can be at many places at once and are not consumed by use).

ternational intellectual property law *per se*;<sup>4</sup> instead intellectual property rights are subject to the principle of territoriality.<sup>5</sup> These rights vary according to what each state recognizes and enforces.<sup>6</sup> Corresponding to the growth of trade and improvements in technology, there have been many important international efforts at harmonizing intellectual property rights protection that are based on the principles of national treatment<sup>7</sup> and minimum rights.<sup>8</sup> According to scholars, the most significant effort to date is Annex IC of the World Trade Organization ("WTO") Agreement<sup>9</sup> that establishes universal minimum stan-

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4. See CRAIG JOYCE ET AL., COPYRIGHT LAW 29 (Mathew Bender & Co. 4th ed. 1998) (stating that author who wishes to protect his work abroad must look to pertinent national laws of the countries where protection is sought, because there is no universal copyright system).

5. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997) (commenting on territorial reach of intellectual property law and presumption against extraterritoriality); Joanna Schmidt-Szalewski, *The International Protection of Trademarks After the TRIPS Agreement*, 9 DUKE J. COMP. & INT'L L. 189, 190 (1998) (stating that principle of territoriality governs intellectual property rights); Jeffrey J. Blatt & Phillip H. Miller, *Preparing for the Pacific Century: Fostering Technology Transfer in Southeast Asia*, 3 ANN. SURV. INT'L & COMP. L. 235, 241 (1996) (stating that intellectual property protection is territorial in nature). Jeffrey Blatt and Phillip Miller note that the specific intellectual property laws of each jurisdiction are unique and reflect the local culture and concerns due to the territorial limits of laws. *Id.*

6. See Schmidt-Szalewski, *supra* note 5, at 190 (stating that rights are effective only in country that creates such rights); Bradley, *supra* note 5, at 548 (noting that nation where conduct in question occurred determines applicable law).

7. See Bradley, *supra* note 5, at 547-48 (defining national treatment principle as requiring foreign nationals receive same intellectual property protection as afforded to each signatory country's citizens); JOYCE, *supra* note 4, at 28-29 (noting that in 1827, various German states initiated formal reciprocity of protection that continues as national treatment).

8. See ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY LAW 8 (Kluwer Law International 1997) (remarking that development of international standards reflects history of growth of trade and development of technology and global marketplace); Bradley, *supra* note 5, at 548 (defining minimum rights as necessary because nondiscrimination alone does not guarantee adequate protection of foreign intellectual property interests); JOYCE, *supra* note 4, at 28-29 (noting that in 1886, Berne Convention introduced *minima* to supplement national treatment).

9. Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. See *About the WTO* (visited Mar. 8, 2000) <<http://www.wto.org>> (on file with the *Fordham International Law Journal*) (remarking that establishment of World Trade Organization ("WTO") on Jan. 1, 1995 marked largest reform of international trade since World War II). The WTO is an international organization dealing with the rules of trade between nations as embodied in the WTO Agreement. *Id.* The WTO Agreement is a contract that binds its member nations to keep their trade policies within agreed limits. *Id.*

dards for intellectual property protection in the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>10</sup> ("TRIPs").<sup>11</sup>

Attitudes toward intellectual property tend to differ greatly between those countries that import intellectual property and those that export it.<sup>12</sup> Southeast Asia is a net consumer and importer of intellectual property and the focus of much attention from the nations that are net producers and exporters, such as the United States and the European Union.<sup>13</sup> As one of the largest economies in the Association of South-East Asian Nations<sup>14</sup> ("ASEAN"), new developments in Thailand affect the entire region.<sup>15</sup> According to the U.S. Embassy in Bangkok, despite Thai-

10. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization; Annex III, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1125 (1994) [hereinafter TRIPs].

11. See Friedrich-Karl Beier & Gerhard Schricker, *Preface* to FROM GATT TO TRIPs—THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS v (Friedrich-Karl Beier & Gerhard Schricker eds., Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996) (stating that Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") is "the most important event in the history of the protection of intellectual property since the creation of the major international conventions more than 100 years ago."). Friedrich-Karl Beier and Gerhard Schricker further state that TRIPs is "an integral element of the new world order." *Id.*

12. See MARETT, *supra* note 1, at 215 (stating that different nations' perceptions of intellectual property enforcement depend on whether they import and consume it or export and produce it).

13. Consolidated version of the Treaty on European Union, O.J. C 340/2 (1997), 37 I.L.M. 67 [hereinafter Consolidated TEU], incorporating changes made by Treaty of Amsterdam amending Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). See John J.P. Howley & Antonio B. Roman, *Assessing Enforcement Status of Intellectual Property Rights in Asia*, N.Y.L.J., Apr. 26, 1999 (commenting that, for many years, United States has had serious problem with enforcement of intellectual property rights in Asia).

14. The Association of South-East Asian Nations ("ASEAN") was established on August 8, 1967 in Bangkok, Thailand by five original member nations of Indonesia, Malaysia, Philippines, Singapore, and Thailand. ASEAN Secretariat (visited Jan. 3, 2000) <<http://www.aseansec.org>> (on file with the *Fordham International Law Journal*). Later, Brunei, Cambodia, Laos, Myanmar, and Vietnam also joined ASEAN. *Id.* According to ASEAN public statements, its fundamental goal is cooperative peace and shared prosperity. *Id.*

15. See ASEAN Overview Statistics (visited Jan. 3, 2000) <<http://www.us-asean.org/>>

land's improvements in its intellectual property legal system, enforcement remains a problem.<sup>16</sup> The single most important development in Thailand to combat this problem is the establishment of the Intellectual Property and International Trade Court<sup>17</sup> ("IPIT Court" or "Court").<sup>18</sup>

This Comment examines the extent to which the IPIT Court satisfies the intellectual property enforcement provisions of TRIPs. Part I presents the legal environment of intellectual property in Thailand before TRIPs, the background of TRIPs, and the enforcement requirements of TRIPs. Part II discusses the legislation creating the IPIT Court, and assesses the enforcement procedures as prescribed by the legislation that created the IPIT Court and as employed by the IPIT Court. Part III argues that the IPIT Court is a positive development because it reduces conflict between Western ideas of intellectual property protection and Thai standards of protection, and because it promotes Thai compliance with TRIPs. This Comment concludes that the establishment of a separate court with exclusive jurisdiction and unique procedures follows historical and cultural traditions in

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aseanoverview/statistics.htm> (on file with the *Fordham International Law Journal*) (reporting that ASEAN is third largest overseas trading partner for United States). Although its rate of growth is behind that for exports to China, in dollar terms, U.S. exports to ASEAN are nearly four times those of China. *Id.* The 1997 nominal gross domestic product ("GDP") of ASEAN was approximately US\$675 billion. *Id.* Of this amount, Thailand was responsible for a 1997 nominal GDP of US\$188.9 billion. *See* Department of State Report Submitted to the Senate Committee on Foreign Relations and on Finance and to the House Committee on Foreign Affairs and on Ways and Means, *Thailand: Economic Policy and Trade Practices Report* (1997) (visited Jan. 3, 2000) <[http://www.state.gov/www/issues/economic/trade\\_reports/eastasia97/thailand97.html](http://www.state.gov/www/issues/economic/trade_reports/eastasia97/thailand97.html)> (on file with the *Fordham International Law Journal*) (reporting trade statistics for Thailand).

16. *See* U.S. & Foreign Commercial Service & U.S. Department of State, American Embassy in Bangkok, Thailand, *Thailand: Investment Climate Statement for 1997* (1/2), INT'L MKT. INSIGHT REP., June 13, 1997 [hereinafter *Investment Climate 1997*] ("While Thailand's legal structure for the protection of property rights is reaching world-class standards, enforcement continues to be a problem.").

17. THE ACT FOR THE ESTABLISHMENT OF AND PROCEDURE FOR INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE COURT, B.E. 2539 (1996) (Thail.) [hereinafter ACT].

18. *See* Interview with Akarawit Sumawong, Chief Justice, Intellectual Property and International Trade Court, in Bangkok, Thail. (June 15, 1999) (calling Intellectual Property and International Trade Court ("IPIT Court") most important recent development in intellectual property protection in Thailand); *see also* Christian H. Nguyen, Comment, *A Unitary ASEAN Patent Law in the Aftermath of TRIPs*, 8 PAC. RIM L. & POL'Y J. 453, 479 (1999) (noting that other nations with specialized intellectual property courts are China, Germany, United Kingdom, and United States). Currently, Thailand is the only ASEAN nation with a specialized intellectual property court. Nguyen, *supra*.

Thailand, even though the IPIT Court was created at the behest of the United States and the European Union.

### 1. INTELLECTUAL PROPERTY IN THAILAND AND COMPLIANCE WITH TRIPS

While Thai law embraced the concept of intellectual property rights over a hundred years ago,<sup>19</sup> Thailand has developed its intellectual property rights laws only in response to international pressure.<sup>20</sup> Unlike other Asian nations that exhibited xenophobia towards the West, Thailand has long recognized the importance and benefits of maintaining international relations.<sup>21</sup> Thailand has sought to benefit from its relations with Western nations by encouraging foreign investment, trade, and technology transfers.<sup>22</sup> To advance this goal, Thailand became a member country of the WTO, promised to comply with TRIPs, and adopted laws to protect intellectual property rights.<sup>23</sup>

#### A. Intellectual Property in Thailand

Scholars note that Thailand's negotiations with its trading partners have influenced the substance of rights Thailand has granted in its intellectual property acts.<sup>24</sup> Enforcement of those

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19. ROYAL PROCLAMATION OF VACHIRAYAN LIBRARY FOR THE PROTECTION OF LITERARY WORK, R.S. 111 (1892) (Thail.). See Weerawit Weeraworawit, *Copyright in Thailand, in THE INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE LAW FORUM: SPECIAL ISSUE 1998* 47 (1998) (alleging that copyright is not new result of Thailand's rapid modernization).

20. See, e.g., Sakda Thanitcul, *Vagueness and Enforceability: Potential Problems of the 1991 Thai Trademark Act*, 3 PAC. RIM L. & POL'Y J. 31, 33 (1994) (asserting that Thailand modeled its first trademark act on British Trademark Act of 1905).

21. See THAILAND 152 (DK Publishing, Inc. 1997) (reporting that Thailand established diplomatic and trade contacts with Dutch, English, French, and Portuguese during 16th and 17th centuries and sent envoys to court of Louis XIV).

22. See TILLEKE & GIBBINS, THAILAND BUSINESS PRACTICES 10, 11 (1993) (explaining that Thailand has maintained friendly relations with major powers and may benefit by attracting investment, trade, and technology).

23. See Piyawat Kayasit, *Thailand: New IP Enforcement Mechanisms Developing*, IP ASIA, Oct. 1998, at 15 (revealing that Thailand realizes level of intellectual property rights protection must be raised to attract foreign investors and to comply with TRIPs); Wutipong Vechayanon, *Intellectual Property Rights Enforcement and the Role of Intellectual Property Court in Thailand*, in THE INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE LAW FORUM: SPECIAL ISSUE 1998 33 (1998) (stating that Thailand recognizes that honoring its WTO obligations is crucial to Thailand's economic development and prosperity).

24. See Thanitcul, *supra* note 20, at 32 (commenting that amendments to trademark legislation resulted from negotiations with United States); see also Stefan Kirchan-ski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts To Enforce Pharma-*

rights, however, was problematic.<sup>25</sup> Before the IPIT Court, persons claiming infringement of their intellectual property rights employed a system that lacked the specialization necessary to handle intellectual property matters.<sup>26</sup>

## 1. Sources of Intellectual Property Rights in Thailand

Thailand is a civil law country with a legal history stretching back at least as far as the thirteenth century.<sup>27</sup> As seen in Thai historical legal codes, Thailand is able to accommodate external influences by co-existing with those influences.<sup>28</sup> Modern intellectual property law in Thailand finds its sources in legislative codes and international intellectual property treaties.<sup>29</sup>

### a. Historical Influences on Thai Legal System

Traditional Thai law has been traced to three sources: Chinese Maritime law,<sup>30</sup> customary Thai law,<sup>31</sup> and Buddhist law.<sup>32</sup>

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*ceutical Patents in Thailand*, in INTERNATIONAL INTELLECTUAL PROPERTY LAW 67 (Anthony D'Amato & Doris Estelle Long eds., Kluwer Law International, 1997) (noting that Thai negotiations with United States prompted revisions to patent legislation).

25. See Yvonne Chua, *Global Developments in Protecting Against Counterfeiting and Infringement of Trademarks and Copyrights*, 455 PRAC. L. INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 195, 227 (1996) (asserting that main obstacle to enforcement was lack of administrative and judicial infrastructure); U.S. & Foreign Commercial Service & U.S. Department of State, American Embassy in Bangkok, Thailand, *Thailand: Investment Climate Statement for 1998 (1/2)*, INT'L MKT. INSIGHT REP., June 18, 1998 [hereinafter *Investment Climate 1998*] (declaring that, although Thai intellectual property is approaching world class standards, enforcement remains problematic).

26. See Interview with Sae Sujintaya, Attorney, Director, Intellectual Property Operations, Tilleke & Gibbins, R.O.P., in Bangkok, Thailand. (June 30, 1999) [hereinafter Sujintaya] (setting forth that judges of courts of general jurisdiction lacked specialized training in intellectual property law); Chua, *supra* note 25, at 228 (revealing instances of Thai judges in courts of general jurisdiction misapplying intellectual property law).

27. See Sompong Sucharitkul, *Thai Law and Buddhist Law*, 46 AM. J. COMP. L. 69, 76 (1998) (tracing history of Thai law back to Sukothai Stone Inscriptions, circa 1292, which are collections of earliest Thai customs and Royal Codes); Jonathan W. Leeds, *United States International Law Enforcement Cooperation: A Case Study in Thailand*, 7 J. INT'L L. & PRAC. 1, 3 (1998) (recognizing that Buddhist law influenced secular Thai law as of 1296).

28. See THE ACT CONCERNING THE ORGANIZATION OF THE COURTS (1908) (Thail.) (establishing separate court to handle matters involving non-Thais).

29. See Thanitcul, *supra* note 20, at 32 (attributing parts of Trademark Act of 1991 to Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, 1967, of United International Bureaux for the Protection of Intellectual Property).

30. See Sucharitkul, *supra* note 27, at 74 (defining Chinese maritime law as result of



While the exact extent of the influences of Buddhist law and Chinese maritime trade practices are undeterminable, they are widely acknowledged as comprising a portion of traditional Thai law.<sup>33</sup> In 1805, King Rama I, of the present Chakri Dynasty, issued the Three Seals Code, which systematically classified the existing statutes, edicts, and customs from these different sources.<sup>34</sup>

In 1897, King Rama V, more popularly known as King Chulalongkorn, began a process of modernization and westernization of Thailand's legal system.<sup>35</sup> Authorized by the Ministry of Justice, the Law Reform Commission adopted the civil law system for its ease of organization and simplicity of enactment.<sup>36</sup> The Law Reform Commission issued a Code of Civil Procedure, a Civil and Commercial Code, a Penal Code, and a Statute on the Courts of Justice.<sup>37</sup> The Statute on the Courts of Justice established three levels of Thai courts.<sup>38</sup> As a civil law country, Thai courts do not rely on prior decisions as precedent, but consider

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maritime commercial customs practiced throughout South-east Asia by Chinese trading partners).

31. See *id.* at 76 (defining customary Thai law as earliest Thai customs, before adoption of Buddhism, as collected in Ahom Buranji legal texts). The Ahom Buranji illustrates that earliest Thai custom "attach[ed] considerable importance to the maintenance of cultural separateness . . ." *Id.*

32. See *id.* at 69 (defining Buddhist law as religious principles, binding in Buddhist community, based on teachings of Buddha). According to Mr. Sompong Sucharitkul, one influence of Buddhist law upon Thai secular law is the concession that Thai law governs "a pluralistic society wherein persons of different faiths could be subject to different personal laws . . ." *Id.* at 86. Buddhist law strongly influenced secular traditional Thai law, especially in the northern Thai Lanna Kingdom, which began in 1296. See Leeds, *supra* note 27 (noting that Royal Decrees and judgments often compared state law with religious texts). The Lanna kings relied on Buddhist monks to be the official scribes documenting the royal decrees. Leeds, *supra*. To give their rule authority and legitimacy, the Lanna kings required that Buddhist texts support the laws to be administered. *Id.*

33. See Sucharitkul, *supra* note 27, at 74 (noting that scholars are unable to distinguish effect of neighboring Asian influences on traditional Thai law).

34. See *id.* at 75 (stating that Three Seals Code sought to eradicate conflicts between earlier texts, conform Thai law to religious texts and to organize laws into groups).

35. See Leeds, *supra* note 27, at 3 (reporting that King Chulalongkorn enlisted aid of non-Thai legal experts from Belgium, England, and Japan to assist process of reformation).

36. *Id.*

37. Sucharitkul, *supra* note 27, at 75.

38. STATUTE ON THE COURTS OF JUSTICE (1897) (Thai.). See Tilleke & Gibbins, *Thailand Law Digest Reviser*, MARTINDALE-HUBBELL, THAI-9 (1999) [hereinafter MARTINDALE-HUBBELL] (describing Courts of First Instance, Courts of Appeal and Dika, or

the decisions of the Thai Supreme Court as secondary authority.<sup>39</sup> The Law Reform Commission also established the first International Court in Thailand, over which Thai and European judges presided.<sup>40</sup> The first International Court was a specialized court chartered to handle all matters that involved the citizens of certain European nations.<sup>41</sup>

### b. Intellectual Property Legislation in Thailand

Thai intellectual property rights stem from three domestic legislative sources: the Trademark Act of 1991,<sup>42</sup> the Patent Act of 1992,<sup>43</sup> and the Copyright Act of 1994<sup>44</sup> as amended by the Ministerial Regulations of 1997.<sup>45</sup> The Trademark Act of 1991 replaced the earlier Trademark Act of 1961,<sup>46</sup> which did not provide a legal cause of action for the trademark holder.<sup>47</sup> Instead, the trademark owner relied on remedies under the civil and criminal codes.<sup>48</sup> The Trademark Act of 1991 protects registered marks and provides the trademark holder with criminal remedies.<sup>49</sup> The Thai government promulgated the Patent Act of 1992 to remedy the specific exclusion of patent protection for pharmaceuticals under the Patent Act of 1979.<sup>50</sup> Another salient

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Supreme Court). The Thai Supreme Court is unique in that it hears appeals on both issues of law and of fact. MARTINDALE-HUBBELL, *supra*.

39. See *Investment Climate 1998*, *supra* note 25, at 3 (stating that Thai courts regard Supreme Court decisions as secondary authority).

40. THE ACT CONCERNING THE ORGANIZATION OF THE COURTS (1908) (Thail.). See Fabrice Mattei, *Enforcing Copyright Law in Thailand: The New Intellectual Property Court*, 75 COPYRIGHT WORLD 32 (1997) (remarking that first International Court constitutes example of history of specialized courts in Thailand).

41. See Mattei, *supra* note 40 (stating that first International Court had jurisdiction over certain non-Thai nationals in accordance with their countries' treaties with Thailand).

42. TRADEMARK ACT, B.E. 2534 (1991) (Thail.).

43. PATENT ACT, B.E. 2535 (1992) (Thail.).

44. COPYRIGHT ACT, B.E. 2537 (1994) (Thail.).

45. MINISTERIAL REGULATIONS, B.E. 2540 (1997) (Thail.). See MARTINDALE-HUBBELL *supra* note 38, at THAI-17, 18 (listing relevant intellectual property acts).

46. TRADEMARK ACT NO. 3, B.E. 2504 (1961) (Thail.).

47. See Thanitcul, *supra* note 20, at 32 (explaining that U.S. Trade Representative demanded changes to Thai trademark protection).

48. See *Investment Climate 1997*, *supra* note 16 (remarking that criminal rather than civil law predominantly governed Thai business regulations).

49. See Chua, *supra* note 25, at 227 (comparing TRADEMARK ACT, B.E. 2534 (1991) with previous Trademark Act).

50. PATENT ACT, B.E. 2535 (1992) (Thail.). See Thomas N. O'Neill III, *Intellectual Property Protection in Thailand: Asia's Young Tiger and America's "Growing" Concern*, 11 U. PA. J. INT'L BUS. L. 603, 609 (1990) (stating that Patent Act of 1979 specifically excluded

feature of the Patent Act of 1992 is the provision for compulsory licensing.<sup>51</sup> Originally intended to satisfy U.S. pressure, the copyright bill was hotly debated and even caused a government to fall in 1988.<sup>52</sup> Eventually passed in 1994, the Copyright Act provides both criminal and civil liabilities.<sup>53</sup>

Other sources of intellectual property rights are the international intellectual property treaties to which Thailand is a signatory.<sup>54</sup> These treaties and organizations require member countries to grant and recognize certain substantive intellectual property rights and provide reciprocal treatment to citizens of other member countries.<sup>55</sup> Among the intellectual property treaties Thailand belongs to are the Berne Convention for the Protection of Literary and Artistic Works<sup>56</sup> ("Berne Convention"), the World Intellectual Property Organization<sup>57</sup> ("WIPO"), and TRIPs.<sup>58</sup> As a member country of the Berne Convention since 1931, Thailand has promised to provide reciprocal copyright

food and pharmaceutical products, pharmaceutical ingredients, agricultural machinery, plant or biological processes, scientific or mathematical rules and theories, and computer programs); *see also* Kirchanski, *supra* note 24 (stating that revision to include pharmaceutical patents was intended to satisfy U.S. objections).

51. *See* O'Neill, *supra* note 50, at 609 (reporting that Patent Act provides for compulsory licenses if patent not worked in Thailand within three years and that United States considers this provision as one shortcoming of Patent Act).

52. *See id.* at 606 (discussing how Prime Minister Prem Tinsulanonda dissolved his cabinet after dispute over passing unpopular copyright reform legislation, for which United States had pressed).

53. *See* Mattei, *supra* note 40 (comparing changes in Copyright Act of 1994 with prior act).

54. *See* MARTINDALE-HUBBELL, *supra* note 38, at THAI-17 (listing Thailand as signatory of several international intellectual property treaties).

55. *See generally* Frank Romano, *International Conventions and Treaties*, 536 PRAC. L. INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 545, 552-61 (1998) (describing main provisions of principal intellectual property treaties and conventions).

56. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, amended Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

57. Constitution of the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3 entered into force for the United States on Aug. 25, 1970 [hereinafter WIPO]. *See* Romano, *supra* note 55, at 554 (discussing WIPO history and objectives). The World Intellectual Property Organization ("WIPO") is one of the specialized agencies of the United Nations. Romano, *supra*. WIPO was established in 1967 to administer international intellectual property treaties, promote the protection of intellectual property and assist developing nations in creating intellectual property laws. *Id.* WIPO has 128 members. *Id.*

58. *See* TRIPs, *supra* note 10, art 1(1) (requiring compliance by WTO Members because it is annex of WTO Agreement).

protection<sup>59</sup> for the citizens of other Berne Convention member countries.<sup>60</sup> The Berne Convention and WIPO, however, lack enforcement mechanisms and are voluntary federations that allow member countries to determine provisions by which they will abide.<sup>61</sup> One scholar has questioned their actual effectiveness as sources of intellectual property rights.<sup>62</sup>

## 2. Intellectual Property Dispute Settlement and Enforcement Prior to the Establishment of the IPIT Court

Prior to the establishment of the IPIT Court, parties settled intellectual property disputes in Thailand in the courts of general jurisdiction.<sup>63</sup> A person claiming intellectual property right ownership could have a cause of action under Section 420 of the Civil and Commercial Code,<sup>64</sup> which allows a civil action for

59. See Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, in *INTERNATIONAL INTELLECTUAL PROPERTY LAW* 258 (Anthony D'Amato & Doris Estelle Long eds., Kluwer Law International, 1997) (defining material reciprocity as country A granting country B's authors same protection as country B would grant country A's authors).

60. See Romano, *supra* note 55, at 621 (listing 121 States that are party to Berne Convention); see also JOYCE, *supra* note 4, at 35 (noting that United States was last major Western country to join Berne Convention). The United States signed on to the Berne Convention on March 1, 1989. JOYCE, *supra*.

61. See Wineburg, *supra* note 2, at 27 (stating that it is easier for Asian countries to adopt legislation than to reform culture to enforce these laws). According to Arthur Wineburg, "Asian cultures share characteristics that are antagonistic to private intellectual property rights." *Id.* The role of the family and community in Asian society affects the Asian perspective of the process of invention and creation. *Id.* at 26. Traditional Asian culture views these processes as accomplishments of the family and community to be shared. *Id.* As such, the products of these endeavors are in the public domain, and do not warrant legal protection as personal property, which would place the individual over society. *Id.* Additionally, Asian societies would consider any attempt to sequester an advance in learning as morally wrong. *Id.* But see Hettinger, *supra* note 3, at 30 (commenting that in United States, intellectual property creators are individually granted property rights in their works as incentive to promote progress of science and useful arts). By contrast, Western societies consider intellectual property to be a category of personal property. *Id.*; see also Adam D. Moore, *Toward a Lockean Theory of Intellectual Property*, in *INTELLECTUAL PROPERTY—MORAL, LEGAL AND INTERNATIONAL DILEMMAS* 82 (1997) (revealing that Anglo-American systems rely on incentive justification for granting private intellectual property rights).

62. See Monique Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 130 (1994) (calling bilateral and multilateral agreements, prior to TRIPs, essentially unenforceable and emphasizing that WIPO was unable to enforce intellectual property rights granted in conventions it administered).

63. See Chua, *supra* note 25, at 228-29 (noting that courts handling intellectual property disputes were not specialized).

64. CIVIL AND COMMERCIAL CODE B.E. 2535 (1992), § 420 (Thail.). Section 420

compensation, or Section 273-75 of the Penal Code,<sup>65</sup> which provides criminal penalties for pirating.<sup>66</sup> These statutes, combined with the existing intellectual property codes, however, were ineffectual in enforcing intellectual property rights.<sup>67</sup>

According to one expert, the general jurisdiction courts presented obstacles to effective civil and criminal enforcement of intellectual property rights.<sup>68</sup> Foreign copyright, trademark, and patent holders contended with no pre-trial discovery procedures,<sup>69</sup> burdensome technicalities,<sup>70</sup> and protracted proceed-

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provides that "[a] person who willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore." *Id.*

65. PENAL CODE, § 273-75 (Thail.). Sections 273-75 of the Penal Code read:

Section 273.- Whoever forges the registered trade-mark of the other person, whether it be registered within or outside the Kingdom, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both.

Section 274.- Whoever imitates the registered trade-mark of the other person, whether it be registered within or outside the Kingdom in order to make the public to believe that it is the registered trade-mark of such other person, shall be punished with imprisonment not exceeding one year or fine not exceeding two thousand baht, or both.

Section 275.- Whoever brings into the Kingdom, disposes or exposes for disposal the goods bearing the name, figure, artificial mark or any wording as provided in Section 272(1), or the goods bearing the forged or imitated trade-mark belonging to the other person according to Section 273 or 274, shall be liable to the same punishment as provided in such Section.

*Id.*

66. See TILLEKE & GIBBINS, *supra* note 22, at 30/2 (explaining that legal protection of intellectual property is based on provisions of intellectual property legislation as well as Civil and Commercial Code, Penal Code, and Consumer Protection Act).

67. See Chua, *supra* note 25, at 227 (stating that Thai administrative and judicial infrastructures were not prepared to manage intellectual property matters causing obstacles to effective enforcement).

68. See Wineburg, *supra* note 2, at 29 (noting that specific procedural differences in Asian courts hampered efforts of Westerners to protect their intellectual property rights).

69. See *id.* at 29 (claiming that most Asian countries do not allow pretrial discovery); MARTINDALE-HUBBELL, *supra* note 38, at THAI-7 (noting that Thai courts do not recognize interrogatories, depositions, and broad requests for document production).

70. See Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 SANTA CLARA COMPUTER & HIGH TECH. J. 335, 382 (1992) (claiming that Thai enforcement officials placed burdensome requirements for documenting claims); Faye Rice, *How Copycats Steal Billions: Foreign Theft of Ideas and Innovations, from Hit Songs to Computer Software, Has Become a Huge Headache for American Business. Wise Companies Have Learned To Fight Back.*, FORTUNE, Apr. 22, 1991, at 157 (commenting that U.S. entertainment company, M.C.A., filed 14 suits between 1987 and 1990 and lost all on "outrageous technicalities" despite hiring Thailand's most prestigious copyright attorneys).

ings.<sup>71</sup> Another factor interfering with their efforts to adjudicate their claims was a lack of expertise on the part of the judiciary.<sup>72</sup> Should the foreign right-holder prevail, the courts granted inadequate awards and fines.<sup>73</sup> Additionally, U.S. copyright holders found that, prior to the United States signing the Berne Convention, the indirect means they utilized to secure protection in other nation's markets were ineffectual in Thailand.<sup>74</sup>

Experts note that the pre-existing process of enforcing intellectual property rights in the general courts, even in simple cases of outright piracy, was time-consuming and unreliable.<sup>75</sup> In

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71. See Chua, *supra* note 25, at 228 (stating that civil cases go before bench in monthly installments and average case goes before court of general jurisdiction only one day per month).

72. See *id.* at 228 (revealing that former Deputy Director General of Department of Intellectual Property strongly criticized court of general jurisdiction for misapplying law and not understanding concept of copyright).

73. See Wineburg, *supra* note 2, at 29 (stating that Asian courts award damages slowly and infrequently); Chua, *supra* note 25, at 227 (noting that prior to Copyright Act of 1994, fines for infringement were approximately US\$80, and prior to Trademark Act of 1991, fines for forgery were approximately US\$240).

74. See *Cine-Ads Video Co. v. Nai Mongkol Thainprathan* [Crim. Ct.] No. 7388/2530 (1987) (Thail.) (refusing to hold Thai defendant guilty of pirating U.S. films); see also JOYCE, *supra* note 4, at 33 (describing back door method of receiving protection under Berne Convention). Prior to the United States signing on to the Berne Convention, U.S. authors could simultaneously publish their works in a country that adhered to the 1971 Paris Act or the 1948 Brussels Act of the Berne Convention and thus be protected under the Berne Convention. JOYCE, *supra*. Simultaneous publication in a Berne member country, however, did not protect U.S. authors in countries that adhered to the 1928 Rome Act of the Berne Convention. *Id.* at 32.

75. See Sujintaya, *supra* note 26 (describing difficulty in litigating intellectual property rights before establishment of IPIT Court); Chua, *supra* note 25, at 228 (commenting that civil and criminal enforcement faced many obstacles prior to IPIT Court). See also Sujintaya, *supra* (explaining that practice of law in Thailand is among list of professions allowed only to Thai citizens under Alien Business Law (N.E.C. Announcement No. 281), B.E. 2515 (1972)). When a foreign copyright, trademark, or patent holder suspected infringement or pirating of his or her intellectual property, he or she would contact a Thai law firm to pursue the matter. Sujintaya, *supra*. The Thai law firm would then initiate an investigation by hiring a private detective agency to discover the necessary facts to include in the complaint, which could take weeks or months. *Id.* When finished, the attorney would present this complaint to the police department, which would decide whether to issue a search warrant. *Id.* If the police granted a search warrant, then an attorney would accompany them on the raid. *Id.* After the raid, the police returned to the police station with both parties and the seized articles, which could be the offending goods, the equipment by which they were produced, and any documents. *Id.* There, the police would take statements from both parties and decide whether to arrest the offender. *Id.* Frequently, the police only pursued cases of outright piracy. *Id.* Either way, the police then made their own investigation of the case. *Id.* Again this stage could take months and stories abound regarding discontented right-holders. *Id.* If the police determined there was sufficient cause to pursue the

Thailand, unlike the United States, experts note that most foreign right-holders have preferred to file criminal charges rather than civil causes of action.<sup>76</sup> This preference is due in part to the Thai Code of Civil Procedure.<sup>77</sup> Another deterrent in pursuing a civil case is that upon receiving a civil complaint, the infringer who operated a sole ownership business could simply close shop and move.<sup>78</sup> While criminal actions allow for the immediate termination of the infringing acts, interim injunctions are seldom available in civil cases.<sup>79</sup> Should a right-holder still decide to pursue a civil complaint, a final adjudication, taking into account the full appeal process, may require up to six years.<sup>80</sup>

### B. TRIPs and Enforcement Obligations

Scholars note that multinational treaties, bilateral negotiations, and unilateral trade sanctions affected the development of international intellectual property law.<sup>81</sup> The United States and other Western nations moved to unite international intellectual

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matter, then they would turn the case over to a public prosecutor. *Id.* Once received by a public prosecutor, the case would be handled as any other criminal case, because there was not a special intellectual property section with built up expertise and background within the judiciary or prosecutor's office. *Id.*

76. See Vechayanon, *supra* note 23, at 33 (stating that increasing trend is to use criminal process in intellectual property enforcement); Sujintaya, *supra* note 26 (remarking that criminal process is preferred because civil process is not practical in Thailand).

77. THAI CODE OF CIVIL PROCEDURE (Thail.). See Sujintaya, *supra* note 26 (explaining that complaining parties have avoided civil cases because complying with filing requirements of Thai Code of Civil Procedure in intellectual property cases was inefficient). Sae Sujintaya revealed that the Thai Code of Civil Procedure requires that the complaint in civil cases include all of the evidence. *Id.*; see also MARTINDALE-HUBBELL, *supra* note 38, at THAI-7 (reporting that Thai courts generally do not employ pretrial discovery procedures). Thus a civil complainant cannot expect to discover evidence to support his allegations through interrogatories, broad requests for document production, or discovery depositions. MARTINDALE-HUBBELL, *supra*.

78. See Sujintaya, *supra* note 26 (revealing that sole ownership businesses are not required to file for licenses that would make infringing owner easy to identify and locate).

79. See *id.* (commenting that courts require overwhelming evidence for interim injunctions).

80. See Chua, *supra* note 25, at 228 (estimating that civil intellectual property cases in courts of general jurisdiction required six years for final adjudication after full appeal process).

81. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV 273, 289 (1991) (noting that United States uses multinational treaties, bilateral negotiations, and unilateral trade sanctions to af-

property law with trade at the Uruguay Round<sup>82</sup> of the General Agreement on Tariffs and Trade<sup>83</sup> ("GATT"), which produced TRIPs.<sup>84</sup> TRIPs is the first multilateral intellectual property agreement to prescribe comprehensive enforcement procedures that its member countries must adopt.<sup>85</sup>

### 1. Pre-existing Intellectual Property Mechanisms

The United States has employed three approaches to enforce its intellectual property interests in other countries, such as Thailand: unilateral trade sanctions, bilateral negotiations, and multilateral treaties administered by international agencies.<sup>86</sup> Initially, the United States directed most of its efforts towards unilateral trade sanctions under Section 301 of the Trade Act of

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fect development of intellectual property laws in other nations); Wineburg, *supra* note 2, at 25 (remarking that formal diplomatic actions develop intellectual property rights).

82. WTO Agreement, *supra* note 9.

83. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950) [hereinafter GATT]. See *About the WTO*, *supra* note 9 (remarking that international organization was created later). The General Agreement on Tariffs and Trade ("GATT") was both an international agreement and an international organization to support the agreement. *About the WTO*, *supra*. GATT was a provisional agreement that governed much of world trade from 1948 to 1994. *Id.* GATT was aimed at reducing tariff concessions and providing trade rules. *Id.* It was replaced by the WTO in the Uruguay Round of Negotiations, which culminated in 1994. *Id.*

84. See Cordray, *supra* note 62, at 135 (commenting that United States shifted its efforts for intellectual property enforcement to Uruguay Round); Leaffer, *supra* note 81, at 277 (asserting that Uruguay Round of GATT was proposed to remedy deficient international protection of intellectual property); Doane, *supra* note 2, at 466 (reporting that intellectual property rights protection was placed on negotiating agenda of Uruguay Round due to persistence of U.S. business community and government).

85. See Thomas Dreier, *TRIPs and the Enforcement of Intellectual Property Rights*, in FROM GATT TO TRIPs—THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 1, 2 (Friedrich-Karl Beier & Gerhard Schricker eds., Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996) (commenting that before TRIPs formal and practical aspects of enforcement was left to signatory states to determine); Ana Maria Pacon, *What Will TRIPs Do for Developing Countries?*, in FROM GATT TO TRIPs—THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 1, 2 (Friedrich-Karl Beier & Gerhard Schricker eds., Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996) (reporting that for first time international intellectual property convention lays down detailed standards for procedures and litigation); Doane, *supra* note 2, at 428 (noting that TRIPs has enforcement measures); Schmidt-Szalewski, *supra* note 5, at 191 (stating that TRIPs is first intellectual property treaty to introduce sanctions against non-complying members).

86. See Leaffer, *supra* note 81, at 289 (stating that United States has fought piracy through three-prong approach).



1974<sup>87</sup> ("Section 301") and bilateral trade negotiations, such as friendship, commerce, and navigation treaties.<sup>88</sup> Scholars note that these approaches proved inadequate in many instances.<sup>89</sup> Direct negotiations with developing nations often were unsuccessful and made little headway because they created resentment

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87. Title III, Chapter 1, of the Trade Act of 1974, 19 U.S.C. §§ 2411-20 (1988) (Omnibus Trade and Competitiveness Act of 1988) [hereinafter Section 301]. See Ted L. McDorman, *U.S.-Thailand Trade Disputes: Applying Section 301 to Cigarettes and Intellectual Property*, 14 MICH. J. INT'L L. 90 (1992) (describing U.S. pressure and application of trade sanctions against Thailand to provide greater protection for intellectual property rights). According to Ted McDorman, the U.S. use of Section 301 of the Trade Act of 1974 ("Section 301") confers short-term economic benefits on the United States at the cost of political goodwill. McDorman, *supra*. There is a growing resentment to the United States and "significant opposition to Thailand's perceived capitulation to U.S. pressure." *Id.* at 118. In 1987, this opposition reached its head when the Thai legislature refused to pass amendments to the Copyright Act of 1978 that were intended to satisfy U.S. pressure. *Id.* The resulting political upheaval caused the government of Prime Minister Prem Tinsulanonda to fall. See also Lee Siew Hua, *New Thai Copyright Law Comes into Force Today*, STRAITS TIMES (Sing.), Mar. 21, 1995 (on file with the *Fordham International Law Journal*) (reporting that refusal of Members of Parliament to pass copyright amendment bill caused downfall of Prem Tinsulanonda government); O'Neill, *supra* note 50, at 617-22 (describing legislative and political history of Copyright Act).

88. See Patricia McKinstry Robin, Comment *The Bit Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931, 939 (1984) (explaining that friendship, commerce, and navigation treaties are bilateral agreements that typically include most-favored-nation treatment, establish terms of trade and shipping, and establish rights of businesses of both countries to reside, do business, and own property within jurisdiction of other state). According to Wineburg, the United States has used diplomatic and commercial pressures, including bilateral investment and friendship treaties, on Asian countries to encourage the adoption of modern intellectual property laws, in line with Western views of intellectual property. Wineburg, *supra* note 2, at 25. The rationale behind the use of trade by the United States to convince Asian countries to recognize and protect intellectual property rights as private property is that non-recognition of intellectual property as private property results in a taking. Wineburg, *supra*, at 26. Non-recognition, according to the U.S. view, serves as a non-tariff trade barrier against U.S. citizens who wish to trade in their intellectual property. *Id.* But, Wineburg posits, "[d]iplomatic techniques impose Western cultural values, and ignore, or purposefully overlook, the culture and customs of the Asian countries." *Id.* at 25.

89. See O'Neill, *supra* note 50, at 616 (noting that U.S. bilateral action brought about reform in three Asian nations, but not in Thailand); see also McDorman, *supra* note 87, at 91 (stating that "use of Section 301 and Special Section 301 has put pressure on Thailand to alter its laws and practices to provide greater protection for . . . intellectual property."); Howley & Roman, *supra* note 13 (attributing Thailand's placement on Section 301 Watch List in 1998 to high video and software piracy and failure to meet standards of TRIPs patent protection). In 1998, the U.S. Trade Representative again placed Thailand on the Section 301 Watch List due to Thailand's high level of intellectual property infringement, despite the effectiveness of the IPIT Court and the institution of the new Copyright Act that grants higher levels of protection rights. Howley & Roman, *supra* note 13.

among developing nations that viewed them as a form of colonialism.<sup>90</sup> When bilateral persuasion proved ineffective, the United States could impose unilateral trade sanctions.<sup>91</sup> Protests by developing nations,<sup>92</sup> however, illustrated that unilateral Section 301 sanctions were problematic because they were potential violations of U.S. responsibilities under GATT.<sup>93</sup>

The government also employed existing multinational accords to enforce higher levels of protection.<sup>94</sup> Experts, however, maintained that because the Berne Convention and the Paris Convention for the Protection of Industrial Property<sup>95</sup> ("Paris Convention") lacked dispute settlement procedures between member countries, these Conventions could not pressure non-conforming member countries to provide increased protection of intellectual property rights.<sup>96</sup> Rather, the Paris and Berne

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90. See Leaffer, *supra* note 81, at 297 (alleging that bilateral agreements create resentment among Third World countries who view them as species of colonialism); see also D'AMATO & LONG, *supra* note 8, at 70 (quoting one Thai leader as saying that United States is "not the world's big boss" in response to U.S. pressure on Thailand).

91. Leaffer *supra* note 81, at 295; D'AMATO & LONG, *supra* note 8, at 386.

92. See Leaffer *supra* note 81, at 298 (reporting that Brazil claims U.S. Special 301 sanctions violate U.S. responsibilities under GATT); see also D'AMATO & LONG, *supra* note 8, at 385 (claiming that U.S. use of Section 301 against Thailand for its high rate of intellectual property infringement is problematic). First, Section 301 is difficult to legitimize because there has never been an apparent market in Thailand for legitimate U.S. intellectual property. D'AMATO & LONG, *supra*, at 386. The U.S. Trade Representative, therefore, is using Section 301 to coerce Thailand to pass laws that conform to U.S. intellectual property norms rather than to protect U.S. manufacturers from lost sales. *Id.* Thus, Section 301 interferes with sovereignty and ignores comity. *Id.* Second, application of Section 301 is arguably unreasonable because when balancing the potential harms, "it is clear that Thailand stood to lose far more than the United States stood to gain." *Id.* Third, penalizing the Thai government and people when they lack the resources to halt illegal pirating is different than when the government sanctions criminal activity that has harmful effect within the United States. *Id.*

93. GATT, *supra* note 83.

94. See McDorman, *supra* note 87, at 107 (noting that United States pushed for inclusion of international regime of intellectual property protection as part of GATT).

95. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

96. See Cordray, *supra* note 62, at 131 (quoting NATIONAL SECURITY & INT'L AFFAIRS DIV., GEN. ACCT. OFFICE, STRENGTHENING WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 22 (1987) [hereinafter GAO Report] as stating that "knowledgeable government officials agree that [existing multilateral intellectual property agreements] do not contain effective provisions for challenging countries that do not meet their obligations."); Romano, *supra* note 55, at 553, 558 (explaining that Berne and Paris Conventions fail to include mechanisms for right-holders to resolve disputes and sanctions to be applied against member states that do not uphold their obligations);

Conventions relied on WIPO as an administering body.<sup>97</sup> Under WIPO, disputes arising between member countries over WIPO provision violations would be settled in the International Court of Justice<sup>98</sup> ("ICJ").<sup>99</sup> Scholars note that the International Court of Justice was viewed as an unreliable forum, in part due to its slow pace.<sup>100</sup> After the developing nations moved to weaken the provisions of WIPO, the United States ceased to view WIPO as being capable of achieving its objectives of increased intellectual property right protection and enforcement.<sup>101</sup> Instead, the United States shifted its focus towards lobbying for the inclusion of an agreement on intellectual property as part of what would become the WTO.<sup>102</sup>

## 2. Formation of TRIPs

Because TRIPs is an annex of the WTO Agreement, all WTO member countries that seek to benefit from the trade ben-

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Schmidt-Szalewski, *supra* note 5, at 191 (asserting that TRIPs is first international intellectual property treaty to introduce system of sanctions against members who do not comply); Leaffer, *supra* note 81, at 276 (declaring that neither Berne nor Paris Conventions are effective against piracy in Third World nations).

97. See DANIEL GERVAIS, *THE TRIPs AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 9 (Sweet & Maxwell 1998) (stating that WIPO administers Paris and Berne Conventions).

98. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, 59 Stat. 1055. The U.N. Charter established the International Court of Justice [hereinafter ICJ] as the primary judicial forum of the United Nation.

99. See Cordray, *supra* note 62, at 139 (commenting that WIPO conventions require bringing disputes before ICJ).

100. See John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, in *INTERNATIONAL LAW* 16, 20-21 (1999) (remarking that "[t]he Court has been hampered, however, by a perceived lack of bite."); Cordray, *supra* note 62, at 131 (noting that ICJ dispute settlement process is too long, complex, and cumbersome). According to Monique Cordray, countries may declare themselves not to be bound by ICJ jurisdiction. Cordray, *supra*. As of 1989, 26 members of the Paris Convention have refused to accept ICJ jurisdiction and only 60 of the Berne Convention members are subject to ICJ jurisdiction. *Id.*

101. See Doane, *supra* note 2, at 471 (reporting that at March 1980 Conference of WIPO, developing countries attempted to pass proposals to weaken already inadequate standards of protection in Paris Convention); Cordray, *supra* note 62, at 124 (citing GAO Report that United States has actively opposed initiatives by developing nations to weaken current international standards of national intellectual property protection in WIPO). The GAO Report further states that "[t]he government sees greater opportunity for broad substantive progress by addressing this problem as an unfair trade practice within the new 'Uruguay' GATT Round of multilateral negotiations." Cordray, *supra*.

102. See Cordray, *supra* note 62, at 122 (claiming that one reason United States shifted its efforts to GATT was because United States had more influence in GATT than WIPO).

efits conferred by the WTO must adhere to their TRIPs obligations.<sup>103</sup> TRIPs is the result of the efforts of many nations, led by the United States, to connect intellectual property rights enforcement to international trade.<sup>104</sup> The United States strove to include intellectual property in international trade discussions because it viewed intellectual property violations as distorting international trade.<sup>105</sup>

The United States specifically sought to have international intellectual property rights protection included in the agenda of the Uruguay Round of Negotiations of GATT, rather than rely on the pre-existing mechanisms.<sup>106</sup> The developing nations objected to the inclusion of intellectual property as part of the WTO and argued that WIPO was the proper forum.<sup>107</sup> The United States, however, preferred to pursue the WTO as a forum because, unlike WIPO, WTO agreements contractually bind governments to keep their policies within agreed limits,<sup>108</sup> the

103. TRIPs, *supra* note 10, art. 1(1). Article 1(1) states that "Members shall give effect to the provisions of this Agreement." See Paul Katzenberger & Annette Kur, *TRIPs and Intellectual Property*, in *FROM GATT TO TRIPs—THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 1, 2 (Friedrich-Karl Beier & Gerhard Schricker eds., Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996) (noting that because TRIPs is component of WTO Agreement, it is binding on all WTO members); Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 *VAND. J. TRANSNAT'L L.* 735, 759 (1996) (remarking that threat of trade sanctions provides incentive for TRIPs compliance).

104. See Doane, *supra* note 2, at 471 (asserting that United States and European Community brought issue of intellectual property to attention of GATT's contracting parties).

105. See *id.* at 466 (describing why United States views inadequate intellectual property protection as leading to trade distortions); Joyce, *supra* note 4, at 40 (stating that "lax enforcement of the intellectual Property rights of foreign proprietors also could be considered a means by which states shelter local companies from international competition.").

106. See Doane, *supra* note 2, at 465 (maintaining that United States sought to include protection for intellectual property in Uruguay Round due to growth in U.S. exports of intellectual property products); Leaffer, *supra* note 81, at 276 (commenting that United States decided that intellectual property protection must be sought through new mechanism besides existing international intellectual property treaties).

107. See Doane, *supra* note 2, at 472 (stating that developing nations asserted that inclusion of intellectual property rights exceeded GATT's mandate); Trevor Stevens & Davies Collison Cave, *Recent Trademark Developments: Asia/Pacific and Australia*, 393 *PRAC. L. INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES* 329, 336 (1994) (noting that Thailand challenged legitimacy of intellectual property as right and its inclusion in GATT, rather than remaining solely under WIPO).

108. See *About the WTO*, *supra* note 9 (emphasizing that WTO Agreements are contracts between member nations).

WTO is equipped with its own dispute settlement mechanism and with enforcement procedures,<sup>109</sup> and the WTO is not subject to the same U.N.-style voting blocks as WIPO.<sup>110</sup>

Ultimately, the developing nations agreed to include negotiations for an agreement on intellectual property rights in the Uruguay Round.<sup>111</sup> The developing nations bargained for greater market access and fair trade rules in specific industries in exchange for providing greater intellectual property protection.<sup>112</sup> They also bargained for a system requiring staggered compliance, depending on a nation's level of development and economy.<sup>113</sup> These negotiations produced TRIPs,<sup>114</sup> which establishes three transitional compliance periods for nations to meet TRIPs obligations and minimum standards.<sup>115</sup>

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109. See *id.* (remarking that dispute settlement mechanism is important aspect of WTO); Schmidt-Szalewski, *supra* note 5, at 191 (stating that TRIPs is first international treaty to impose sanctions for failing to meet intellectual property protection minimums).

110. See Cordray, *supra* note 62, at 137 (stating that WIPO voting block is similar to those formed in other U.N. organizations). The U.N.-style voting block occurs when less developed countries cast their votes together as a block "even if the result doesn't adequately reflect the interests of some members." *Id.* (citing Frank Emmert, *Intellectual Property in the Uruguay Round—Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1343 (1989)).

111. See Gervais, *supra* note 97, at 10-25 (describing history of negotiations to include intellectual property in WTO).

112. See Gana, *supra* note 103, at 739 (stating that developing countries' accession to TRIPs was "bargained-for-exchange—intellectual property protection for fair trade rules in specific industries . . .").

113. See Gervais, *supra* note 97, at 14 (citing Document MTN.TNC/11 dated Apr. 21, 1989 that stipulates that parties to negotiations agree to discuss transitional arrangements).

114. TRIPs, *supra* note 10.

115. *Id.*; see Gervais, *supra* note 97, at 14 (noting that second "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" suggested three general transitional periods). The first deadline for compliance, which applied to developed nations, was January 1, 1996. TRIPs, *supra* note 10, art. 65(1). Article 65(1) allows that "no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the Agreement Establishing the WTO." TRIPs, *supra*. The second deadline of January 1, 2000 applied to developing nations and nations whose economy is in transition. *Id.* arts. 65(2), 65(3). Article 65(2) states that "[a]ny developing country Member is entitled to delay for a further period of four years the date of application . . . of the provisions of this Agreement other than Articles 3, 4 and 5 of Part I." *Id.* Article 65(3) provides that "[a]ny other Member, which is in the process of transformation from a centrally-planned into a market, free-enterprise economy . . . may also benefit from a period of delay as foreseen in paragraph 2 above." *Id.* The third deadline of January 1, 2006 applies to countries on the U.N. list of least-developed nations. *Id.* art. 66. Article 66(1) allows that:

Scholars question whether the obligations established by TRIPs will permit developing nations to have intellectual property systems that reflect their culture and values, or whether these obligations will impose norms and mores of the industrially developed nations.<sup>116</sup> First, because the rules regarding intellectual property are in a state of development, the binding obligations of TRIPs may create intellectual property laws in member countries where none existed.<sup>117</sup> Second, in addition to requiring the recognition of minimum intellectual property rights, TRIPs provides an international dispute settlement mechanism that allows member countries in good standing to exact compensatory damages from other member countries that fail to comply with their TRIPs obligations.<sup>118</sup>

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In view of their special needs and requirements, and their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, least-developed country Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65 above.

*Id.*

116. See Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Over-protective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996) (predicting that TRIPs "will be one of the most effective vehicles of Western imperialism in history.").

117. See Daniel Gervais, *An Overview of TRIPs: Historical and Current Issues*, Remarks at the Fordham University School of Law Seventh Annual Conference on International Intellectual Property Law & Policy (Apr. 8-9, 1999) (transcript on file with the *Fordham International Law Journal*) (noting that TRIPs binds WTO Member nations to provide intellectual property rights and protections at specified minimum standards). According to Daniel Gervais:

The TRIPS Agreement obliges WTO Members to comply with the substantive provisions of the Paris and Berne Conventions, in addition to the specific ("Paris-plus" and "Bern-plus") provisions of TRIPS itself . . . . [T]ogether they ensure that no provision of TRIPS is interpreted to lower the level of protection existing before TRIPS . . . . The incorporation of Paris and Berne provisions by reference into TRIPS allows WTO members to challenge other Members' implementation of those provisions (as well as those added by TRIPS, of course), using the WTO dispute-settlement mechanism.

*Id.*

118. See Cordray, *supra* note 62, at 133 (setting forth that GATT Article 23 allows contracting parties to suspend concessions or other GATT obligations to offending parties); see also Gana, *supra* note 103, at 773 (claiming that prevailing party in WTO dispute is entitled to seek compensation or suspend concessions). According to Monica Cordray, developing nations must relinquish their sovereign right to pursue their own policies, which they adopted to stimulate indigenous creative action, if those policies are inconsistent with TRIPs. Gana, *supra*, at 737. "TRIPs requires [that] member countries ensure that enforcement procedures as specified in TRIPs are made available under national laws." *Id.* at 769. Developing nations, therefore, must conform to a

### 3. Enforcement Obligations under TRIPs

The primary goal of TRIPs, as expressed in its preamble, is to promote free trade by ensuring that member countries protect intellectual property rights, but not to such an extent as to constitute a trade barrier.<sup>119</sup> The principle that each member country provides intellectual property protection for citizens of other member countries is fundamental to TRIPs.<sup>120</sup> In pursuit of this goal, TRIPs features minimum substantive standards, dispute settlement between member countries, and enforcement provisions.<sup>121</sup>

The first main feature of TRIPs is that member countries pledge to conform to an internationally recognized minimum level of standards.<sup>122</sup> These minimum standards govern what constitutes protected subject matter, what rights are to be conferred and the allowable exceptions to those rights, and the duration of protection.<sup>123</sup> In order to determine at what level to set these minimum standards, the drafters of TRIPs looked to the existing international intellectual property treaties.<sup>124</sup> TRIPs ex-

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system and philosophy of laws and values that are alien and may be in direct conflict with the historical framework which has sustained these societies. *Id.* at 770.

119. TRIPs, *supra* note 10, pmbl. The Preamble of TRIPs reads "[d]esiring to reduce trade distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade . . . ." *Id.*

120. See J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 348 (1995) (emphasizing that principle of equal treatment under domestic laws is important basic principle of TRIPs).

121. See *An Overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)* (visited Oct. 10, 1999) <<http://www.wto.org>> (on file with the *Fordham International Law Journal*) [hereinafter *Overview*] (reporting that three main features of TRIPs are standards, enforcement, and dispute settlement); Gana, *supra* note 103, at 759 (noting that "[t]he impetus behind the TRIPs Agreement is a combination of two inextricable objectives: (1) to secure global economic rewards of an intellectual property grant, and (2) to facilitate the enforcement of these rights as a means to accomplish the first objective.").

122. See *Overview*, *supra* note 121 (citing adherence to minimum standards as one main feature of TRIPs).

123. See *id.* (defining aspects that are covered by minimum standards).

124. See *Other Intellectual Property Conventions Incorporated by Reference into the TRIPs Agreement* (visited Oct. 10, 1999) <<http://www.wto.org>> (on file with the *Fordham International Law Journal*) (declaring that TRIPs references provisions of Paris, Berne, and other intellectual property conventions); Schmidt-Szalewski, *supra* note 5, at 191 (remarking that TRIPs requires members to comply with substantive rules of Paris Conven-

pressly incorporates the substantive obligations of WIPO, the Paris Convention, and the Berne Convention.<sup>125</sup> It, however, expressly does not incorporate the Berne Convention's moral rights provision.<sup>126</sup> Furthermore, TRIPs provides for additional obligations to cover areas that are either unanticipated by the pre-existing conventions or purposefully omitted.<sup>127</sup>

The second significant feature of TRIPs, because it is an integral part of the WTO Agreement, is the dispute settlement mechanism of the WTO, which governs disputes arising between member countries due to noncompliance with their TRIPs obligations.<sup>128</sup> All member countries promise to conform to the minimum standards set out by TRIPs, subject to their transition periods.<sup>129</sup> Member countries, however, are free to provide

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tion); GERVAIS, *supra* note 97, at 97 (revealing that TRIPs negotiators opted to adopt existing rules).

125. TRIPs, *supra* note 10, arts. 2(1), 9(1). Article 2(1) states that "Members shall comply with Articles 1-12 and 19 of the Paris Convention (1967)." *Id.* Article 9(1) provides that "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971)." *Id.*

126. *Id.* art. 9(1). Article 9(1) notes that "[h]owever, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or the rights derived therefrom." *Id.*; see GERVAIS, *supra* note 97, at 71-79 (detailing drafting history of decision to omit moral rights obligations).

127. TRIPs, *supra* note 10, arts. 8(1), 71(1). Article 8(1) reads, "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right-holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." *Id.* Article 71(1) allows that "[t]he Council may also undertake reviews in the light of any relevant new developments which might warrant modifications or amendment of this Agreement." *Id.* See Doane, *supra* note 2, at 474 (describing how TRIPs allows for developments in technology that may warrant modification or amendment to TRIPs).

128. See Overview, *supra* note 121 (contending that TRIPs makes member nations subject to WTO dispute settlement procedures with respect to intellectual property); Karen D. Lee & Silke von Lewinski, *The Settlement of International Disputes in the Field of IP*, in FROM GATT TO TRIPs—THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 278, 312 (Friedrich-Karl Beier & Gerhard Schricker eds., Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996) (reasoning that as one of WTO's multilateral agreements, WTO dispute settlement procedures apply to TRIPs).

129. See The Honourable Mr. Justice Laddie, *TRIPs: A Critical View*, Remarks at the Fordham University School of Law Seventh Annual Conference on International Intellectual Property Law & Policy (Apr. 8-9, 1999) (transcript on file with the *Fordham International Law Journal*) (stating that "all countries are expected to adopt intellectual property laws which contain the TRIPs provisions . . ."). Justice Laddie further notes that "[a]lthough TRIPs is designed to impose a uniform intellectual property code, it has not been uniformly welcomed." *Id.*



more extensive intellectual property protection than TRIPs provides and to determine which methods are appropriate for implementing the provisions of the agreement.<sup>130</sup>

The requirements regarding intellectual property enforcement through domestic procedures and remedies are the third important feature of TRIPs.<sup>131</sup> Besides ensuring that right-holders have an effective means of enforcing their rights, the agreement seeks to ensure that the domestic procedures employed by member countries are not applied in a manner that creates barriers to legitimate trade.<sup>132</sup> In furtherance of this goal, Part III of TRIPs designates the enforcement procedures that member countries are required to provide.<sup>133</sup> The first section presents the general principals for all enforcement procedures.<sup>134</sup> The remaining four sections detail what procedures and remedies must be available for right-holders to obtain effective enforcement against violators.<sup>135</sup> In the second section, TRIPs requires the creation of certain civil and administrative procedures and remedies.<sup>136</sup> The third section discusses provisional remedies.<sup>137</sup> Special requirements related to border measures are covered in the forth section.<sup>138</sup> The fifth section determines when criminal

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130. See *Overview*, *supra* note 121 (explaining that TRIPs is minimum standards agreement, which allows member nations to provide more extensive protection of intellectual property).

131. TRIPs, *supra* note 10, Part III, §§ 1-5, arts. 41-61. Part III is titled "Enforcement of Intellectual Property Rights."

132. *Id.* art. 41; see *Overview*, *supra* note 121 (asserting that member nations have general obligations not to apply procedures in such manner that they will hinder trade). The relevant language in Article 41(1) provides that "[t]hese procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse." *Overview*, *supra*.

133. TRIPs, *supra* note 10, Part III, §§ 1-5, arts. 41-61. Article 41(1) requires that "[m]embers shall ensure that enforcement procedures as specified in this Part are available under their national laws . . . ." *Id.* art. 41(1)

134. *Id.* Part III, § 1, art. 41. Section 1 of Part III is titled "General Obligations."

135. See *Overview*, *supra* note 121 (declaring that after Section 1, following sections deal with civil and administrative procedures and remedies, provisional measures, border measures, and criminal procedures).

136. TRIPs, *supra* note 10, Part III, § 2, art. 42-49. Section 2 of Part III is titled "Civil and Administrative Procedures and Remedies." *Id.*

137. *Id.* Part III, § 3, art. 50. Section 3 of Part III is titled "Provisional Measures." *Id.*

138. *Id.* Part III, § 4, arts. 51-60. Section 4 of Part III is titled "Special Requirements Related to Border Measures."

procedures shall be available.<sup>139</sup>

Scholars note that the basic objective of the first section, which states the general obligations, is the guarantee of due process.<sup>140</sup> TRIPS requires that the enforcement procedures should not be overly complicated or costly and should not include any unreasonable time limits or unwarranted delays.<sup>141</sup> TRIPS also directs that the courts issue written decisions that are available to both parties without undue delay.<sup>142</sup> The courts must base their decisions on the merits of the case and on evidence that both parties had the opportunity to dispute.<sup>143</sup> The parties must also have the opportunity for judicial review of final administrative decisions and appeals on matters of law of an initial court decision, subject to a member country's jurisdictional provisions.<sup>144</sup> Member countries, however, are not obligated to create a special court or to allocate resources for the enforcement for intellectual property rights.<sup>145</sup>

The second section imparts civil and administrative procedures and remedies.<sup>146</sup> Articles 42 and 43 discuss the civil, judicial, and evidentiary procedures that each member country must

139. *Id.* Part III, § 5, art. 61. Section 5 of Part III is titled "Criminal Procedures." *Id.*

140. *See Overview, supra* note 121 (contending that goal of first three paragraphs is to guarantee due process).

141. TRIPS, *supra* note 10, art. 41(2). Article 41(2) states that "[p]rocedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." *Id.*

142. *See id.* art. 41(3) (providing that "[d]ecisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay.").

143. *See id.* (ordering that "[d]ecisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.").

144. *Id.* art. 41(4). Article 41(4) requires that "[p]arties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in national laws concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case." *Id.*

145. *Id.* art. 41(5). Article 41(5) recognizes that:  
[T]his Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.

*Id.*

146. *Id.* Part III, § 2, arts. 42-49.

establish.<sup>147</sup> The fair and equitable procedures mandated by Article 42 provide that the defendant has the right to timely and sufficiently detailed written notice, that all parties are allowed independent legal counsel, that all parties have the right to substantiate their claims, and that the court shall provide protection for confidential information.<sup>148</sup> Article 43 grants courts the authority to order a limited discovery, in particular, that the opposing party produce specified evidence once the moving party proves this evidence is relevant to substantiate the claim and is within the opposing party's control.<sup>149</sup> Additionally, a member country may grant the court the authority to determine a case based on the information presented, even if it is unsubstantiated, once the opposing party has had an opportunity to be heard, yet voluntarily refuses access to the necessary information.<sup>150</sup>

Articles 44 through 47 empower judicial authorities to grant injunctions, award damages, order the disposal of infringing

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147. *Id.* arts. 42, 43. Article 42 is titled "Fair and Equitable Procedures." *Id.* art. 42. Article 43 is titled "Evidence of Proof." *Id.* art. 43.

148. *Id.* art. 42. Article 42 requires that "Members shall make available to right-holders civil judicial procedures . . . ." *Id.* Article 42 also states that:

[d]efendants shall have the right to written notice . . . . Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

*Id.*

149. *Id.* art. 43(1). Article 43(1) provides that:

The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

*Id.*

150. *Id.* art. 43(2). Article 43(2) instructs that:

In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations . . . on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information . . . .

*Id.*

goods, and provide the right-holder with a right of information.<sup>151</sup> Article 44 requires that courts have the ability to order injunctions, but does not require them to do so when the accused infringer acted in good faith.<sup>152</sup> Article 45 states that the courts must also be able to award damages adequate to compensate the right-holder for his or her injury and to award expenses, including attorney's fees.<sup>153</sup> Even when the infringer acted in good faith, a member country may grant the judicial authorities the power to award the recovery of profits.<sup>154</sup> In order to punish the infringer and deter future violations, Article 46 declares that courts have the authority to order the disposal of infringing goods outside the channels of commerce or their destruction without compensation of any sort to the infringer.<sup>155</sup> To further deter intellectual property rights violations, Article 47 is aimed at

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151. *Id.* arts. 44-47. Article 44 is titled "Injunctions." *Id.* art. 44. Article 45 is titled "Damages." *Id.* art. 45. Article 46 is titled "Other Remedies." *Id.* art. 46. Article 47 is titled "Right of Information." *Id.* art. 47.

152. TRIPs, *supra* note 10, art. 44. Article 44(1) states that:

The judicial authorities shall have the authority to order a party to desist from and infringement . . . . Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

*Id.*

153. *Id.* art. 45. Article 45(1), concerning damages, requires that "[t]he judicial authorities shall have the authority to order the infringer to pay the right-holder damages adequate to compensate for the injury the right-holder has suffered . . . by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity." *Id.*

154. *Id.* art. 45(2). Article 45(2), concerning expenses, mandates that:

The judicial authorities shall have the authority to order the infringer to pay the right-holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not know or had no reasonable grounds to know that he was engaged in infringing activity.

*Id.*

155. *Id.* art. 46. Article 46, concerning other remedies, provides that:

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce . . . or . . . destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which had been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

*Id.*

assisting the intellectual property right-holder to find the source of the infringing goods.<sup>156</sup> Under Article 47, member countries have the discretion to provide their judicial authorities with the power to order the infringer to inform the right-holder of the identity of third parties involved in the production and distribution of the infringing goods.<sup>157</sup>

In order to prevent abuse and to promote due process, Article 48 provides indemnification for the wrongly-accused defendant.<sup>158</sup> It states that where an applicant has abused the enforcement procedures to enjoin a party wrongly, the court shall have the authority to order the applicant to pay adequate compensation and the defendant's expenses, which may include appropriate attorney's fees.<sup>159</sup> Public authorities and officials who have acted in good faith to administer any intellectual property enforcement measures, however, are exempt from liability.<sup>160</sup>

The third section of Part III supplies provisional measure requirements that comply with the general obligation of expeditious enforcement remedies.<sup>161</sup> The twin aims of the provisional measures are to prevent infringement from occurring, especially by preventing infringing goods from entering into the channels of commerce, and to preserve evidence relevant to proving an alleged infringement.<sup>162</sup> Generally, the member countries must

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156. See GÉRAIS, *supra* note 97, at 210 (remarking that Article 47 allows judicial authorities to order infringer to reveal his partners, sources, and clients).

157. TRIPS, *supra* note 10, art. 47. Article 47 allows that "Members may provide that the judicial authorities shall have the authority . . . to order the infringer to inform the right-holder of the identity of third persons involved in the productions and distribution of infringing goods or services and of their channels of distribution." *Id.*

158. *Id.* art. 48. Article 48 is entitled "Indemnification of the Defendant." *Id.*; see *Overview*, *supra* note 121 (remarking that Article 48 contains safeguards against abuse of enforcement process).

159. *Id.* art. 48(1). Article 48(1) requires that:

The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

*Id.*

160. *Id.* art. 48(2). Article 48(2) mandates that "[i]n respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith . . . ." *Id.*

161. *Id.* Part III, § 3. Section 3 of part III is entitled "Provisional Measures." *Id.*

162. *Id.* art. 50(1). Article 50(1) explains that the provisional measures are "to

grant their judicial authorities the power to order prompt and effective provisional measures.<sup>163</sup> TRIPs specifically requires member countries to provide *inaudita altera parte*<sup>164</sup> measures that allow court action without notice to the other side if any delay is likely to cause irreparable harm to the right-holder or if there is a demonstrable risk of evidentiary destruction.<sup>165</sup> Additionally, a court must have the power to confirm that the applicant is the right-holder and that infringement of the right is imminent or occurring before ordering provisional measures.<sup>166</sup> Paragraphs 3 and 5 of Article 50 permit the court to require the applicant to provide a security deposit to protect the defendant and prevent abuse, any reasonably available evidence, and any information necessary to identify the goods.<sup>167</sup> Once the court grants an *inaudita altera parte* measure, it shall notify the affected party without delay.<sup>168</sup> The party then has the right to a hearing on whether the measures should be modified, revoked, or confirmed.<sup>169</sup> If the right-holder fails to initiate proceedings, however, then the measures will be revoked and the right-holder will

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prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce . . . [and] to preserve relevant evidence in regard to the alleged infringement." *Id.*

163. *Id.* art. 50(1). Article 50(1) states that "[t]he judicial authorities shall have the authority to order prompt and effective provisional measures . . . ." *Id.*

164. See William Whitaker, *Words by William Whitaker* (visited Feb. 5, 2000) <<http://www.lysy2.archives.nd.edu/cgi-bin/word.exe>> (on file with the *Fordham International Law Journal*) (defining *inaudita altera parte* as Latin phrase meaning out of hearing of other party).

165. TRIPs, *supra* note 10, art. 50(2). Article 50(2) declares that "[t]he judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right-holder, or where there is a demonstrable risk of evidence being destroyed." *Id.*

166. *Id.* art. 50(3). Article 50(3) states that "[t]he judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves . . . that the applicant is the right-holder and that his right is being infringed or that such infringement is imminent." *Id.*

167. *Id.* arts. 50(3), 50(5). Article 50(3) requires that the court have the authority "to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse." *Id.* art. 50(3). Article 50(5) allows that "[t]he applicant may be required to supply other information necessary for the identification of the goods . . . ." *Id.* art. 50(5).

168. *Id.* art. 50(4). Article 50(4) orders that "the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon the request of the defendant [to determine] whether these measures shall be modified, revoked or confirmed." *Id.*

169. *Id.* art. 50(4).

be liable to compensate the affected party for any injury.<sup>170</sup>

The last section of Part III requires member countries to provide criminal procedures and remedies to sanction certain intellectual property right violators.<sup>171</sup> According to TRIPs, those who operate on a commercial scale and willfully commit trademark counterfeiting or copyright piracy must be subject to criminal procedures.<sup>172</sup> It is up to the discretion of the member countries, however, whether to subject other commercial, willful infringement cases to criminal proceedings.<sup>173</sup>

## II. THAILAND'S ACT FOR THE ESTABLISHMENT OF AND PROCEDURE FOR INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE COURT

In October of 1997, the Thai National Assembly<sup>174</sup> passed the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court ("Act").<sup>175</sup> As a specialized court of first instance, the IPIT Court is not a new phenomenon in Thailand.<sup>176</sup> The Thai government established the IPIT

170. *Id.* arts. 50(6), 50(7). Article 50(6) states that "provisional measures . . . shall, upon request of the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period . . . ." *Id.* art. 50(6). Article 50(7) also provides that:

Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement . . . the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

*Id.* art. 50(7).

171. *Id.* Part III, § 5. Section 5 of Part III is entitled "Criminal Procedures." *Id.*

172. *Id.* art. 61. Article 61 mandates that "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale." *Id.*

173. *Id.* art. 61. Article 61 also provides that "Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale." *Id.*

174. See MARTINDALE-HUBBELL, *supra* note 38, at THAI-1 (describing Thailand's government as constitutional monarchy since 1932). The Thai National Assembly holds legislative power and is comprised of a Senate and House of Representatives. *Id.*

175. ACT, *supra* note 17.

176. See Mattei, *supra* note 40 (mentioning history of specialized courts in Thai judicial system). According to Mr. Fabrice Mattei, the Act Concerning the Organization of the Courts (1908) established the first International Court in Thailand, which had jurisdiction over matters involving the citizens of certain nations that had treaties with Thailand. *Id.* Thai and European judges presided over the first International Court. *Id.* The Thai National Assembly had already passed legislation to establish two

Court to provide a mechanism to satisfy its TRIPs obligations.<sup>177</sup>

### A. *The Formation of the Intellectual Property and International Trade Court*

The goal of the IPIT Court is to provide enhanced intellectual property enforcement.<sup>178</sup> The IPIT Court is a separate and specialized court convened to consider intellectual property cases.<sup>179</sup> The IPIT Court employs specially trained judges, its own court rules, unique procedures, such as hearings without adjournments, and equitable remedies, such as preliminary injunctions.<sup>180</sup>

#### 1. The Background of the Act

On December 1, 1997, a Royal Decree inaugurated the IPIT

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other specialized courts of first instance—the Labour Court and the Tax Court. THE ACT FOR THE SETTING UP OF LABOUR COURTS AND PROCEDURE FOR LABOUR CASES, B.E. 2522 (1979) (Thail.). THE ACT ON THE ESTABLISHMENT OF THE TAX COURTS AND PROCEDURE FOR TAX CASES, B.E. 2526 (1985) (Thail.).

177. See Akarawit Sumawong, *The Role of the Central Intellectual Property and International Trade Court*, Remarks at the Fordham University School of Law Seventh Annual Conference on International Intellectual Property Law & Policy 1 (Apr. 8-9, 1999) (transcript on file with the *Fordham International Law Journal*) (asserting that establishment of IPIT Court is Thailand's answer to TRIPs enforcement obligations); see also Vechayanon, *supra* note 23, at 30 (declaring that Thailand has improved intellectual property laws and created IPIT Court to provide adequate protection for intellectual property rights in response to WTO).

178. See Vechayanon, *supra* note 23, at 39 (contending that IPIT Court testifies to Thailand's commitment to create effective system of protecting intellectual property rights); see also Sujintaya, *supra* note 26 (describing IPIT Court as proof of Thailand's efforts to lower rate of intellectual property infringement).

179. See MARTINDALE-HUBBELL, *supra* note 38, at THAI-9 (explaining that IPIT Court is separate from courts of general jurisdiction); see also Robert Holleyman, *Copyright Protection for Computer Software: A Global Overview*, 416 PRAC. L. INST.: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 313, 319 (1995) (stating that Thai government wished to establish specialized court to consider intellectual property cases).

180. See Interview with Dr. Suthiphon Thaveechaiyagarn, Associate Judge, Secretary of the Court, The Central Intellectual Property and International Trade Court, in Bangkok, Thai. (June 15, 1999) (commenting on unique features of IPIT Court); Pimvimol (June) Vipamaneerut, *Intellectual Property and International Trade Court* (visited Oct. 25, 1999) <<http://www.tillekeandgibbins.com>> (on file with the *Fordham International Law Journal*) (explaining that IPIT Court hearings do not adjourn, judges have expertise in intellectual property, and Chief Justice of IPIT Court may stipulate rules for court procedure); see also Rupert Ross-MacDonald, UK: *Thai IPR Developments—March 1997-March 1998*, MONDAQ BUSINESS BRIEFING, June 16, 1998, available in 1998 WL 9017769 (stating that IPIT Court employs judges with intellectual property experience and utilizes exceptional procedures).



Court.<sup>181</sup> The Thai Government undertook this effort in large part as a result of its negotiations with the United States and the European Union.<sup>182</sup> The U.S. Trade Representative had been actively involved in an ongoing discourse with the Thai Ministry of Commerce for increased intellectual property protection and enforcement.<sup>183</sup> In 1992, the Thai Ministry of Commerce established the Department of Intellectual Property, a separate department within the Ministry charged with handling these discussions.<sup>184</sup> The European Union, under its WTO cooperation commitment,<sup>185</sup> sent a mission to Thailand to assist in the process of improving Thailand's intellectual property enforcement procedures.<sup>186</sup> One of the changes in Thai enforcement, for which the European Union Mission called, was the establishment of a separate court.<sup>187</sup> Article 41(5) of TRIPs, however, does not require the establishment of a separate intellectual

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181. ACT, *supra* note 17, pmbl. See *Thailand Establishes International Trade Court, PROJECT & TRADE FIN.*, Mar. 10, 1998, at 15 (reporting that Thailand established intellectual property and international trade court with exclusive jurisdiction for intellectual property matters).

182. See Vichai Ariyanuntaka, *Rethinking Intellectual Property Rights Enforcement in the Light of TRIPs and Specialized Intellectual Property Court in Thailand*, in THE INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE LAW FORUM: SPECIAL ISSUE 1998 10, 14 (1998) (contending that U.S.-Thai negotiations and E.U.-Thai negotiations prompted Thailand to establish IPIT Court).

183. See O'Neill, *supra* note 50, at 614 (noting that since 1984, U.S. Trade Representative may independently institute actions under Section 301). In 1988, the U.S. Trade Representative cut Thailand's Generalized System of Preferences benefits by US\$165 million when Thailand failed to provide "adequate and effective protection for U.S. intellectual property rights." *Id.* at 606; see also Telephone Interview with Shawn Murphy, U.S. Trade Representative (Oct. 21, 1999) (admitting that U.S. Trade Representative pressed for separate intellectual property court).

184. See Sumawong, *supra* note 177, at 2 (reporting that Department of Intellectual Property began working on increasing Thai intellectual property protection before end of Uruguay Round Negotiations); see also *Investment Climate 1997*, *supra* note 16 (noting creation of Department of Intellectual Property within Ministry of Commerce); Chua, *supra* note 25, at 229 (stating that Thai government has centralized management of intellectual property matters in Department of Intellectual Property).

185. See *Technical Cooperation in the TRIPs Area* (visited Oct. 1, 1999) <<http://www.wto.org/about/facts7.htm>> (on file with the *Fordham International Law Journal*) (noting that Article 67 requires developed nation Members to provide technical and financial cooperation to developing and least-developed nations to bring their intellectual property systems into compliance with TRIPs).

186. See *Finance: Call for Property Court*, NATION, Apr. 25, 1998 (stating that European Union mission offered technical and financial assistance to Thailand for campaign to improve suppression of intellectual property violations).

187. See *id.* (reporting that European Union urged Thailand to establish separate intellectual property court).

property court or the allocation of resources by member countries.<sup>188</sup> Thailand, by establishing the IPIT Court, has surpassed its obligations under TRIPs.<sup>189</sup> The final form of the Act was the result of a joint effort by the Ministry of Commerce and the Ministry of Justice, which administers the Thai judicial system.<sup>190</sup>

## 2. Jurisdiction

The IPIT Court has original jurisdiction over intellectual property and international trade matters.<sup>191</sup> The drafters of the Act chose to combine jurisdiction over intellectual property and international trade in one court as a response to the negotiations with the United States and the European Union.<sup>192</sup> The grouping of intellectual property and international trade also ensures that the enforcement of intellectual property laws will not be at the expense of legitimate trade, in accordance to Article 41(1) of TRIPs.<sup>193</sup>

188. TRIPs, *supra* note 10, art. 41(5). Article 41(5) states that "[i]t is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general . . . ." *Id.*

189. See Ariyanuntaka, *supra* note 182, at 14 (stating that Thailand is exceeding its obligation under TRIPs).

190. See *id.* (revealing that Act for the Establishment of and Procedure for Intellectual Property and International Trade Court ("Act") was joint effort by Thai Ministries of Justice and Commerce after negotiations with United States and European countries).

191. Act, *supra* note 17, § 8. Section 8 states that "[o]nce an intellectual property and international trade court is inaugurated, no other courts of first instance shall accept a case that falls under the jurisdiction of the intellectual property and international trade courts for adjudication." *Id.*; see Sumawong, *supra* note 18 (remarking that IPIT Court has exclusive jurisdiction because intellectual property and international trade cases are different from ordinary civil and criminal cases). No other court of first instance may hear civil or criminal cases regarding trademarks, copyrights, patents, licensing and technology transfer agreements, international sale, exchange of goods or financial instruments, international services, carriage, and insurance, inward and outward remittance of funds, trust receipts and guarantees, ship arrests, dumping and subsidization of goods or services from abroad, layout-designs of integrated circuits, scientific discoveries, trade names and geographical indicators, trade secrets, and plant varieties. MARTINDALE-HUBBELL, *supra* note 38, at THAI-9.

192. See Ariyanuntaka, *supra* note 182, at 14 (stating that grouping of intellectual property and international trade was to create user-friendly forum and Act was culmination of negotiations between European Nations, Thailand, and United States that wished to facilitate needs of their nationals doing business in Thailand).

193. See Sumawong, *supra* note 18 (remarking that twin jurisdictions of IPIT Court provide assurance that intellectual property enforcement will not be at expense of international trade); see also The Central Intellectual Property and International Trade

The Act, however, does not limit the IPIT Court's jurisdiction to only intellectual property and international trade cases.<sup>194</sup> Section 35 claims that when a single act gives rise to several offenses, one of which is within the exclusive jurisdiction of the IPIT Court, the IPIT Court may exercise jurisdiction over all the offenses.<sup>195</sup> Similarly, Section 36 asserts that in situations where several offenses arise from related acts, including one under the exclusive jurisdiction of the IPIT Court, the IPIT Court may decide whether to extend its jurisdiction.<sup>196</sup>

### 3. Judges

In order to best handle its caseload, the IPIT Court employs two classes of specially trained judges—career judges and associate judges.<sup>197</sup> Prior to the establishment of the IPIT Court, intellectual property cases were heard by non-specialized judges, which often resulted in misapplications of the law and, moreover, misunderstandings of basic intellectual property concepts.<sup>198</sup> A career judge must have competent knowledge in intellectual property or international trade in order to be qualified

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Court 1 (1997) (pamphlet, on file with author) (calling IPIT Court "a new dimension for the promotion of foreign investment and trade.").

194. See Thaveechaiyagarn, *supra* note 180 (noting that restructure of intellectual property or international trade companies may be brought before IPIT Court rather than Bankruptcy Court).

195. Act, *supra* note 17, § 35. Section 35 provides that "[i]n a criminal charge where a single act violates several offences and one of offences falls within the jurisdiction of the intellectual property and international trade court, the court shall also accept other offences for adjudication." *Id.*

196. *Id.* § 36. Section 36 specifies that:

In a criminal case where several related offences are filed in the same charge, and some of the offences are not within the jurisdiction of the intellectual property and international trade court, the court may accept all offences for adjudication or reject any one or more of the offences which falls outside its jurisdiction so that the prosecutor may file a new charge with the competent court. In reaching its decision, the court shall regard convenience and fairness as its prime consideration.

*Id.*

197. See Sumawong, *supra* note 177, at 4 (stating that IPIT Court bench includes career judges with law degrees and associate judges who are specialists in intellectual property or international trade from private and public sector); see also Mattei, *supra* note 40 (stating that professional and associate Thai judges with special expertise will compose IPIT Court bench).

198. See Chua, *supra* note 25, at 228 (revealing that former Deputy Director General of Department of Intellectual Property strongly criticized court for misapplying law and not understanding concept of copyright).

to serve on the bench of the IPIT Court.<sup>199</sup> Frequently, judges have completed further legal studies in the common law systems of the United States or the United Kingdom.<sup>200</sup> The Court also employs associate judges, who are lay experts in intellectual property or international trade legal matters.<sup>201</sup> Often, associate judges are attorneys who specialize in these fields and have also received a graduate law degree in the United States or its equivalent in the United Kingdom.<sup>202</sup> The associate judges are appointed in accord with the Ministry Regulations<sup>203</sup> for a period of five years.<sup>204</sup> Cases are heard before two career judges and one associate judge.<sup>205</sup> The IPIT Court, however, may also empower the officers of another court to examine evidence on its behalf.<sup>206</sup> As an additional aid to provide the expertise that these cases frequently require, the Act grants the IPIT Court the authority to call on any knowledgeable person or expert.<sup>207</sup>

199. ACT, *supra* note 17, § 14. Section 14 provides that "[j]udges of the intellectual property and international trade court shall be appointed by the King from the judicial officials under the Law on Judicial Service who possess competent knowledge of the matters relating to intellectual property or international trade." *Id.*

200. See Sumawong, *supra* note 177, at 2 (reporting that Ministry of Justice sent many judges abroad to further their training in intellectual property law).

201. ACT, *supra* note 17, § 15(3). Section 15(3) requires that associate judges shall "hav[e] been trained on the purposes of the intellectual property and international trade court and on the judicial duties in accordance with the rules and methods prescribed in the Ministerial Regulations . . . ." *Id.*; see Thaveechaiyagarn, *supra* note 180 (revealing that associate judges can be lay specialists in intellectual property or international trade).

202. See Sumawong, *supra* note 177, at 4 (declaring that most judges of IPIT Court have law degrees from both Thai and non-Thai universities and are fluent in English); see also Thaveechaiyagarn, *supra* note 180 (commenting that he and several other judges hold advanced law degrees from countries other than Thailand).

203. MINISTERIAL REGULATIONS, B.E. 2540 (1997) (Thail).

204. ACT, *supra* note 17, § 15. Section 15 specifies that:

Associate judges shall be appointed by the King from intellectual property or international trade proficient[sic] selected by the Judicial Service Commission under the Law on Judicial Service, in accordance with the rules and methods prescribed in the Ministerial Regulations . . . . Each associate judge shall hold office for a term of five years, but may be reappointed by the King.

*Id.*

205. See Sumawong, *supra* note 177, at 4 (noting that quorum requirement of two career judges and one associate judge is "double guarantee of specialization").

206. ACT, *supra* note 17, § 21. Section 21 allows, "[w]here the intellectual property and international trade court deems appropriate, it may empower another court or its court officer to examine any evidence on its behalf. The examination of such evidence may be conducted in or outside the court." *Id.*

207. *Id.* § 31. Section 31 states that "[t]he intellectual property and international

#### 4. Rules for Intellectual Property and International Trade Cases

Scholars reveal that one of the most notable aspects of the Act is the amount of discretion and authority it gives to the judges.<sup>208</sup> In Section 30, the Act empowers the Chief Justice of the IPIT Court to formulate and issue the Rules for Intellectual Property and International Trade Cases<sup>209</sup> ("Rules of the Court"), including rules on proceedings and the hearing of evidence.<sup>210</sup> The only limit on this power is that the provisions cannot impair the rights of the defendant in a criminal case.<sup>211</sup> In addition, where the Rules of the Court are silent, the Civil Procedural Code and the Criminal Procedural Code provide the default rules.<sup>212</sup> Granting the Chief Justice the authority to issue the Rules of the Court, subject to the approval of the President of the Supreme Court, permits quicker changes in the procedure of the Court—in months rather than years—and allows the Court to evolve as needed.<sup>213</sup>

The Thai civil law system has no antecedent for employing a

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trade court may call any knowledgeable persons or experts to appear and give opinions for its consideration." *Id.*

208. See Ariyanuntaka, *supra* note 182, at 14 (maintaining that liberal use of Rules for Intellectual Property and International Trade Cases ("Rules of Court") is salient feature of system). Cf. Thanitcul, *supra* note 20, at 31 (commenting that Thai legislation is usually very brief and limited to broad grants of empowerment to specified ministries or departments).

209. RULES FOR INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE CASES B.E. 2540 (1997) (Thail.) [hereinafter RULES OF COURT].

210. ACT, *supra* note 17, § 30. Section 30 notes that:

For the purpose to [sic] ensure convenience, expediency and fairness of the proceedings, the Chief Justice of the Central Intellectual Property and International Trade Court shall be empowered, subject to the approval of the President of the Supreme Court, to issue Rules of the Court on proceedings and hearing of evidence in the intellectual property and international trade cases provided that such provisions shall not impair the right of defence [sic] of an accused in a criminal case.

*Id.*

211. *Id.*

212. *Id.* § 26. Section 26 states that "[w]here there are no provisions and Rules on the issue, the provisions of the Civil Procedural Code, the Criminal Procedure Code or the Act for the Establishment of Kwaeng Court and its Criminal Procedure Code shall apply *mutatis mutandis*." *Id.*

213. See Thaveechaiyagarn, *supra* note 180 (claiming that changes in procedure for IPIT Court are achieved more quickly by altering Rules of Court than by amending codes through acts of Parliament).

common law procedure similar to the Rules of the Court.<sup>214</sup> As with most civil law regimes, any change in Thai procedural law is accomplished by amending the Procedural Code.<sup>215</sup> One expert questions how much power the legislature intended to grant the judiciary to perform what is, in Thailand, an essentially legislative function, and whether the expenditure of this power is a judicial encroachment on the powers of the legislature.<sup>216</sup> Notably, Section 37 of the Act grants the IPIT Court the discretion to lengthen or shorten any period of time that is prescribed in the Act.<sup>217</sup> In effect, Section 37 of the Act allows the judiciary to override the law established by the legislature when it concerns time limits or delays.<sup>218</sup>

### 5. Expeditious Hearings

Another significant aspect of the IPIT Court originates in Section 27 of the Act, which is intended to satisfy the three requirements in Article 41 of TRIPs calling for expeditious remedies, no unwarranted delays, and the written holdings of the case to be made available to the parties without undue delay.<sup>219</sup> Section 27 of the Act provides for hearings to proceed without adjournment and for the IPIT Court to render judgment promptly.<sup>220</sup> This IPIT Court procedure starkly contrasts with the standard practice of the general courts regarding civil cases,

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214. *See id.* (asserting that IPIT Court differs from other courts in Thai judicial system because it employs Rules of Court); *see also* Ariyanuntaka, *supra* note 182, at 17 (contending that Rules of Court is common law solution unique to IPIT Court).

215. *See* Thaveechaiyagarn, *supra* note 180 (explaining that courts of general procedure are governed by statutory codes); Ariyanuntaka, *supra* note 182, at 17 (declaring that because Thailand is civil law country, procedural changes are generally accomplished by amending procedural codes).

216. *See* Ariyanuntaka, *supra* note 182, at 17 (considering whether legislature intended to give judiciary legislative role or blank-check).

217. ACT, *supra* note 17, § 37. Section 37 states that "[t]he intellectual property and international trade court may, where necessary in the interest of justice, shorten or extend the period of time prescribed in the Act or fixed by it, when it thinks fit or upon application of any party concerned." *Id.*

218. *Id.*

219. *Id.* § 27. Section 27 mandates that "[a]fter the hearing is over, the court shall promptly render a judgment or order." *Id.*; TRIPs, *supra* note 10, arts. 41(1), (2), (3).

220. ACT, *supra* note 17, § 27. Section 27 also declares that "[t]he intellectual property and international trade court shall proceed with the hearing without adjournment until the hearing is over, save in the case of unavoidable necessities." *Id.*

wherein a case is heard only one day per month.<sup>221</sup>

To ensure swift resolutions of intellectual property disputes, Section 38 of the Act provides that both criminal and civil appeals are made directly to the Thai Supreme Court.<sup>222</sup> This form of direct appeal to the Thai Supreme Court will bring disputes to a final resolution swiftly.<sup>223</sup> To ensure that the Thai Supreme Court will have the necessary expertise to rule on these appeals, Section 43 of the Act mandates that the Supreme Court shall establish a special section to hear IPIT Court appeals.<sup>224</sup>

Sections 38 and 44 of the Act provide the parties with a greater right to appeal than that required by Article 41(4) of TRIPs.<sup>225</sup> Article 41(4) of TRIPs only requires that parties in a civil case have a right to an appeal on a question of law provided that the national laws do not otherwise prohibit the appeal.<sup>226</sup> The Thai Supreme Court, however, is unique in that it may entertain appeals both on question of law and questions of fact.<sup>227</sup> Section 44 of the Act, furthermore, grants the Thai Supreme Court additional flexibility in intellectual property matters by empowering it with the discretion to hear an appeal that would normally be prohibited by law.<sup>228</sup>

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221. See Chua, *supra* note 25, at 228 (reporting that civil cases in courts of general jurisdiction are heard in monthly installments of one day per month).

222. ACT, *supra* note 17, § 38. Section 38 states that "[s]ubject to the provisions of this Act, the Civil Procedure Code or the Criminal Procedure Code, and appeal against any judgment or order of the intellectual property and international trade court shall be submitted to the Supreme Court within one month from the date of its pronouncement." *Id.*

223. See Mattei, *supra* note 40 (noting that limitation to one appeal will avoid delay in resolving proceedings).

224. ACT, *supra* note 17, § 43. Section 43 states that "[t]he President of the Supreme Court shall set up an Intellectual Property and International Trade Section in the Supreme Court for the adjudication of intellectual property and international trade cases that may be appealed to the Supreme court." *Id.*

225. See ACT, *supra* note 17, § 38 (stating that appeals from IPIT Court directly go to Thai Supreme Court); see also *id.* § 44 (stating that Thai Supreme Court has power to entertain prohibited appeal). Cf. *Id.* art. 41(4) (detailing allowable limitations on right to appeal).

226. *Id.* art. 41(4).

227. See MARTINDALE-HUBBELL, *supra* note 38, at THAI-9 (asserting that Thai Supreme Court may hear appeals on both questions of law and of fact).

228. ACT, *supra* note 17, § 44. Section 44 provides:

In the case where the intellectual property and international trade court [sic] has accepted an appeal for submission to the Supreme Court, and the Supreme Court holds that such appeal is prohibited by law, the Supreme Court shall dismiss the appeal. On the other hand, if the Supreme Court

## 6. Provisional Measures

Another salient feature of the Act is that it makes available to the claiming parties additional provisional measures, which are unique to the IPIT Court.<sup>229</sup> As a civil law country, Thailand has neither a previously developed system of equitable procedures,<sup>230</sup> nor any measure similar to a blanket authorization for a search.<sup>231</sup> Generally, complaining parties only have access to limited provisional measures in criminal cases by requesting a police search.<sup>232</sup> Granting provisional measures, such as preventive injunctions, prior to filing a complaint is contrary to the practices under the Civil Procedure Code.<sup>233</sup> Because the complaint in a civil case must contain specific evidence, most right-holders have found that they cannot file a complaint without already obtaining an order to seize the evidence.<sup>234</sup>

Sections 28 and 29 of the Act meet one of the obligations set forth in Article 50 of TRIPs by expanding a right-holder's ability to obtain evidence.<sup>235</sup> Section 28 states that in civil and

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deems it appropriate, for reason [sic] of fairness, to rectify the same, the Supreme Court may accept and consider the appeal that is prohibited by law.

*Id.*

229. See Thaveechaiyagarn, *supra* note 180 (remarking that Act provides IPIT Court with power to issue provisional measures that are not available in other Thai courts); see also Ross-MacDonald, *supra* note 180 (asserting that IPIT Court employs "exceptional procedures" such as *ex parte* search orders and emergency injunctions).

230. See Blatt & Miller, *supra* note 5, at 251 (claiming that Thailand has not developed common law system of equity and specific equity principles because it is civil law country).

231. See *Investment Climate 1997*, *supra* note 16 (declaring that Thai police can respond only to specific complaints because there is no blanket authorization for police raids).

232. See Ariyanuntaka, *supra* note 182, at 18 (alleging that conventional method for protecting intellectual property rights against infringement is conducting police raids).

233. See *id.* (concluding that preventive injunctions provided by IPIT Court are novel to Thailand because civil procedure code only allows courts of general jurisdiction to issue injunctions after complaining party has filed).

234. See Sujintaya, *supra* note 26 (revealing that clients who wish to file civil complaints for infringement perceive civil system as problematic because it requires that complaints contain evidence that is unobtainable without court order).

235. ACT, *supra* note 17, § 28. Section 28 states:

Where a person apprehends that the evidence on which he may have to rely in the future will be lost or become difficult to produce, or where a party to a case apprehends that the evidence on which he intends to rely will be lost before he can adduce it in Court or become difficult to adduce at a later stage, such person or party may apply to the Court by petition or motion for an order directing such evidence to be taken at once.



criminal cases, the IPIT Court may grant a motion for the evidence to be taken at once when the evidence is necessary to prove infringement and will become lost or difficult to obtain if not taken.<sup>236</sup> Section 28 of the Act also requires the IPIT Court to notify the other party and grant that party the opportunity to be heard before issuing a motion to seize the evidence.<sup>237</sup> This requirement in Section 28 satisfies Article 42 of TRIPs that concerns due process and notification, but contravenes Article 50(2) of TRIPs, which permits the court the discretion to grant *ex parte* provisional measures.<sup>238</sup> In case of an emergency, Section 29 of the Act allows the IPIT Court to issue an order immediately to seize evidence without notifying the other side.<sup>239</sup>

Sections 28 and 29 of the Act, however, do not meet the other obligations set forth in Article 50 of TRIPs.<sup>240</sup> Neither Section 28 nor Section 29 meets the requirement that the IPIT Court have the authority to prevent an infringement from occurring.<sup>241</sup> Section 28 and Section 29 also do not delineate any criteria for provisional measures, such as when an *ex parte* hearing is appropriate, what timetable applies, whether the petitioner should provide compensation for damages if the claim fails, whether or when the defendant may request a review, and when the provisional measures lapse.<sup>242</sup>

The Chief Justice of the IPIT Court and the author of the Rules of the Court have noted that the Rules of the Court ad-

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*Id.*; *Id.* § 29. Section 29 provides that:

In case of an emergency, when an application is filed under Section 28, the applicant may simultaneously file a motion to the effect that the court may issue an order or a warrant without delay. Where necessary, the applicant may also request the court to seize or attach the documents or materials that will be adduced as evidence upon any conditions as the Court may think fit.

*Id.* Cf. TRIPs, *supra* note 10, art. 50(1) (requiring that courts have authority to preserve relevant evidence with regard to alleged infringement).

236. Act, *supra* note 17, § 28.

237. *Id.* Section 28 states that “[u]pon receipt of such application, the Court shall summon the applicant and the opposing party or third person concerned, and after having heard them, shall decide on the application as it thinks fit.” *Id.*

238. *Id.* Cf. TRIPs, *supra* note 10, arts. 42, 50(2).

239. Act, *supra* note 17, § 28.

240. See TRIPs, *supra* note 10, art. 50(1) (“to prevent an infringement of any intellectual property right from occurring . . .”); see also *id.* art. 50(2) (“to adopt provisional measures *inaudita altera parte* where appropriate . . .”). Cf. Act, *supra* note 17, §§ 28, 29.

241. *Id.*

242. See Sumawong, *supra* note 177, at 5 (commenting that Act fails to provide mechanism for application of interim injunction).

dress many of the shortcomings in Sections 28 and 29 of the Act.<sup>243</sup> Rules 12 through 19 pertain to provisional measures of protection prior to instituting an action.<sup>244</sup> Rules 20 through 22 cover the taking of evidence in advance.<sup>245</sup>

According to the Rules of the Court, the IPIT Court may grant an application for a provisional measure under Section 65 of the Copyright Act, Section 77*bis* of the Patent Act, and Section 116 of the Trademark Act.<sup>246</sup> Taken together, these acts prescribe that in cases where there is clear evidence that a person commits, is committing, or is about to commit an infringement on another's intellectual property right, the right-holder may petition the court for an order to restrain the infringer.<sup>247</sup> Nowhere else in Thai civil procedure is a claimant allowed to petition the court for a restraining order prior to instituting an action.<sup>248</sup>

Under Rule 13 of the Rules of the Court, the IPIT Court

243. See Sumawong, *supra* note 18 (stating that Rules of Court generally supplement Act); Sumawong, *supra* note 177, at 6 (reporting that Rules of Court have corrected omissions of Act regarding interim injunctions).

244. RULES OF COURT, *supra* note 209, rules 12-19. Rules 12-19 are titled "Provisional Measures of Protection Prior to Instituting an Action." *Id.*

245. *Id.*, rules 20-22. Rules 20-22 are titled "Application for Taking of Evidence in Advance." *Id.*

246. See Sumawong, *supra* note 177, at 5 (noting that recent intellectual property legislation equipping IPIT Court with authority to grant interim injunctions is novel to Thai judicial process). Section 65 of the Copyright Act provides "[w]here there is clear evidence showing that a party is infringing or preparing to infringe a copyright or performer's rights, the owner of the copyright or performer's rights may petition the court to order the party to cease those activities." COPYRIGHT ACT, B.E. 2537 § 65 (1994) (Thail.). Section 116 of the Trademark Act declares:

Should there be express evidence that a person has performed or is performing any act according to Section 108, Section 109 or Section 110, the proprietor of a trademark, service mark, certification mark or collective mark may petition the court to instruct the person to stop or cease such act.

TRADEMARK ACT, B.E. 2534 § 116 (1991) (Thail.). Section 77*bis* of the Patent Act reads:

In the case where there is clear evidence that a person has committed or is about to commit an act in violation of a patentee's or a petty patentee's rights under Section 36 or Section 63 or Section 65 *decem* together with Section 36, the patentee or petty patentee may apply to the court for an injunction against the said person to stop or refrain from committing such act.

PATENT ACT, B.E. 2535 § 77*bis* (1992) (Thail.).

247. See Ariyanuntaka, *supra* note 182, at 18 (recognizing that provisions of existing intellectual property acts grant right-holders permission to petition court for restraining orders against any person who they have evidence is committing, about to commit, or commits act of infringement).

248. See *id.* (contending that restraining orders prior to filing were first instituted in Thailand in intellectual property acts).

may grant a temporary restraining order.<sup>249</sup> The application for the temporary restraining order may be held *in camera*.<sup>250</sup> After granting the restraining order, the IPIT Court must notify the defendant, but the order is immediately effective regardless of whether the defendant is actually contacted.<sup>251</sup> The IPIT Court may order the party requesting the restraining order to provide a security for any damage that the prospective defendant may incur as a result of the order.<sup>252</sup> After fifteen days, if the party who requested the order does not institute an action relating to the order, then the order lapses.<sup>253</sup> Upon its lapse, the restrained party may request compensation for his or her damages from the other party.<sup>254</sup>

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249. 42 AM. JUR. 2D 715. According to American Jurist, a temporary restraining order differs from a temporary, interlocutory or preliminary injunction. *Id.* "A temporary restraining order, while in effect a species of injunction, is in some respects to be distinguished therefrom. The purpose of such an order is to restrain the defendant for what should be a very brief period, pending a hearing on the application of a temporary injunction . . . ." *Id.* A temporary restraining order, "is generally granted without notice to the opposite parties, and is intended only as a restraint on the defendant until the propriety of granting a temporary injunction can be determined, and it goes no further than to preserve the status quo until that determination." *Id.*

250. RULES OF COURT, *supra* note 209, rule 19. Rule 19 provides that "[t]he provisions on *in camera* proceedings and prohibition of publication under Rule 24 and hearing conducted via video conferencing facility under Rule 32 shall apply to the proceedings under Rules 13 and 15 to 18 *mutatis mutandis*." *Id.*

251. *Id.* rule 14. Rule 14 states that "[i]n case where the Court grants the application under Rule 13, the Court shall notify the prospective defendant of the order without delay. The order under paragraph one shall immediately bind the prospective defendant even though the prospective defendant has not been notified of the order." *Id.*

252. *Id.* rule 15. Rule 15 notes that:

In case where the Court grants the application under Rule 13, taking into account any damage that the prospective defendant might incur, the Court shall order the person filing the application to provide security for such damage in the amount, within the period and under the conditions, the Court deems appropriate.

*Id.*

253. *Id.* rule 17, ¶1. Paragraph 1 of Rule 17 provides that:

In case where the Court grants the application under Rule 13 but the person requesting for the provisional measures fails to institute an action relating to the application within fifteen days from the date on which the application was granted or within the period prescribed by the Court, the provisional measures shall lapse at the expiration of the aforesaid period.

*Id.*

254. *Id.* rule 17, ¶2. Paragraph 2 of Rule 17 allows that:

[T]he defendant may file with the Court, within thirty days from the date on which the provisional measures is deemed to lapse, a request for the Court order directing the person requesting for such measures to compensate him for his damage. The Court may order the compensation be paid in the

The Rules of the Court allow that the temporary restraining order may become a preliminary injunction once the plaintiff files an action.<sup>255</sup> After the IPIT Court grants the restraining order, the prospective defendant may challenge the order and request that it be repealed or modified.<sup>256</sup> Should the IPIT Court grant a repeal, the prospective defendant may also request damages.<sup>257</sup>

Rules of the Court Rule 20, meanwhile, states that the IPIT Court may grant an order for the taking of evidence under Section 29 of the Act.<sup>258</sup> This rule is similar to a less draconian version of the British Anton Piller order.<sup>259</sup> Article 50(1)(b) of

amount it deems appropriate. If the person requesting for the measures [sic] fails to comply with such order, the Court may enforce such order as if he is a judgment debtor.

*Id.*

255. See 42 AM. JUR. 2D 715 (defining preliminary or interlocutory injunction as, "a form of equitable proceeding designed to protect from irreparable injury property, or other rights of which a court of equity will take cognizance, by prohibiting or commanding the doing of certain acts."). Furthermore, American Jurist states that, "a temporary injunction is rarely granted without notice, but when granted, it is effective until the trial of the cause in which it issued." *Id.*

256. RULES OF COURT, *supra* note 209, rule 16, ¶1. Paragraph 1 of Rule 16 states in part that "the prospective defendant may file an application requesting the Court to repeal or modify the provisional measures of protection." *Id.*

257. *Id.* ¶2. Paragraph 2 of Rule 16 states that:

[T]he prospective defendant may make a request in the application to repeal or modify the provisional measure, or file with the Court, within thirty days from the date on which the Court issues an order repealing or modifying the measures, a request for the Court order directing the person requesting for such measures to compensate him for his damage.

*Id.*

258. *Id.* rule 20, ¶2. The relevant language in paragraph 2 of Rule 20 states: In case of emergency under section 29 of the Act, the motion shall state the facts showing the emergency situation which, if the other party or the third party involved is to be notified beforehand, such evidence will be damaged, lost, destroyed or, due to some other reasons, difficult to be adduced at a later stage.

*Id.*

259. See *Anton Piller KG v. Manufacturing Process Ltd.*, (1976) 1 All E.R. 779 (Eng. C.A. 1975) (holding that courts have inherent jurisdiction to prevent destruction of subject matter of action or documents). The Anton Piller order is a pre-suit or pre-judgment discovery procedure that allows a person claiming intellectual property rights to search the premise of an alleged violator of those rights and to seize goods, materials, or documents that may later become evidence in a cause of action. See Samuel K. Alexander III, *The Mareva Injunction and Related Orders*, by Dr. Mark S.W. Hoyle, *London: Lloyd's of London Press* (1997), 39 VA. J. INT'L L. 503 (1999) (book review) (stating that purpose of Anton Piller order is to prevent alleged violator from destroying evidence before trial or writ is issued). Under *Anton Piller*, the court may grant an application for

TRIPS does not require that the member countries provide any measure as drastic as the Anton Piller order.<sup>260</sup> The "reformed" Anton Piller order, as defined in the Rules of the Court, provides for the plaintiff to supply a security to compensate the defendant for any damages caused by granting the order should the plaintiff's claim fail.<sup>261</sup> The Drafting Committee of the Rules of the Court also preferred that the information or material acquired as a result of the order not be used for any purpose other than the action, that an officer of the court be present in enforcing the order, and that the plaintiff is not entitled to use force.<sup>262</sup>

While the Anton Piller order in the United Kingdom may be used to order the defendant to supply the plaintiff with the names and addresses of his clients and suppliers, this situation is not the case in Thailand.<sup>263</sup> The Thai Constitution has provisions against self-incrimination that are supreme.<sup>264</sup> Article 47

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an injunction *ex parte* and *in camera*. Alexander, *supra*. The court may issue an Anton Piller order if the plaintiff can satisfy the court that he has an extremely strong *prima facie* case on the merits, that he is likely to suffer serious damage for the defendants' actions, that there is clear evidence that the defendant has incriminating documents or articles in his possession, and that there is grave danger that the defendant will destroy the material before a hearing where both parties are present could be conducted. *Id.*; see Christopher Finlayson, Keynote, *Proving Your Case—Evidence and Procedure in Action*, 13 CARDOZO L. REV. 257, 276 (describing how United Kingdom amended legislation to remove privilege of self-incrimination in situation of interrogatories). The Anton Piller order allows the court to order the defendant to disclose the names and addresses of his suppliers or customers to the plaintiff. Finlayson, *supra*; see also Marett, *supra* note 1, at 16 (remarking that Anton Piller order is civil procedure and must not be confused with search warrant). The Anton Piller order should not be confused with a search warrant in a criminal case. Marett, *supra*; see Ariyanuntaka, *supra* note 182, at 23 (noting that, should Anton Piller order be unavailable, plaintiff may try to obtain search warrant).

260. TRIPS, *supra* note 10, art. 50(1)(b) ("to preserve relevant evidence in regard to the alleged infringement").

261. RULES OF COURT, *supra* note 209, rule 21. Rule 21 provides that:

In case where the Court grants an order for attachment or seizure of documents or materials to be adduced as evidence in emergency situation under Rule 20 paragraph two, the Court may order the petitioner to provide security for any damage that might be incurred, in the amount, within the period and under any condition the Court deems appropriate.

*Id.*

262. See Ariyanuntaka, *supra* note 182, at 22-23 (explaining that Section 29 of Act and Rules 20-22 of Rules of Court provide for reformed Anton Piller order that limits rights of moving party).

263. *Id.* (describing differences between Thai and English practice of Anton Piller order).

264. WRITTEN CONSTITUTION OF THAILAND, B.E. 2540 art. 243 (1997) (Thai). Article 243 of the Written Constitution of Thailand provides that "[p]ersons have the right

of TRIPs, furthermore, does not require that the court grant a right of information; it only states that member countries may empower the courts with the authority to order the defendant to provide such information to the plaintiff.<sup>265</sup> Thailand, therefore, does not violate its TRIPs obligations by denying this right.<sup>266</sup>

### B. Responses to the IPIT Court

Some scholars predicted that the establishment of the IPIT Court would result in increased trade and economic success for Thailand and would solve Thailand's intellectual property enforcement problems.<sup>267</sup> Although the IPIT Court is functioning efficiently as intended,<sup>268</sup> serious problems with intellectual property enforcement persist.<sup>269</sup> While many of the problems with intellectual property enforcement are within the control of the IPIT Court,<sup>270</sup> others are not.<sup>271</sup> Due to these problems, the

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to refuse to give statements against themselves which could cause themselves to be sued in a criminal case." *Id.*

265. TRIPs, *supra* note 10, art. 47.

266. *See* Ariyanuntaka, *supra* note 182, at 24 (noting that Thailand could choose whether to grant right of information under TRIPs).

267. *See id.* at 13 (commenting that IPIT Court is single most important development in creating legal environment to encourage international trade and investment); Thaveechaiyagarn, *supra* note 180 (claiming that multinational companies that import technology into Thailand feel secure that IPIT Court will provide fair and efficient forum to defend their intellectual property rights); Vechayanon, *supra* note 23, at 39 (asserting that IPIT Court aspires to play important role in furthering Thai efforts of globalization).

268. *See* Sumawong, *supra* note 177, at 4 (setting forth that IPIT Court provides effective intellectual property enforcement mechanism); Sujintaya, *supra* note 26 (reporting that litigating in IPIT Court is more efficient and effective than litigating in courts of general jurisdiction because it is more conscientious); *Investment Climate 1998*, *supra* note 25 (noting that IPIT Court beginning to make difference in intellectual property enforcement in Thailand); *Report Rates IPR Accomplishments by Asian Countries*, BUSINESSWORLD (Phil.), Nov. 25, 1999 (on file with the *Fordham International Law Journal*) [hereinafter *1999 PERC Report*] (citing report by Political and Economic Risks Consultancy, Ltd., which claims IPIT Court is working well).

269. *See* Howley & Roman, *supra* note 13 (remarking that piracy is still rampant despite creation of Department of Intellectual Property and IPIT Court); *1999 PERC Report*, *supra* note 268 (commenting that Thai law and policy are adequate, but enforcement remains weak).

270. *See* *1999 PERC Report*, *supra* note 268 (maintaining that only retailers have been charged with infringement at IPIT Court); *Investment Climate 1997*, *supra* note 16 (stating that jail sentences and fines are too light to constitute deterrents).

271. *See* *Investment Climate 1998*, *supra* note 25 (reporting that allegations of police irregularities affect intellectual property enforcement in Thailand); Ariyanuntaka, *supra* note 182, at 11 (citing International Intellectual Property Alliance report that

rate of intellectual property violations in Thailand has increased,<sup>272</sup> despite the efforts of the Thai government.<sup>273</sup>

Experts differ on whether the IPIT Court satisfies Thailand's enforcement obligations under TRIPs or merely represents progress towards meeting its TRIPs obligations.<sup>274</sup> Experts do agree, however, that the Thai system of intellectual property enforcement and the TRIPs requirements for enforcement and remedies diverge in several aspects.<sup>275</sup> According to the U.S. Trade Representative, the Thai Patent Act of 1992 does not comply with TRIPs standards.<sup>276</sup> The Thai Patent Act of 1992 pro-

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reveals that sharing of policing duties, once solely held by Thailand's Economic Crime Investigation Division, has increased level of intellectual property rights enforcement activity); *see also Thailand Still on U.S. Watchlist over IPR*, NATION (THAIL.), May 25, 1999 (on file with the *Fordham International Law Journal*) (revealing that infringers use methods, such as delivery of infringing goods through private Express Mail Service, that are difficult to police); Rice, *supra* note 70 (noting that infringers have begun to use violence against Thai private investigators hired by U.S. companies).

272. See Jirapan Boonoon, *Legislation Will Be Amended for Copyrights*, NATION (THAIL.), Oct. 6, 1998 (on file with the *Fordham International Law Journal*) (citing Price-Waterhouse study that claimed rate of software copyright violation in Thailand increased to 85% in 1997 from 82% in 1996).

273. See Weeraworawit, *supra* note 19, at 19 (revealing that Thai government established many committees to handle problem of intellectual property violations and Department of Intellectual Property has begun public education campaigns); *see also* Boonoon, *supra* note 272 (asserting that Thai government proposed new legislation and set up new committee to prevent intellectual property violations because it realized that without serious effort at improving intellectual property enforcement, U.S. Trade Representative would impose trade sanctions); *Investment Climate 1998*, *supra* note 25 (noting increase in seizures of infringing materials); *Thai Software Pirates Hit by Government Crackdown*, BUSINESS DAY (THAIL.), JULY 9, 1999, at 1 (on file with the *Fordham International Law Journal*) (reporting that IPIT Court handed out its first jail sentence to retailer); *Copyright Violation Arrests Stepped Up: Better Enforcement Intended to Satisfy Western Concerns*, BANGKOK POST (THAIL.), MAY 26, 1997 (on file with the *Fordham International Law Journal*) (stating that Thailand increased arrests for copyright violations after complaints by Western businesses in Thailand).

274. See Sumawong, *supra* note 177, at 1 ("The establishment in Thailand of the Central IP&IT Court is an answer to the enforcement of intellectual property rights under TRIPs . . . . [T]he court is established along the guidelines laid down by the provisions in Part III of the TRIPs Agreement."); Ruggiero, *supra* note 2 (stating that IPIT Court is important for fulfillment of Thailand's international commitments); Ariyanuntaka, *supra* note 182, at 11 (citing International Intellectual Property Alliance report, which states that Thailand has gone far towards meeting its substantive obligations and U.S. Trade Representative should encourage Thailand to continue rapid progress towards full compliance).

275. See Ariyanuntaka, *supra* note 182, at 10 (noting that particular Thai intellectual property laws, procedures, and enforcement are not in accord with TRIPs provisions); *Investment Climate 1998*, *supra* note 25 (stating that Thailand's patent law does not conform to TRIPs).

276. See Preeti Sinha, *Special 301: An Effective Tool Against Thailand's Intellectual*

vides for compulsory licensing, which Article 31 of TRIPs<sup>277</sup> allows, but limits by entitling the patent holder to a reasonable royalty.<sup>278</sup> The U.S. Trade Representative also maintains that the Thai system does not provide sufficient compensation to the successful complainant under TRIPs.<sup>279</sup> Article 64 of the Copyright Act of 1994 only allows the court to determine and order appropriate damages and expenses if the infringer foresaw or could

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*Property Violations*, 1 PAC. RIM L. & POL'Y J. 281, 297 (1993) (revealing that U.S. Trade Representative disapproves of Thai patent legislation that established Thai Pharmaceutical Patent Board); see also Howley & Roman, *supra* note 13 (noting that U.S. Trade Representative objects to Thai patent protection levels and Pharmaceutical Patent Board); Myles Getlan, Comment, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 197 (1995) (stating that Pharmaceutical Manufacturers Association petitioned U.S. Trade Representative under Section 301 with objections to Thailand's compulsory licenses, requirement of manufacture or use of patent in Thailand, and Pharmaceutical Patent Board). According to Myles Getlan, the Pharmaceutical Manufacturers Association estimates that U.S.-based members have lost between US\$16 and US\$24 million in Thailand. Getlan, *supra*. In 1991, the U.S. Trade Representative demanded that Thailand amend its patent laws within 180 days or face sanctions. *Id.* The Thai drug companies, academics, and medical community objected to the proposed changes. *Id.* They argued that the changes advocated by the U.S. Trade Representative would raise drug prices, create monopolies, make Thailand dependent on the holders of foreign drug patents, bankrupt the government's public health budget, and prevent the government from licensing drugs in a medical emergency. *Id.* In 1992, the National Assembly amended the patent legislation. *Id.* At the same time, the National Assembly established the Pharmaceutical Patent Board to counteract the concerns of those who opposed the amendments. See TIL-LEKE & GIBBINS, *supra* note 22 (claiming that Thai government established Pharmaceutical Patent Board to monitor drug prices); McDorman, *supra* note 87, at 97 (reporting Thai opinions that change to Patent Act would make Thailand's market vulnerable to foreign drug monopolies); Sujintaya, *supra* note 26 (asserting that many Thais view Pharmaceutical Board as necessary to promote access to drug patents held by non-Thai pharmaceutical companies).

277. TRIPs, *supra* note 10, art. 31. The pertinent language of Article 31 reads:

Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right-holder, including use by the government or third parties authorized by the government, . . . the right-holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization[.]

*Id.*

278. See Blatt & Miller, *supra* note 5, at 247 (remarking that TRIPs limits, but does not eliminate, compulsory licensing); see also Reichman, *supra* note 120, at 355 (explaining that TRIPs allows compulsory licensing under Article 31 if grounds for triggering non-exclusive compulsory licensing is due to abuse and if would-be-licensee first seeks negotiated license from right-holder and agrees to pay equitable compensation).

279. See Ariyanuntaka, *supra* note 182, at 25 (stating that Section 64 of Copyright Act of 1994 does not meet compensation requirements of TRIPs); see also *Investment Climate 1997*, *supra* note 16 (remarking that Thai courts do not satisfy their TRIPs requirements for damages).



have foreseen the consequences of the action that caused the injury.<sup>280</sup> This judicial limitation complies with the requirement of Article 45(1) of TRIPs for awarding adequate damages when an infringer acts knowingly or with reasonable grounds to know<sup>281</sup> but, does not satisfy Article 45(2) of TRIPs, which provides for the inclusion of appropriate attorney fees in cases of knowing infringement and the recovery of profits even in cases of unknowing infringement.<sup>282</sup>

Another way in which Thai law is inconsistent with TRIPs is that the right to information granted to the right-holder in Article 47 of TRIPs conflicts with Article 243 of the Thai Constitution,<sup>283</sup> which grants a defendant the right against self-incrimination.<sup>284</sup> Additionally, while Article 61 of TRIPs mandates that certain willful violators who operate on a commercial scale be subject to criminal proceedings, imprisonment, and fines, Thailand still allows these accused infringers to settle with the right-holder.<sup>285</sup> Despite the TRIPs requirement, Thailand continues

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280. COPYRIGHT ACT, B.E. 2537, § 64 (1994) (Thail). Section 64 of the Copyright Act provides:

In the case of infringement of a copyright or performer's rights, the court has the authority to have the infringer pay damages to the owner of the copyright or the party having the performer's rights in an amount judged appropriate by the court, taking into account the severity of the damage inflicted and including any losses and essential expenses incurred because of the need for a lawsuit to protect the copyright or performer's rights.

*Id.*

281. TRIPs, *supra* note 10, art. 45(1).

282. *Id.* art. 45(2).

283. WRITTEN CONSTITUTION OF THAILAND, B.E. 2540 art. 243 (1997) (Thail.).

284. See Ariyanuntaka, *supra* note 182, at 24 (noting that applying Article 47 of TRIPs in criminal case infringes on privilege against self-incrimination.)

285. See Interview with Huey S. Tan, Counsel for Microsoft, Southeast Asia Region, in Bangkok, Thail. (June 24, 1999) (discussing problems in intellectual property protection encountered by Microsoft in Thailand). According to Huey Tan, the IPIT Court is "brilliant for speed" and is getting good sentences and fines. *Id.* Supporting Tan's assertion are statistics showing the increased arrests and seizures handled by the IPIT Court. See *Investment Climate 1998*, *supra* note 25 (citing statistics that intellectual property related arrests increased 48% in 1997 and that seizures have increased to 568,000 from 168,000); see also *Copyright Violation Arrests Stepped Up*, *supra* note 273 (describing efforts of government to lower rates of copyright piracy). Enforcement of intellectual property rights in Thailand, however, remains a problem for Microsoft despite the new IPIT Court and intellectual property acts that increase the rights of owners. Tan, *supra*. One possible explanation is a lack of respect in Asia for intellectual property stemming from a lack of understanding of the value of intellectual property rights, a lack of vested interest, and a lack of input. *Id.* This situation can only be rectified by training and educating the general public on the hidden costs of insufficient intellectual property

to handle cases against these infringers as civil, not criminal, matters.<sup>286</sup>

The U.S. Trade Representative has again placed Thailand on its Special 301 Watch List, because some Thai nationals continue to commit intellectual property violations at a high rate and because Thailand has failed to maintain intellectual property laws compliant with TRIPs.<sup>287</sup> Some experts maintain that the U.S. Trade Representative should recognize that Thailand, as a developing country, does not have resources comparable to the United States to monitor and prosecute intellectual property violators effectively.<sup>288</sup> Experts also note that the U.S. Trade Representative's use of Special 301 has caused resentment and created anti-U.S. factions in Thailand, where none previously existed.<sup>289</sup>

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protection, such as a brain-drain of talented programmers throughout the region and disincentives for start-up software companies tailored to Thai needs. *Id.* Another problem is that many people who purchase infringing material use the Asian financial crisis as a justification. *Id.*

286. See Tan, *supra* note 285 (remarking that punishment of infringers in Thailand is often lighter than TRIPs mandates).

287. See Boonoon, *supra* note 272 (claiming that United States used punitive trade measures against Thailand after increased software copyright violations due to devaluation of Thai baht); *Thailand Still on U.S. Watchlist over IPR*, *supra* note 271 (revealing that United States put Thailand on Watch List because of intellectual property violations despite Thailand's increased efforts for suppression); 1999 PERC Report, *supra* note 268 (declaring that Thailand is on Watch List because of poor enforcement of intellectual property laws although IPIT Court is working well and Thailand's policies and laws are adequate); Howley & Roman, *supra* note 13 (asserting that, despite Thailand's recent accomplishments, such as establishing IPIT Court and committee on intellectual property, U.S. Trade Representative recommended Thailand be placed on Watch List in 1998 because of rampant infringement and patent law that does not comply with TRIPs standards).

288. See Sinha, *supra* note 276, at 297 (stating that United States should recognize that developing countries do not have strong administrative systems to enforce intellectual property rights and such enforcement is subject almost entirely to political process); Vitthya Vejijava, Ambassador of Thailand, *Letters to the Editor*, WASH. POST, Apr. 5, 1989 ("Americans should understand that there are limits to how fast Thailand can move—just as the United States has political limits in a comparable situation."); O'Neill, *supra* note 50, at 623 (noting that Thailand's difficulty in reforming legislation may be due to healthy state of democracy).

289. See Suvicha Pouaree, *Friends For Life?*, BANGKOK POST, May 30, 1999 (describing that many Thai leaders view U.S. sanctions as trade protectionism and economic aggression). Suchiva Pouaree suggests that Thai-U.S. economic relations began to deteriorate when the U.S. trade surplus became a trade deficit and the Cold War ended, making Thailand less important to U.S. strategic interests. *Id.* According to Dr. Chaichana Ingavata, Dean of Graduate Studies at Ramkhamhaeng University, "[i]n Thailand, with all [the] political and economic pressure that the U.S. has applied on us,

III. *THE IPIT COURT IS AN EFFICIENT MECHANISM FOR ENFORCING INTELLECTUAL PROPERTY RIGHTS, BUT IT CANNOT SOLVE THE PROBLEM OF INTELLECTUAL PROPERTY RIGHTS VIOLATIONS BY ITSELF*

The Act makes the enforcement procedures specified in Part III of TRIPs available in the IPIT Court.<sup>290</sup> As a democracy, the Thai government is limited in what steps it may take to eradicate intellectual property rights violations.<sup>291</sup> The IPIT Court is a separate court from the other courts of first instance in the judicial system and thus has a historical basis in Thailand.<sup>292</sup> The IPIT Court applies enforcement procedures that conform to the expectations of developed Western nations.<sup>293</sup>

A. *The IPIT Court Reduces Conflict Between Western and Thai Views of Intellectual Property Rights*

The IPIT Court reduces conflict between Western and Thai views of intellectual property rights. In part, this conflict arises from a conflict of interests between Thailand as a net consumer of intellectual property and the Western nations as net producers.<sup>294</sup> An example of this conflict between the Western and

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the people feel that the U.S. is drunk with power." *Id.* Another scholar, Dr. Chaiwat Khamchoo, Dean of the Faculty of Political Science, adds that the United States can ignore negative reactions and resentment among developing nations because they are dependent on the U.S. market. *Id.* Dr. Ingavata, further asserts that U.S. foreign policy is responsible for the devaluation of the Thai baht and that "the global economy is controlled by the U.S., with the WTO as its main mechanism." *Id.* Subscribing to this view, Thai Democrat MP Charoen Kanthawong led a protest against the United States for alleged unfair blocking of Thailand's candidate, Mr. Supachai Panitchpakdi, for head of the WTO. *Id.* Additionally, Thai Senator Meechai Ruchupan, when proposing that Thailand review its foreign policy with the United States, said "Thailand must have political claws of its own and must not kowtow [bow down] to Washington or feel *kreng jai* [fear] towards the United States all the time." *Id.*

290. See *supra* notes 119-73 and accompanying text (discussing TRIPs Part III enforcement procedures). Cf. *supra* note 215-62 and accompanying text (discussing enforcement procedures available in IPIT Court).

291. See *supra* note 287 and accompanying text (discussing political limitation and accountability of Thai government).

292. See *supra* notes 28, 40, 41, 176 and accompanying text (describing prior separate courts).

293. See *supra* note 118 and accompanying text (discussing effect of conforming to TRIPs).

294. See *supra* note 12 and accompanying text (reasoning that interests of countries that import intellectual property differ from those that export it).

Thai views is the Thai Pharmaceutical Patent Board.<sup>295</sup> According to Western opinions, the Thai Pharmaceutical Patent Board is an obstacle to free trade.<sup>296</sup> According to the Thais, it is a protector of Thai interests from monopoly by rich and powerful pharmaceutical companies.<sup>297</sup>

As Thailand's legal traditions partially consist of Buddhist law and Chinese Maritime Law, Thailand shares with other Asian cultures values that are antagonistic to private intellectual property rights. In most Asian societies, including Thailand, inventing a product, creating a work of art, or advancing learning is an activity in the public domain.<sup>298</sup> The fruits of these activities do not warrant special legal protections that benefit the individual over the community.<sup>299</sup>

Additional factors contribute to the Thai view of intellectual property.<sup>300</sup> Educational and economic factors contribute to what is perceived as a lack of respect for intellectual property in Asia.<sup>301</sup> Since the Asian financial crisis, there has been an additional economic incentive to purchase infringing goods.<sup>302</sup> One expert suggests that it is the lack of vested interest and input that contributes most to the problem; because Thais are consumers and not involved in building the product, they do not understand the harm in piracy.<sup>303</sup> Educating the Thai consumer is key to overcoming these factors.<sup>304</sup>

In Western societies, intellectual property is merely another form of private property.<sup>305</sup> Under this view, when a foreign gov-

295. See *supra* note 276 and accompanying text (discussing difference of opinion between Thai and Western interests regarding Thai Drug Patent Board).

296. *Id.*

297. *Id.*

298. See *supra* note 61 and accompanying text (stating that inventing and creating works are in public domain in traditional Asian society).

299. *Id.*

300. See *supra* note 61 and accompanying text (noting that cultural values form Asian view of intellectual property).

301. See *supra* note 285 and accompanying text (discussing problems of intellectual property protection encountered by Microsoft).

302. See *supra* note 287 and accompanying text (noting that devaluation of Thai baht increased rate of infringement).

303. See *supra* note 285 and accompanying text (discussing reasons for high rate of infringement in Thailand).

304. *Id.*; see *supra* note 273 and accompanying text (noting that Thai government has begun to educate public against consuming infringing goods).

305. See *supra* note 61 and accompanying text (describing Western theories behind intellectual property).

ernment does not recognize or enforce the protection of a U.S. citizen's intellectual property, it is a taking that also serves as a barrier to that citizen's trading in his or her own intellectual property.<sup>306</sup> This premise supports the U.S. view that intellectual property infringement in a domestic market distorts international trade.<sup>307</sup> Thus, Western nations use diplomatic techniques to impose Western cultural values, while overlooking the culture and customs of Asian countries.<sup>308</sup>

The Thai people have a long tradition of acknowledging other beliefs and allowing the followers of other beliefs to co-exist peacefully within Thailand, while maintaining a separate Thai identity.<sup>309</sup> The idea that there is no justice at the expense of harmony is fundamental to Buddhism and integrated into Thai jurisprudence. For example, the Code on the Conflict of Laws<sup>310</sup> reflects the recognition of a pluralistic society where persons of different faiths may be subject to different personal laws.<sup>311</sup> The IPIT Court follows in this tradition by satisfying Thailand's TRIPs enforcement obligations as well as Western pressure regarding intellectual property protection, without altering the manner in which the entire Thai legal system operates. Thus, it is a Thai institution, although it employs procedures that are alien to the rest of the Thai legal system.

### B. *The IPIT Court Is a Dependable Enforcement Mechanism*

The IPIT Court is an efficient mechanism for enforcing intellectual property rights irrespective of the rate of intellectual property infringement.<sup>312</sup> After its establishment, the number of

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306. See *supra* note 88 and accompanying text (describing U.S. perspective concerning non-recognition of intellectual property).

307. See *supra* note 105 and accompanying text (claiming that United States asserts that trade distortions result from ineffective or nonexistent intellectual property protection).

308. See *supra* note 116 and accompanying text (describing TRIPs as mechanism for Western imperialism); see also *supra* note 118 and accompanying text (describing effect of TRIPs on developing nations' cultures).

309. See *supra* notes 31-32 and accompanying text (stating that traditional Thai "co-existence" allowed for maintenance of separate cultural identities and mores).

310. CODE ON THE CONFLICT OF LAWS, B.E. 2481 (1934) (Thail.).

311. See *supra* note 31 and accompanying text (explaining that Thai law recognizes different cultures within its jurisdiction).

312. See *supra* note 13 and accompanying text (noting the accomplishments of Thailand to improve intellectual property protection); see also *supra* note 268 and accompanying text (describing IPIT Court as efficient).

intellectual property arrests increased in 1997 by forty-eight percent from 1996, while the number of seizures of infringing materials more than tripled.<sup>313</sup> Yet, despite these impressive numbers, intellectual property infringement has not decreased by corresponding rates, even though the IPIT Court strictly enforces the law.<sup>314</sup>

Rather, the conclusion that the IPIT Court is efficient rests on the fact that it provides a dependable enforcement mechanism.<sup>315</sup> According to experts, the IPIT Court quickly resolves cases and imposes adequate sentences and fines when necessary.<sup>316</sup> Additionally, the IPIT Court is fulfilling its mandate diligently, raising the confidence of multinational joint ventures that import intellectual property into Thailand.<sup>317</sup> The IPIT Court makes multinational joint ventures feel more secure in transferring technology to Thailand.<sup>318</sup>

### *C. The IPIT Court Meets Thailand's Enforcement Obligations Under TRIPS*

The IPIT Court, furthermore, is a positive development because it meets Thailand's enforcement obligations under TRIPS.<sup>319</sup> The IPIT Court contributes to the general Thai efforts to reduce intellectual property infringement and thus avoid trade sanctions.<sup>320</sup> By meeting its obligations under TRIPS, Thailand can argue that the United States is unjustified in continuing Special 301 trade sanctions.<sup>321</sup> The establishment of an

313. See *supra* note 285 and accompanying text (citing statistical improvements in intellectual property enforcement in 1997 from 1996).

314. See *supra* notes 268, 272 and accompanying text (describing increase in rate of infringement during period when IPIT Court is functioning well).

315. See *supra* note 268 and accompanying text (discussing sources that approve of IPIT Court's efficiency).

316. See *supra* note 285 and accompanying text (noting positive aspects of IPIT Court).

317. See *supra* note 268 and accompanying text (discussing perception of IPIT Court held by multi-national joint ventures in Thailand).

318. See *supra* note 267 and accompanying text (predicting effect of IPIT Court on non-Thai companies).

319. See *supra* note 274 and accompanying text (discussing IPIT Court as means for achieving TRIPS enforcement obligations).

320. See *supra* note 273 and accompanying text (discussing Thailand's efforts for reducing rate of infringement).

321. See *supra* note 92 and accompanying text (discussing unreasonableness of applying Section 301 to Thailand for intellectual property infringement); see also *supra* note 284 (providing reasons why United States should not impose trade sanction).

effective intellectual property court is evidence of Thailand's efforts to eradicate piracy.<sup>322</sup> It is difficult to legitimize penalizing the government and the people of Thailand for the activities of violators who have the resources to violate the law, especially when the government lacks the resources to combat the problem.<sup>323</sup>

### CONCLUSION

The IPIT Court is mutually beneficial to Thai interests, in attracting foreign direct investment, and the interests of foreign intellectual property right-holders. The IPIT Court provides a mechanism for Thailand to develop a system that conforms to Thai concerns and customs, as it furthers Thai development goals in the WTO by meeting Thailand's TRIPs obligations. Without the IPIT Court, Thai resentment at U.S. pressure regarding intellectual property right enforcement would be dangerous.<sup>324</sup> The IPIT Court, however, has managed to avoid this public backlash because the Thai public considers the IPIT Court to be a mechanism for encouraging direct investment from non-Thai investors, technology transfer, and the recovery of the Thai economy.<sup>325</sup>

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322. See *supra* note 178 and accompanying text (discussing IPIT Court as mechanism for reducing rate of infringement).

323. See *supra* note 92 and accompanying text (commenting that penalizing Thai government and people for lacking resources to halt illegal pirating is different than when government sanctions criminal activity that has harmful effect within United States).

324. See *supra* note 289 and accompanying text (describing escalating Thai resentment of U.S. pressure to adopt unwanted intellectual property laws).

325. See *supra* note 170 and accompanying text (describing positive view of IPIT Court held by Thais); see also *supra* note 263 (discussing Thai predictions that IPIT Court will invite foreign direct investment aiding Thailand's economic recovery).