

**CROSS-STRAITS ECONOMIC
COOPERATION FRAMEWORK
AGREEMENT, CROSS-STRAIT AGREEMENT
ON INTELLECTUAL PROPERTY RIGHT
PROTECTION AND COOPERATION, AND
IMPLICATIONS OF ONE-CHINA**

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I. INTRODUCTION

China continues to consider Taiwan as its territory.¹ In recent years, China has made many efforts to incorporate Taiwan into its economic system.² The traditional approach was to attract Taiwanese companies to set-up manufacturing facilities in China.³ The new approach characterizes the Chinese market as Taiwan’s most promising export market.⁴ In 2010, China finally had a chance to include Taiwan into a central government-to-local government scenario.⁵

1. “Taiwan” in this Article covers Taiwan (including the main island and its surrounding small islands), Penghu, Kinmen and Matsu. See Ming-Sung Kuo, *W(h)ither the Idea of Publicness? Besieged Democratic Legitimacy Under the Extraconstitutional Hybrid Regulation Across the Taiwan Strait*, 7 E. ASIA L. REV. 221, 234 (2012). The last two islands have been included in the concept of Taiwan since China succeeded in ousting Kuomintang (KMT) from the Chinese territory but failed to take these two islands back. See Robert B. Norris, *Quemoy and Matsu: A Historical Footnote Revisited*, AM. DIPL. (Nov. 2010), http://www.unc.edu/depts/diplomat/item/2010/0912/comm/norris_quemoymatsu.html.

2. See, e.g., Denny Roy, *Cross-strait Economic Relations: Opportunities Outweigh Risks (Occasional Paper Series)*, ASIA-PAC. CTR. FOR SEC. STUD. 1–4 (Apr. 2004), <http://www.apcss.org/Publications/Ocasional%20Papers/Cross-StraitEconomicRelations.pdf>.

3. See, e.g., Karen M. Sutter, *Business Dynamism Across the Taiwan Strait*, 42 ASIAN SURV. 3, 522, 524–25 (2002) (discussing the numerous incentives and policies enacted by the People’s Republic of China to attract Taiwanese investments); Huang Tien-lin, *The DPP Not To Blame For Economy*, TAIPEI TIMES, Oct. 16, 2003, at 8.

4. See *Mainland’s Market Attracts Taiwan Firms*, CHINA DAILY, July 7, 2011, http://www.chinadaily.com.cn/bizchina/2011-07/20/content_12942354.htm (discussing how China’s booming retail market attracts Taiwanese retailers and encourages cross-strait cooperation).

5. See Pasha L. Hsieh, *The China—Taiwan ECFA, Geopolitical Dimensions and WTO Law*, 14 J. INT’L ECON. L. 121, 121–22 (2011); *The Liberty Times Editorial: ECFA Debate: Ma Dodges the Issues*, TAIPEI TIMES, May 2, 2010, at 8 (comparing the ECFA to

On June 29, 2010, Taiwan and China entered into an “agreement” named “Cross-Straits Economic Cooperation Framework Agreement” (兩岸經濟合作架構協議, *liang an jing ji he zuo jia gou xie yi*, in Mandarin Chinese; hereinafter, ECFA)⁶ which then was ratified by the Legislative Yuan (Taiwanese congress) on August 17, 2010.⁷ The ECFA was designed, according to the Ma Ying-Jeou Administration, to facilitate stronger economic cooperation between the two states.⁸ Particularly, the ECFA was expected by the same administration to make Taiwan a gateway for foreign companies to enter the Chinese market.⁹

During the making of the ECFA, another agreement was being negotiated by the two countries.¹⁰ This unique agreement

the 2003 agreement between Hong Kong and China, and stating the ECFA is not a free-trade agreement between two countries, but an agreement between a locality and a central authority).

6. See Hsieh, *supra* note 5, at 121; see also Stuart Harris, *Taiwan and its New Economic Agreement with China*, E. ASIA FORUM (July 9th, 2010), <http://www.eastasiaforum.org/2010/07/09/taiwan-and-its-new-economic-agreement-with-china/>.

7. See Wallace Wen-yeu Wang & Christopher Chen Chao-hung, *Liberalization of Taiwan's Securities Markets—The Case of Cross-Taiwan-Strait Listings*, 26 BANKING & FIN. L. REV. 259, 263 (2011).

8. See Press Release, Department of Investment Services, Ministry of Economic Affairs (Taiwan), Grand Opening of InvestTaiwan Service Center (Aug. 8, 2010), available at http://www.moea.gov.tw/Mns/english/news/News.aspx?kind=6&menu_id=176&news_id=19326 (“After signing the Economic Cooperation Framework Agreement (ECFA), the relationship between Taiwan and China is far more amenable to mutual benefit and cooperation. This puts Taiwan in a core position be a global gateway to China, the Asia-Pacific region and the world. Taiwan is using this opportunity to extend further cooperation with foreign investors to enhance its economic position and increase employment.”).

9. See Press Release, Department of Investment Services, Ministry of Economic Affairs (Taiwan), Taiwan Business Alliance Conference Set for Oct. 19 Economic Innovation to Create a Golden Decade (Sep. 9, 2011), available at http://www.moea.gov.tw/Mns/english/news/News.aspx?kind=6&menu_id=176&news_id=22945 (“[The ECFA] makes Taiwan an even more attractive gateway to the Chinese and Asian markets for American, European, and Japanese enterprises, and strengthens the island’s potential to become a global innovation center and Asia-Pacific operations hub.”).

10. See *Taiwan and China Sign Intellectual Property Rights Protection Agreement*, CHINA POST, June 30, 2010, <http://www.chinapost.com.tw/taiwan/china-taiwanrelations/2010/06/30/262702/Taiwan-and.htm> (stating the Intellectual Property Rights protection pact was signed on the same day as the ECFA following negotiations).

was specifically about the affairs of intellectual property protection¹¹ and is called “Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation” (海峽兩岸智慧財產權保護合作協議, *hai xia liang an zhi hui cai chan quan bao hu he zuo xie yi*, in Mandarin Chinese; hereinafter, Taiwan-China IP Agreement).¹² The Taiwan-China IP Agreement and ECFA were signed on the same day.¹³

Some commentators try to characterize the ECFA as a free trade agreement (FTA).¹⁴ However, the ECFA is not a FTA because of its two distinctive features. First, the signatory representatives are not government agencies responsible for economic affairs.¹⁵ The Taiwanese signatory is the Strait Exchange Foundation (海峽交流基金會, *hai xia jiao liu ji jin hui*, in Mandarin), while the Chinese signatory is the Association for Relations across the Taiwan Straits (海峽兩岸經貿交流協會, *hai xia liang an jing mao jiao liu xie hui*, in Mandarin Chinese), a special association created by the Chinese Government to deal with Taiwan affairs to avoid recognizing Taiwan’s statehood.¹⁶

11. *See id.*

12. *See Cross-Strait Agreement on IPR Protection and Cooperation’ and Supplementary Legislation Approved by Legislative Yuan*, TAIWAN INTELL. PROP. OFF. (Nov. 15, 2010), <http://www.tipo.gov.tw/fp.asp?fpage=cp&xItem=318110&ctNode=6687&mp=2&Captcha.ImageValidation=C52Ao>.

13. *See* Wayne Chen, *From ECFA, Taiwan is Extending Its Trade Horizon to the Globe*, 9 ASIA-PACIFIC PERSPECTIVES 10, 11 (2010), available at <http://www.ctpecc.org.tw/publications/Perspectives9904.pdf>.

14. *See, e.g.,* Hsieh, *supra* note 5, at 121–22 (characterizing the Economic Cooperation Framework Agreement as a Free Trade Agreement); Chi-An Chou, *A Two-Edged Sword: The Economic Cooperation Framework Agreement between the Republic of China and the People’s Republic of China*, 6 BYU INT’L L. & MGMT. REV. 1, 3–4 (2012) (characterizing the Economic Cooperation Framework Agreement as a Free Trade Agreement).

15. *See, e.g.,* *China, Taiwan Sign Service Trade Agreement*, THE ECON. TIMES, June 21, 2013, http://articles.economictimes.indiatimes.com/2013-06-21/news/40119578_1_economic-cooperation-framework-agreement-straits-exchange-foundation-china-and-taiwan (“The agreement was inked by the Association for Relations Across the Taiwan Straits (ARATS) and the Straits Exchange Foundation (SEF) . . . [authorized] to handle cross-strait affairs.”).

16. *See id.* (“The ARATS and SEF are authorised by the Chinese mainland and Taiwan, respectively, to handle cross-Strait affairs.”); *Backgrounder: “1992 Consensus” on “One-China” Principle*, CHINA DAILY, Oct. 13, 2004, http://www.chinadaily.com.cn/english/doc/2004-10/13/content_382076.htm (stating the ARATS adheres to the one-

The formation of the ECFA was managed by this Chinese special association.¹⁷ On the other hand, China's FTAs are managed by the Ministry of Commerce.¹⁸ The signature of each FTA is the Government of the People's Republic of China.¹⁹ Hence, the ECFA is very different from China's regular FTA practice, which shows that China intended to treat the ECFA as a non-FTA agreement.

Second, the ECFA does not have IP-related provisions.²⁰ The independency of the Taiwan-China IP Agreement from the ECFA further demonstrates that the ECFA is not a FTA.²¹ The general practice of forming a FTA includes IP clauses in an agreement.²² For example, the United States always raises IP issues in negotiating FTAs with other countries and provides clauses in its model FTA.²³ Even China, as this Article

China principle); *see also* Taiwan Affairs Office and Information Office of the State Council, *The One China Principle and the Taiwan Issue*, 2 CHINESE J. INT'L L. 732, 734 (2003) (stating the one-China principle stands for the proposition that Taiwan is an inalienable part of Chinese territory).

17. *See, e.g.*, Elizabeth Chien-Hale, *Introductory Note to the Economic Cooperation Framework Agreement Between the Straits Exchange Foundation and the Association for Relations Across the Taiwan Strait*, 50 INT'L LEGAL MATERIALS 440, 440 (2011).

18. *See* Guoyou Song & Wen Jin Yuan, *China's Free Trade Agreement Strategies*, 35 WASH. Q. 107, 115 (2012).

19. *See* Yunling Zhang, *The Impact of Free Trade Agreements on Business Activity: A Survey of Firms in the People's Republic of China 1* (Asian Dev. Bank Inst., Working Paper No. 251, 2010).

20. *See* Economic Cooperation Framework Agreement, China-Taiwan, June 29, 2010, *available at* <http://www.ecfa.org.tw/EcfaAttachment/ECFADoc/ECFA.pdf>; *see also* Jonathan Adams, *China, Taiwan to Sign Breakthrough Trade Deal*, CHRISTIAN SCI. MONITOR (June 24, 2010), <http://www.csmonitor.com/World/Asia-Pacific/2010/0624/China-Taiwan-to-sign-breakthrough-trade-deal>.

21. *See* Note, *Keeping Our Balance in the Face of Piracy and Counterfeiting: Limiting the Scope of Intellectual Property Rights Enforcement Provisions in Free Trade Agreements*, 42 GEO. WASH. INT'L L. REV. 159, 170 (2010) (noting the development of intellectual property provisions in trade negotiations that ultimately led to most free trade agreements containing some additional IP protection); *ECFA is Not a Fully-fledged Free Trade Agreement: Lai*, CHINA POST, Apr. 28, 2010, <http://www.chinapost.com.tw/Taiwan/national/national-news/2010/04/28/254215/ECFA-is.htm>.

22. *See* Anselm Kamperman Sanders, *Intellectual Property, Free Trade Agreements and Economic Development*, 23 GA. ST. U. L. REV. 893, 893, 897 (2007).

23. *See id.* at 897–98 (discussing uniform interpretation of the TRIPS Agreement is often in line with U.S. law and the United States' extraordinary efforts to achieve global patent standards).

discusses, has included IP clauses in its FTAs.²⁴ Therefore, China must have reasons for structuring the ECFA without IP clauses.

This Article particularly explores the second distinctive feature of the ECFA, a lack of IP-related provisions, and is intended to address what Taiwan has lost through the ECFA. That is, Taiwan has created an impression that it has conceded that it is part of China.²⁵ This observation is based on the distinctive feature of the formation of the ECFA, as well as the contextual structures of the ECFA and Taiwan-China IP Agreement.

This Article has four parts. Part II discusses the background of FTA negotiations and IP-related issues thereof. Part II also examines Taiwan's FTA negotiations to figure out how Taiwan frames IP-related provisions in its FTAs, and reviews China's FTAs to find out how China approaches IP-related issues in its FTA negotiations. Part III specifically analyzes the FTA-like "arrangements" that China entered into with its two special administrative regions, Hong Kong and Macau. The purpose is to find out how IP-related issues are handled when China faces its local governments. Part IV attempts to explain why the ECFA has no IP-related provisions and how the Taiwan-China IP Agreement works within this framework. This part is intended to explore how China constructed a legal framework to implement its ideology of "One China." Finally, Part V briefly discusses the aftermath of the ECFA and echoes the intention of this Article.

24. See Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation Between the People's Republic of China and the Association of Southeast Asian Nations, China-ASEAN, art. 7, Nov. 4, 2002, *available at* <http://fta.mofcom.gov.cn/dongmeng/annex/xieyi2004en.pdf>; Free Trade Agreement Between the People's Republic of China and the Government of the Republic of Chile, China-Chile, arts. 11, 106, 111, Nov. 18, 2005, *available at* <http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf> (examples of China Free Trade Agreements with IP provisions).

25. See Chou, *supra* note 14, at 11.

II. TRIPS AND FTA

A. Overview

The General Agreement on Tariffs and Trade (GATT) establishes two basic principles for international trade law: national treatment and most-favored-nation (MFN).²⁶ “National treatment” expresses a nondiscrimination principle applied within the border of a member.²⁷ The principle requires a member to treat like products, either made in this nation or imported from another member, equally with respect to laws and regulations.²⁸ On the other hand, MFN focuses on the nondiscrimination principle applied at the border.²⁹ MFN requires a member to treat like products imported from all other members equally.³⁰

FTAs are considered as a bypass of the principles of MFN.³¹ Two WTO members can use a bilateral agreement to treat each other better than other members outside the bilateral agreement.³² This practice is governed by GATT Article XXIV, which allows WTO members to form a free trade agreement.³³ Article XXIV establishes two main conditions as prerequisites of FTAs.³⁴ Article XXIV.5 provides an external requirement, while Article XXIV.8 provides an internal requirement.³⁵ The external

26. See J. Janewa OseiTutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1651 n.66 (2012).

27. See Robert Howse, *Beyond the Countertrade Taboo: Why the WTO Should Take Another Look at Barter and Countertrade*, 60 U. TORONTO L.J. 289, 304 (2010) (stating WTO members are required to treat imported products “no less favorable” than domestic products).

28. See *id.*

29. See *id.* at 303–04 (discussing the MFN nondiscrimination obligation applies between countries rather than within the border of one country).

30. See *id.* at 303.

31. See Anna Turinov, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan-Mexico Economic Partnership Agreement*, 25 UCLA PAC. BASIN L.J. 336, 339 (2008).

32. See Meredith Kolsky Lewis, *The Prisoners’ Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?*, 11 CHI. J. INT’L L. 631, 634 (2011).

33. See *id.*

34. See *id.* at 636.

35. Turinov, *supra* note 31, at 341.

requirement forecloses that FTA participants can raise more tariffs or impose higher regulatory duties than what they had promised before entering into the WTO.³⁶ On the other hand, the internal requirement imposes that the elimination of tariffs or regulatory duties has to apply to “substantially all the trade between” the FTA parties.³⁷ The internal requirement also sets a ten-year timeframe for the FTA parties to reduce tariffs down to zero.³⁸

In addition, FTAs may have different names, such as economic partnership agreements (EPAs), closer economic partnership agreement (CEPAs), new-age economic partnership agreement (NEPAs), and comprehensive economic cooperation agreement (CECAs).³⁹

B. IP Issues in FTA Negotiations

During the formation of the WTO, the participating countries negotiated an international IP agreement, which later became an Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) in 1994 at the end of the Uruguay Round of negotiations on the GATT.⁴⁰ The need for this new IP treaty resulted from the lack of enforcement clauses in traditional IP treaties, such as the Paris Convention and Berne Convention.⁴¹

The TRIPS set a minimum standard requiring members to implement national IP protection,⁴² and any country which wants to join the WTO has to accept the TRIPS and implement the TRIPS provisions into its domestic law.⁴³ Today, the WTO

36. *Id.* at 342.

37. *See id.* at 341.

38. *See* Lewis, *supra* note 32, at 636.

39. *See* Alireza Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 SYRACUSE J. INT'L L. & COM. 43, 47–49 (2008).

40. Beatrice Lindstrom, Comment, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 927–28 (2010).

41. *See* Note, *supra* note 21, at 170.

42. *See* Sufian Jusoh, *Free Trade Agreements and Implications on Public Health—An Analysis of FTA of Selected ASEAN Member States*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 187, 188 (2009).

43. Lindstrom, *supra* note 40, at 923–24.

has 153 members, meaning that the TRIPS have become an international standard for IP protection.⁴⁴

However, the TRIPS is not a perfect standard for developed countries because the TRIPS was made by balancing the competing interests of developed and developing countries with the latter countries' main concern that the IP protection may only benefit foreign investors.⁴⁵ Moving from multilateralism, some developed countries have adopted bilateralism as one approach to implement their IP legal traditions into another country's legal system.⁴⁶ Consequently, FTA negotiations have become a tool for exceeding the TRIPS standard.⁴⁷ This practice is so-called "TRIPS-plus" bilateral agreements.⁴⁸

Up to now, TRIPS-plus provisions have commonly appeared in Asian-Pacific FTAs.⁴⁹ This phenomenon began after the TRIPS was effective.⁵⁰ While developed countries always include IP issues in their FTA negotiations,⁵¹ developing countries also have interests in IP because they have to protect traditional knowledge or generic resources.⁵² Thus, it is reasonable to conclude that IP issues are part of FTA negotiations for most countries.

If the ECFA is a FTA, then the negotiation of the ECFA is certainly a rare case in the Asian-Pacific FTA practice because the finalization of the ECFA does not cover IP clauses. To answer whether the ECFA is a rare case, it is necessary to examine the FTA practices of both Taiwan and China.

44. *Id.*

45. See Mohamed R. Hassanien, *Bilateral WTO-Plus Free Trade Agreements in the Middle East: A Case Study of OFTA in the Post-TRIPS Era*, 8 WAKE FOREST INTELL. PROP. L.J. 161, 170–71 (2008).

46. See *id.* at 171, 176–77.

47. See *id.* at 177.

48. See Lindstrom, *supra* note 40, at 925.

49. See *id.* at 926–29.

50. See *id.* at 926–27.

51. See *id.* at 927–28 (stating that developed countries such as the United States, Japan, and European countries include intellectual property coverage in their FTAs).

52. See Sonali Maulik, Comment, *Skirting the Issue: How International Law Fails to Protect Traditional Cultural Marks from IP Theft*, 13 CHI. J. INT'L L. 239, 256–57 (2012).

C. *Taiwan's Approach*

1. *Overview*

Under China's diplomatic strategy to isolate Taiwan from the international community, Taiwan rarely acts as a sovereign state building up relationships with other countries.⁵³ Until now, Taiwan has entered into four FTAs with five countries in Latin America.⁵⁴ This great achievement was made by the Chen Shui-bian Administration.⁵⁵

On August 21, 2003, the Free Trade Agreement between the Republic of China and the Republic of Panama (hereinafter, "Taiwan-Panama FTA") was signed.⁵⁶ It was effective on January 1, 2004.⁵⁷

On September 22, 2005, the Free Trade Agreement between the Republic of China (Taiwan) and the Republic of Guatemala (hereinafter, "Taiwan-Guatemala FTA") was signed.⁵⁸ The effective date was July 1, 2006.⁵⁹

On June 16, 2006, the Free Trade Agreement between the Republic of China (Taiwan) and the Republic of Nicaragua (hereinafter, "Taiwan-Nicaragua FTA") was signed.⁶⁰ It became effective on January 1, 2008.⁶¹

On May 7, 2007, the Free Trade Agreement between the Republic of China (Taiwan), the Republic of El Salvador, and the Republic of Honduras (hereinafter, "Taiwan-El

53. See Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765, 765-67 (2007).

54. See Daniel P. Erikson & Janice Chen, *China, Taiwan, and the Battle for Latin America*, 31 FLETCHER F. WORLD AFF. 69, 76 (2007).

55. See *id.*

56. Council for Trade in Services, *Notification of Regional Trade Agreement*, 1, WT/REG268/N/1 (Aug. 3, 2009).

57. *Id.*; see also Chen-huan Hsiao, *Taiwan's First Trade Policy Review in the World Trade Organization*, 24 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 185, 216 (2006).

58. Council for Trade in Services, *Notification of Regional Trade Agreement*, 1, WT/REG297/N/1 (July 12, 2011).

59. *Id.*

60. Council for Trade in Services, *Notification of Regional Trade Agreement*, 1, WT/REG267/N/1 (July 14, 2011).

61. *Id.*

Salvador-Honduras FTA”) was signed.⁶² The Taiwan-El Salvador-Honduras FTA was effective between Taiwan and El Salvador on March 1, 2008 and between Taiwan and Honduras on July 15, 2008.⁶³

While Taiwan is considered a sovereign state by those four FTAs, one distinctive difference exists between one FTA and the other three FTAs.⁶⁴ The Taiwan-Panama FTA uses “ROC” to represent “Republic of China” in the text, which is different than the other three FTAs that use “Taiwan” as a synonym of the “Republic of China.”⁶⁵ This practice makes sense because during the second term of former President Chen Shui-bian, using “Taiwan” as an alternative expression of “Republic of China” had become a diplomatic strategy.⁶⁶

In terms of IP clauses, those four FTAs have various approaches. Three FTAs include a special chapter for regulating

62. Kevin Chun-Ming Chen, *Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras*, 25 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 89, 91 (2007).

63. Council for Trade in Services, *Notification of Regional Trade Agreement*, 1, WT/REG283/N/1 (Apr. 8, 2010).

64. *Compare* Free Trade Agreement Between the Republic of China and the Republic of Panama, Taiwan-Pan., pmbl., Aug. 21, 2003, <http://www.trade.gov.tw/English/Pages/List.aspx?nodeID=675>, with Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, Taiwan-El Sal.-Hond., pmbl., May 7, 2007, <http://www.trade.gov.tw/English/Pages/List.aspx?nodeID=678>, and Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, Taiwan-Guat., pmbl., Sept. 22, 2005, <http://www.trade.gov.tw/english/Pages/List.aspx?nodeID=676>, and Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, Taiwan-Nicar., pmbl., Sept. 13, 1997, [http://www.trade.gov.tw/Files/Doc/Annex%20I%20-%20Schedule%20of%20the%20Republic%20of%20Nicaragua%20\(FTA%20between%20Republic%20of%20Nicaragua%20and%20the%20ROC\).pdf](http://www.trade.gov.tw/Files/Doc/Annex%20I%20-%20Schedule%20of%20the%20Republic%20of%20Nicaragua%20(FTA%20between%20Republic%20of%20Nicaragua%20and%20the%20ROC).pdf).

65. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64; Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64.

66. See Jewel Huang, *Analysis: Name Changes Reflect Increasing 'Taiwan Identity'*, TAIPEI TIMES, Feb. 12, 2007, <http://www.taipetimes.com/News/taiwan/archives/2007/02/12/2003348683> (last visited Nov. 8, 2012).

IP issues.⁶⁷ All four FTAs confirm TRIPS as a basis for either bilateral or trilateral relationships in terms of IP issues or concerns.⁶⁸

2. *Taiwan-Panama FTA*

The Taiwan-Panama FTA has a specific Chapter for mandating IP issues and some small provisions related to IP.⁶⁹

Chapter 16 specifically addresses intellectual property issues.⁷⁰ Article 16.01 binds both parties into seven international IP treaties:⁷¹

- Paris Convention for the Protection of Industrial Property (1967) (hereinafter, “Paris Convention”);
- Bern Convention for the Protection of Literary and Artistic Works (1971) (hereinafter, “Bern Convention”);
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Reproduction;
- World Intellectual Property Organization (WIPO) Copyright Treaty of 1996;
- World Intellectual Property Organization (WIPO)

67. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, ch. 16; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, ch. 15; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, ch. 17.

68. *See* Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, ch. 16; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, ch. 15; Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64, art. 10.07; Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, ch. 17.

69. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, ch. 16.

70. *See id.*

71. *Id.* art. 16.01.

Performances and Phonograms Treaty of 1996.⁷²

Article 16.02(1) restates one party's responsibility to protect IP rights of other party's nationals while measures enforcing these rights should not create obstacles to legitimate trade.⁷³ Article 16.02(1) also allows each party to broaden the IP protection.⁷⁴ However, Article 16.03 requires each party to implement the doctrine of exhaustion in its copyright law to an extent where a copyright owner cannot rely on the copyright law of one party to assert copyright infringement against goods imported from the other party, which were acquired from authorized persons or the same owner.⁷⁵

There are several articles related to the protection of traditional, cultural heritages.⁷⁶ Article 16.04 addresses the protection of geographic indications.⁷⁷ Particularly, in Article 16.04(5), Panama asks for recognition of Seco "for exclusive use as a kind of spirits made from sugarcane originating in Panama."⁷⁸ Second, Article 16.05 mandates the protection of "traditional knowledge,"⁷⁹ while Article 16.06 focuses on the protection of folklore.⁸⁰ Article 16.07 highlights the importance of the protection of genetic resources, or traditional knowledge, developed by local people, from being exploited without providing compensation for such local people.⁸¹ Another biological aspect of IP protection is plant breeders' rights provided in Article 16.08.⁸²

Chapter 16 Section C specifies the obligations of IP enforcement.⁸³ Article 16.09 confirms that both countries will

72. *Id.*

73. *Id.* art. 16.02(1).

74. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.02(2).

75. *Id.* art. 16.03.

76. *See, e.g., id.* art. 16.04

77. *Id.*

78. *Id.* art. 16.04(5).

79. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art.16.05.

80. *Id.* art. 16.06.

81. *Id.* art. 16.07.

82. *Id.* art. 16.08.

83. *Id.* arts. 16.09–14

take more efforts to meet the standard of IP protection, mandated by the same chapter.⁸⁴ Article 16.10 mandates that each party make laws or regulations to provide IP protection.⁸⁵ Article 16.11 requires each party to implement border control as a type of protection and authorize the customs to enforce the border protection.⁸⁶ Article 16.12 mandates the transparency of judicial or administration decisions related to IP.⁸⁷ Finally, Articles 16.13 and 16.14 establish a framework for a joint committee or mechanism to facilitate the cooperation between two parties.⁸⁸

Other small IP provisions appear in Chapter 10, which regulates investment issues, and Chapter 12, which regulates issues about financial services.⁸⁹ The first IP provision appears in Article 10.11, which limits one country's nationalization or expropriation of an investment in that country made by an investor from another country.⁹⁰ Article 10.11(6) expressly excludes "the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights," from the formats of nationalization or expropriation vested in other paragraphs.⁹¹ Articles 10.39 and 12.01 define "rights in the intellectual property field" as a class of investments.⁹²

3. *Taiwan-Guatemala FTA*

Compared with the Taiwan-Panama FTA, the Taiwan-Guatemala FTA has less IP provisions,⁹³ while it also

84. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.09.

85. *Id.* art. 16.10.

86. *Id.* art. 16.11.

87. *Id.* art. 16.12.

88. *See id.* arts. 16.13–14.

89. Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, arts. 10.01, 12.02 (explaining that Chapter 10 applies to investments and that Chapter 12, in addition to applying to investments, also applies to cross-border trade in financial services).

90. *See id.* art 10.11.

91. *Id.* art. 10.11(6).

92. *See id.* arts. 10.39, 12.01.

93. *Compare* Free Trade Agreement Between the Republic of China (Taiwan) and

characterizes IP as a form of investment in Article 10.01⁹⁴ and has the same article related to the nationalization or expropriation of an investment and compulsory licenses.⁹⁵

Chapter 15 of the Taiwan-Guatemala FTA focuses on IP issues.⁹⁶ Unlike the Taiwan-Panama FTA, which binds two parties into several international IP treaties, the Taiwan-Guatemala FTA, in Article 15.01, only confirms each party's duty to implement the requirements under TRIPS.⁹⁷ While the Taiwan-Panama FTA covers copyright and breeders' rights, the Taiwan-Guatemala FTA only deals with the protection of traditional, cultural heritages in the following articles: Article 15.02 (Protection of Geographical Indications), Article 15.03 (Protection of Traditional Knowledge), Article 15.04 (Protection of Folklore), and Article 15.05 (Relation between Access to Genetic Resources and Intellectual Property).⁹⁸

Chapter 15 Section C addresses enforcement.⁹⁹ Article 15.06 provides transparency requirements similar to the Taiwan-Panama FTA.¹⁰⁰ Article 15.07 creates an IP committee to monitor the implementation of relevant IP provisions,¹⁰¹ while Article 15.09 emphasizes cooperation between two parties to implement TRIPS duties and achieve six specific goals.¹⁰²

the Republic of Guatemala, *supra* note 64, with Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64.

94. Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, art. 10.01.

95. *See id.* art. 10.11(6).

96. *See id.* art. 15.

97. *Compare id.*, with Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64.

98. *Compare* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, arts. 15.02–.05, with Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.08.

99. Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, arts. 15.06–.09.

100. *See id.* art. 15.06; *see also* Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.12.

101. *See* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, art. 15.07 (stating that the committee shall meet at least once per year to hear Intellectual property matters).

102. *See id.* art. 15.09.

Lastly, the Taiwan-Guatemala FTA includes a dispute resolution provision in Article 15.08,¹⁰³ which is not included in the Taiwan-Panama FTA.¹⁰⁴

4. *Taiwan-Nicaragua FTA*

Compared with the previous two FTAs, the Taiwan-Nicaragua FTA covers more types of IP and includes various IP issues.¹⁰⁵ Article 1.02 declares the protection and enforcement of IP rights as one objective of the FTA.¹⁰⁶ Chapter 17 specifically addresses IP issues, while there are several articles in other chapters related to IP.¹⁰⁷

Chapter 17 begins with Article 17.01, which follows the model of the Taiwan-Panama FTA and includes the same international treaties.¹⁰⁸ However, Article 17.01 further limits the obligations to certain articles of those treaties,¹⁰⁹ while Article 17.03 binds one party to the treaties related to IP, where the other party is a member of the treaties.¹¹⁰ Article 17.02 lists general obligations, such as protection of IP rights of a national of the other party, implementation of broader protection, and establishment of measures to comply with Chapter 17.¹¹¹ But, Article 17.02(4) requires the obligations to start only after the

103. *See id.* art. 15.08 (stating that a party may request a dispute consultation from the Committee).

104. *See* Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64.

105. *Compare* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 1.02, *with* Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, and Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64.

106. Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 1.02.

107. *See, e.g., id.* arts. 10.07, 10.28, 17.02 (relating investments and intellectual property).

108. *See id.* art. 17.01; Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.01.

109. *See* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 17.01.

110. *See id.* art. 17.03.

111. *See id.* art. 17.02.

effective date of the FTA.¹¹² Moreover, Article 17.02(5) allows both parties to take reasonable actions against anticompetition resulting from the misuse of IP rights.¹¹³

Chapter 17 defines the scope of IP rights in Article 17.04 to “include each and every one of the rights in the area of patents (inventions, utility models and industrial designs), trade secrets or confidential information or undisclosed information, integrated circuits, trademarks and other distinctive signs, geographical indications, new varieties of plants, and copyrights and related rights.”¹¹⁴ It further includes articles for each IP right: Article 17.07 (Trademarks), Article 17.08 (Well-known Marks), Article 17.09 (“*Telle quelle*” Marks), Article 17.10 (Geographical Indications), Article 17.11 (Procedures with respect to Geographical Indications), Article 17.12 (Domain Names on the Internet), Article 17.13 (Patents), Article 17.14 (New Varieties of Plants), Article 17.16 (Obligations Pertaining to Copyright and Related Rights), Article 17.17 (Protection of Traditional Knowledge), Article 17.18 (Protection of Folklore), and Article 17.19 (Relation between Access to Genetic Resources and Intellectual Property).¹¹⁵ Particularly for pharmaceutical and agrochemical products, Article 17.15 requires each party to “observe and respect the national legislations and international treaties adopted by the other Party relating to the manufacturing, marketing, and distribution of” these products.¹¹⁶ Moreover, Article 17.20 requires protective measures for IP rights at each party’s border.¹¹⁷

Like the previous FTAs, the Taiwan-Nicaragua FTA creates a committee that monitors the execution of the agreement,¹¹⁸ requires the transparency of legal information,¹¹⁹ and demands

112. *See id.* art. 17.02(4).

113. *See id.* art. 17.02(5).

114. *See* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 17.04(1).

115. *See id.* arts. 17.07–.14, 17.16–.19.

116. *See id.* art. 17.15.

117. *Id.* art. 17.20.

118. *See id.* art. 17.06.

119. *See* Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 17.05.

technical cooperation.¹²⁰ Article 10.07(5) removes compulsory licensing from the forms of expropriation of an investment, and it does not treat the revocation, limitation, or creation of intellectual property rights as an expropriating act.¹²¹ Article 10.09 relates IP to the issue of technology transfer.¹²² Lastly, Article 10.28 defines IP as a form of investment.¹²³

5. *Taiwan-El Salvador-Honduras FTA*

The Taiwan-El Salvador-Honduras FTA has no specific chapter for IP issues and no direct IP provisions.¹²⁴ This practice is substantially different from the previous three FTAs. Nonetheless, the Taiwan-El Salvador-Honduras FTA still has articles related to compulsory licensing under the TRIPS.¹²⁵ Article 10.07 mentions compulsory licensing as a legitimate prerequisite of an investment.¹²⁶ Article 10.11(6) removes compulsory licensing from expropriating acts of each party.¹²⁷ Article 10.11(6) also considers the revocation, limitation, or creation of intellectual property rights not as an expropriating act.¹²⁸ Therefore, while the three parties do not impose duties beyond the TRIPS, the recitation of “TRIPS” indicates that the parties consider the TRIPS as their obligations for the WTO.

120. *See id.* art. 17.21 (stating the countries shall consider the listed “priority activities” in implementing and developing IP protection). *See generally* Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 *IDEA* 167 (2004) (providing background information on complying with the “technical cooperation” language).

121. Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 10.07(5) (stating explicitly that the Article does not apply to these categories).

122. *See id.* art. 10.09 (“No Party may . . . transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory . . .”).

123. *See id.* art. 10.28 (stating that investments may take the form of intellectual property rights).

124. *See* Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64.

125. *See, e.g., id.* arts. 10.07(1), 10.11(6).

126. *See id.* art. 10.07 (stating that a party may not transfer technology, production processes, or proprietary knowledge without the requirement of a judicial court).

127. *See id.* art. 10.11(6) (stating that the Article does not apply to compulsory licenses that have been granted consistent with TRIPS).

128. *See id.*

6. *Comments on the Taiwanese Approach*

The practice of the four Taiwanese FTAs indicates that Taiwan does not have model IP provisions for negotiating FTAs. The first two FTAs, Taiwan-Panama FTA and Taiwan-Guatemala FTA, all have an IP chapter. The Taiwan-Panama FTA might provide model clauses for the Taiwan-Guatemala FTA in terms of wording, though the latter does not cover copyright issues or breeders' rights.

The most comprehensive version is in the Taiwan-Nicaragua FTA, the third FTA, which provides a legal framework different from the previous two FTAs.¹²⁹ The Taiwan-Nicaragua FTA may provide a new model for IP clauses. However, the fourth FTA does not follow that model, and it does not contain an IP chapter.¹³⁰ The Taiwan-El Salvador-Honduras FTA case does not indicate that Taiwan may ignore IP clauses when forming a FTA.¹³¹ This is because the "TRIPS" is recited in some non-typical IP articles.¹³² It may be interesting to research why Taiwan changed its FTA strategy related to IP issues.

Even the Taiwan-El Salvador-Honduras FTA is considered an exceptional case where Taiwan may be silent on IP provisions when formulating a FTA.¹³³ The Taiwan-El Salvador-Honduras FTA case is still distinguishable from the ECFA case, because Taiwan has not entered into any IP-related agreement with either El Salvador or Honduras so far.¹³⁴ That

129. Compare Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64, art. 17, with Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Guatemala, *supra* note 64, art. 15, and Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.

130. See Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64.

131. Cf. Free Trade Agreement Between the Republic of China (Taiwan) and the Republic of Nicaragua, *supra* note 64.

132. See, e.g., Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64, art. 10.11 (discussing TRIPS in an investment section of the Article).

133. See Kevin Chun-Ming Chen, *supra* note 62, at 92 (stating that the lack of intellectual property provisions in the FTA is interesting, considering the CAFTA-DR, which the agreement was modeled after, contained IP provisions).

134. Bureau of Foreign Trade, *Signed Agreements*, BUREAU OF FOREIGN TRADE,

is, if Taiwan does not consider IP issues when negotiating a FTA with a country, it will not enter into a separate IP agreement with that country.

Furthermore, while the result of the Taiwan-El Salvador-Honduras FTA indicates that Taiwan can choose not to include an IP chapter in its FTAs, the indication does not extend to a conclusion, that in terms of FTA negotiations, Taiwan excluded IP discussions when negotiating that FTA with El Salvador or Honduras. The Taiwan-El Salvador-Honduras FTA does have provisions related to compulsory licensing of IP rights.¹³⁵

Therefore, Taiwan's FTA practice does not answer why the ECFA does not include IP clauses. It is necessary, then, to review China's approach.

D. China's Approach

1. Overview

As of writing, China has entered into seven FTAs with six countries and one regional economic union.¹³⁶ While the official FTA website of the Chinese Government includes the Mainland and Hong Kong Closer Economic and Partnership Arrangement (hereinafter, "Hong Kong CEPA") and Mainland and Macao Closer Economic and Partnership Arrangement (hereinafter, "Macau CEPA") as FTAs,¹³⁷ this Article discusses them in a separate section because of their uniqueness.

The six countries include Chile, Costa Rica, New Zealand, Pakistan, Peru, and Singapore.¹³⁸ The one regional economic union is with the Association of Southeast Asian Nations

<http://www.trade.gov.tw/english/Pages/List.aspx?nodeID=663> (last visited on Oct. 25, 2013) (indicating that Taiwan has not signed any bilateral trade agreements since the signing of the FTA between the Republic of China, El Salvador and Honduras).

135. Free Trade Agreement Between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, *supra* note 64, art. 10.11.

136. See Jun Zhao & Timothy Webster, *Taking Stock: China's First Decade of Free Trade*, 33 U. PA. J. INT'L L. 65, 68 (2011).

137. See CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited Oct. 25, 2013).

138. See Zhao & Webster, *supra* note 136, at 66–68.

(“ASEAN”).¹³⁹ China started its FTA partnerships with neighbors, such as ASEAN, and up to now it has entered into FTAs with countries surrounding the Pacific Ocean, such as Chile, Costa Rica, New Zealand, and Peru.¹⁴⁰

China offered ASEAN a proposal of a free trade area in 2000.¹⁴¹ Later, in November 2002, the two sides signed a framework agreement for further negotiations.¹⁴² Finally, the two parties entered into three FTAs, respectively, on investment, trade in goods, and trade in services.¹⁴³ The agreements on investment and trade in goods are related to IP.¹⁴⁴ The Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between the People’s Republic of China and the Association of Southeast Asian Nations (hereinafter, “China-ASEAN FTA on Trade in Goods”) was signed on November 29, 2004 and entered into force on January 1, 2005.¹⁴⁵ The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People’s Republic of China and the Association of Southeast Asian Nations (hereinafter, “China-ASEAN FTA on Investment”) was signed on August 15, 2009 and entered into force on January 1, 2010.¹⁴⁶

The second Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Chile (hereinafter, “China-Chile FTA”) was signed on November 18, 2005 and became effective on

139. *Id.*

140. *See id.* at 78–79.

141. *See* Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 996 (2011).

142. Timothy Webster, *Bilateral Regionalism: Paradoxes of East Asian Integration*, 25 BERKELEY J. INT’L L. 434, 445–46 (2007).

143. *See* Yu, *supra* note 141, at 957.

144. *Id.* at 964.

145. *See* Committee on Trade and Development, *Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the Peoples Republic of China*, WT/COMTD/N/20/Add.1 (Sept. 26, 2005).

146. *See* *ASEAN-China*, MINISTRY OF INT’L TRADE AND INDUSTRY Feb. 2, 2012, http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_b609671a-c0a81573-aba0aba0-c94c2e0c.

October 1, 2006.¹⁴⁷

The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan (hereinafter, "China-Pakistan FTA on Trade in Goods") was signed on November 24, 2006 and became effective on July 1, 2007.¹⁴⁸

The Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand (hereinafter, "China-New Zealand FTA") was signed on April 7, 2008 and entered into force on October 1, 2008.¹⁴⁹

The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore (hereinafter, "China-Singapore FTA") was signed on October 23, 2008 and became effective on January 1, 2009.¹⁵⁰

The Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru (hereinafter, "China-Peru FTA") was signed on April 28, 2009 and entered into force on March 1, 2010.¹⁵¹

A recent FTA, the Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Costa Rica (hereinafter, "China-Costa Rica FTA"), was signed on April 8, 2010 and became effective on August 1, 2011.¹⁵²

147. Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG230/N/1 (June 20, 2007).

148. See Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG237/N/1 (Jan. 21, 2008).

149. See Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG266/N/1 (Apr. 23, 2009).

150. See Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG262/N/1 (Mar., 4 2009).

151. See Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG281/N/1 (Mar. 3, 2010).

152. See Committee on Regional Trade Agreements, *Notification of Regional Trade Agreement*, WT/REG310/N/1 (Feb. 28, 2012).

2. IP Provisions in the FTAs

a. 2.1 China-ASEAN FTA

The China-ASEAN FTA on Trade in Goods has one IP-related provision, Article 7 (WTO Disciplines), reaffirming the parties' compliance with the WTO disciplines on IP.¹⁵³ The China-ASEAN FTA on Investment has a definition provision, Article 1, characterizing IP as a form of investment.¹⁵⁴ Additionally, Article 8(6) excludes compulsory licensing of IP rights from the scope of expropriation.¹⁵⁵

b. 2.2 China-Chile FTA

The China-Chile FTA has some IP-related provisions.¹⁵⁶ Article 11 addresses border protection of IP rights.¹⁵⁷ Article 106 provides the goals of the cooperation between the two parties for research, science, and technology and requires the uses of IP rights generated from the cooperation have to meet those goals.¹⁵⁸ Article 111 is a specific IP provision and reaffirms the obligations based on the TRIPS without creating additional obligations.¹⁵⁹ Particularly, Article 111(1)(a) addresses the implementation of "the principles set out in the *Declaration on the TRIPS Agreement on Public Health*, adopted on November 14, 2001, by the WTO at the Fourth WTO Ministerial held in

153. See Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the People's Republic of China and the Association of Southeast Asian Nations, *supra* note 24, art. 7.

154. See Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between the People's Republic of China and the Association of Southeast Asian Nations, China-ASEAN, art. 1, Nov. 4, 2002, <http://fta.mofcom.gov.cn/topic/chinaasean.shtml>.

155. *Id.* art. 8(6).

156. See Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, China-Chile, arts. 106, 111, Nov. 18, 2005, <http://fta.mofcom.gov.cn/topic/enchile.shtml>.

157. *Id.* art. 11.

158. *Id.* art. 106.

159. See *id.* art. 111 (imposing no additional obligations to those established by TRIPS agreement); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

Doha, Qatar, and the *Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, adopted on August 30, 2003” (hereinafter, “Doha principles”).¹⁶⁰

c. 2.3 China-Pakistan FTA

The China-Pakistan FTA on Trade in Goods has a few IP clauses.¹⁶¹ Article 10 mandates border protection of IP rights.¹⁶² Article 46(1) defines “intellectual property” as a form of investment, where the list of IP rights covers “copyrights, patents, trade-marks, trade-names, technical process, know-how and good-will.”¹⁶³ It is noticeable that “technical process,” “trade-names,” and “good-will” are not IP rights vested in the TRIPS.¹⁶⁴

d. 2.4 China-New Zealand FTA

The China-New Zealand FTA has a special Chapter for IP and other IP-related articles.¹⁶⁵ The Preamble explicitly recognizes that the parties are “[m]indful that fostering innovation and the promotion and protection of intellectual property rights will encourage further trade, investment and cooperation between the Parties.”¹⁶⁶ Article 2 highlights IP protection as one objective of the agreement.¹⁶⁷ Article 135 characterizes IP rights as a form of investment, where the IP rights cover more types than the China-Pakistan FTA by additionally including “industrial designs” and “trade and

160. *Id.* art. 111(1)(a).

161. *See* Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan, China-Pak., Feb. 21, 2009, <http://fta.mofcom.gov.cn/topic/enpakistan.shtml>.

162. *Id.* art. 10.

163. *Id.* art. 46(1).

164. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 159.

165. *See* Free Trade Agreement Between the Government of the People’s Republic of China and the Government of New Zealand, China-N.Z., Apr. 7, 2008, <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>.

166. *Id.*

167. *Id.* art. 2.

business secrets.”¹⁶⁸ Article 145(5) excludes compulsory licensing of IP rights from a type of expropriation.¹⁶⁹

Chapter 12 defines the scope of IP rights again in Article 159 as “copyright and related rights, rights in trade marks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and rights in plant varieties as defined in the TRIPS Agreement.”¹⁷⁰ Article 160 recognizes the importance of IP protection and the necessity of balancing the interests of rights holders and society.¹⁷¹ Article 161 reaffirms the duties under the TRIPS.¹⁷² Some articles, such as Article 162 (Contact Points), Article 163 (Notification and Exchange of Information), and Article 164 (Cooperation and Capacity Building), establish a framework of cooperation.¹⁷³ Article 165 requires the protection of “genetic resources, traditional knowledge and folklore.”¹⁷⁴ Article 166 provides consultation as a priority of dispute resolution.¹⁷⁵

e. 2.5 China-Singapore FTA

The China-Singapore FTA does not have any IP provisions, nor does it mention TRIPS.¹⁷⁶

f. 2.6 China-Peru FTA

The China-Peru FTA has a special chapter for IP rights and other IP-related provisions.¹⁷⁷ Chapter 11 might be considered

168. See *id.* art. 135; Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan, *supra* note 161, art. 46.

169. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of New Zealand, *supra* note 165, art. 145(5).

170. *Id.* art. 159.

171. *Id.* art. 160.

172. *Id.* art. 161.

173. *Id.* arts. 162–64.

174. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of New Zealand, *supra* note 165, art. 165.

175. *Id.* art. 166.

176. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore, China-Sing., Oct. 23, 2008, <http://fta.mofcom.gov.cn/topic/ensingapore/shtml>.

177. See Free Trade Agreement Between the Government of the People’s Republic

an extensive version of Chapter 12 of the China-New Zealand FTA.¹⁷⁸ Article 144 (General Provisions) includes some purpose clauses similar to those contained in previous FTAs discussed.¹⁷⁹ Article 144 recognizes the importance of IP protection and reaffirms the parties' duties under the TRIPS.¹⁸⁰ Article 144(6) further reaffirms the Doha principles, which first appeared in the China-Chile FTA.¹⁸¹ Article 145 addresses the protection of genetic resources, traditional knowledge and folklore,¹⁸² and it further requires both parties follow the Convention on Biological Diversity.¹⁸³ Article 146 mandates each party protect the geographic indications of the other party listed in Annex 10.¹⁸⁴ Article 147 requires the border protection of IP rights.¹⁸⁵ Lastly, Article 148 provides a cooperation framework for both parties with reaffirmation of an early IP cooperation agreement signed by both parties.¹⁸⁶

Other IP-related clauses include Article 126, defining IP rights as a form of investment,¹⁸⁷ and Article 171, establishing a committee for IP cooperation.¹⁸⁸

g. 2.7 China-Costa Rica FTA

The China-Costa Rica FTA contains a chapter specifically

of China and the Government of the Republic of Peru, China-Peru, ch. 11, Apr. 28, 2009, <http://fta.mofcom.gov.cn/topic/enperu.shtml>.

178. *See id.* (elaborating on the provisions set out in Chapter 12 of the China-New Zealand FTA); *see also* Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, *supra* note 165, ch. 12.

179. *See* Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru, *supra* note 177, art. 144.

180. *Id.*

181. *Id.* art. 144(6).

182. *Id.* art. 145.

183. *Id.* art. 145(2).

184. *See* Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru, *supra* note 177, art. 146.

185. *Id.* art. 147.

186. *Id.* art. 148.

187. *See id.* art. 126 (defining investment to include "intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, know-how and technological process, as well as good-will.").

188. *Id.* art. 171.

for IP and other IP-related provisions.¹⁸⁹ Chapter 10 begins with Article 109, which recognizes the importance of IP protection as well as the interests of society.¹⁹⁰ Article 110 reaffirms the duties under the TRIPS.¹⁹¹ Article 111 addresses the needs for protecting genetic resources, traditional knowledge, and folklore, and declares the parties' intent to implement the Convention on Biological Diversity.¹⁹² Article 112 recognizes the Doha principles with respect to the issues of public health.¹⁹³ Article 113 addresses the relationship between technology transfer and economic growth.¹⁹⁴ Article 114 mandates border protection of IP rights.¹⁹⁵ Article 116 requires each party protect the geographical indications of the other party listed in the annexes, Annex 9 for China and Annex 10 for Costa Rica.¹⁹⁶ Lastly, Articles 115 (Contact Points) and 117 (Cooperation) set up a framework of IP cooperation.¹⁹⁷

Other provisions include Article 2, which recognizes IP protection as one objective of the agreement,¹⁹⁸ and Article 126, which considers the cooperation in the IP-related competition law issues.¹⁹⁹

3. *Comments on the Chinese Approach*

One commentator points out that China's FTA practice generally excludes TRIPS-plus IP provisions.²⁰⁰ The China-Pakistan FTA is in contrast because it covers the

189. See Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Costa Rica, China-Costa Rica, Apr. 8, 2010, <http://fta.mofcom.gov.cn/topic/encosta.shtml>.

190. *Id.* art. 109.

191. *Id.* art. 110.

192. *Id.* art. 111.

193. *Id.* art. 112.

194. See Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Costa Rica, *supra* note 189, art. 113.

195. *Id.* art. 114.

196. *Id.* art. 116.

197. *Id.* arts. 115, 117.

198. *Id.* art. 2.

199. *Id.* art. 126.

200. See Claude Barfield, *The Dragon Stirs: China's Trade Policy for Asia—and the World*, 24 ARIZ. J. INT'L & COMP. L. 93, 110–11 (2007).

protection of “technical process,” “trade-names,” and “good-will.”²⁰¹ China’s FTAs with New Zealand, Peru, and Costa Rica even include generic resources, traditional knowledge, and folklore.²⁰²

The China-Singapore FTA is a special case, and it does not mention any IP issue.²⁰³ However, that does not mean China may exclude IP clauses from FTAs, because the China-ASEAN FTAs on Trade in Goods and on Investment, of which Singapore is a member, have some IP-related provisions that at least reaffirm the duties under the TRIPS.²⁰⁴

The Chinese approach indicates that China includes IP-related provisions in its FTA negotiations. This approach negates a conclusion that the ECFA is a FTA. If China had treated the ECFA as a FTA, it would have insisted IP provisions become a part of the ECFA. So, what were China’s major concerns? Before answering this question, it is necessary to examine China’s CEPAs with its two special territories, Hong Kong and Macau.

III. CHINA AND ITS CEPAS WITH HONG KONG AND MACAU

A. Overview

“CEPA” ends with “arrangement” (安排, *an pai*, in Chinese)

201. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan, *supra* note 161, art. 46.

202. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of New Zealand, *supra* note 165, art. 165; see also Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Peru, *supra* note 177, art. 145; Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Costa Rica, *supra* note 189, art. 111.

203. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Singapore, *supra* note 176.

204. See Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between the People’s Republic of China and the Association of Southeast Asian Nations, *supra* note 154, art. 1; see also Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the People’s Republic of China and the Association of Southeast Asian Nations, *supra* note 24, art. 7.

not “agreement.”²⁰⁵ China did that on purpose.²⁰⁶ During the formation of the Hong Kong CEPA, China realized that FTAs were negotiated by sovereign states.²⁰⁷ To avoid misunderstanding, China chose “arrangement” as the name so as to express that Hong Kong is part of China and that the Hong Kong CEPA is amongst one country, but two systems.²⁰⁸ This idea also applied to the Macau CEPA.²⁰⁹

After China resumed its sovereignty over Hong Kong, it chose to keep Hong Kong law so as to demonstrate its ideology of “one country, two systems.”²¹⁰ China followed the same model in Macau.²¹¹ So, the first distinctive feature in both CEPAs is the reaffirmation of the “one country, two systems” principle.²¹² Besides, each CEPA has a dispute resolution mechanism, so that trade-related disputes can avoid being international.²¹³

Throughout both CEPAs, there are no IP-related provisions.²¹⁴ This is the same as the ECFA.²¹⁵ CEPAs are a basic agreement, and there are several supplements attached to

205. See Mainland and Macao Closer Economic Partnership Arrangement, China-Mac., June 29, 2003, <http://fta.mofcom.gov.cn/topic/enmacau.shtml>.

206. See Wei Wang, *CEPA: A Lawful Free Trade Agreement under “One Country, Two Customs” Territories*, 10 L. & BUS. REV. AM. 647, 654–55 (2004).

207. See *id.* at 654.

208. See *id.*

209. See Mainland and Macao Closer Economic Partnership Arrangement, *supra* note 205.

210. See Chang-hsien Tsai, *Exit, Voice and International Jurisdictional Competition: A Case Study of the Evolution of Taiwan’s Regulatory Regime for Outward Investment in Mainland China, 1997-2008*, 39 SYRACUSE J. INT’L. L. & COM. 303, 353–54 (2012).

211. See Guangjian Tu, *The Conflict of Laws System in Macau*, 40 HONG KONG L.J. 85, 85–86 (2010).

212. See, e.g., Mainland and Hong Kong Closer Economic Partnership Arrangement, China-H.K., June 29, 2003, <http://fta.mofcom.gov.cn/topic/enhongkong/shtml>; see also Mainland and Macao Closer Economic Partnership Arrangement, *supra* note 205.

213. See Ignazio Castellucci, *Legal Hybridity in Hong Kong and Macau*, 57 MCGILL L.J. 665, 695–96 (2012).

214. See Mainland and Macao Closer Economic Partnership Arrangement, *supra* note 205; see also Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 212, art. 2.

215. See Cross-Straits Economic Cooperation Framework Agreement, China-Taiwan, June 29, 2010, <http://china.usc.edu/ShowArticle.aspx?articleID=2273>.

each CEPA.²¹⁶ It is interesting to note that China names those supplements as supplementary “agreements” (not “arrangements”).²¹⁷ But, the texts of those supplementary “agreements” do not recite “agreement” as a title.²¹⁸ The formal name of each supplementary agreement is “Supplement.”²¹⁹

B. Supplements to the Hong Kong CEPA

Some supplements to the Hong Kong CEPA do mention IP issues.²²⁰ Supplement III to the Hong Kong CEPA was signed on June 27, 2006 and revised Paragraph 1 of Article 17 of the CEPA to include IP protection as one task of the cooperation.²²¹ It also amended Annex 6 (Trade and Investment Facilitation) of the CEPA.²²² Annex 6 now includes a special IP article (Article 10) affirming the importance of IP protection and outlining the cooperation framework.²²³ It also has newly-amended Article 2 of Annex 6 demanding the cooperation of IP protection.²²⁴

Supplement V to the Hong Kong CEPA was signed on July 29, 2008 and demanded the specific protection of trademarks.²²⁵ Article II.2 highlights the necessity of cooperation in the trademark area, particularly for trademark registration and

216. See, e.g., Supplement V to the Mainland and Hong Kong Closer Economic Partnership Arrangement, China-H.K., July 29, 2008, available at <http://tid.gov.hk/english/cepa/legaltext/cepa6.html>.

217. See Mainland and Hong Kong Closer Economic and Partnership Arrangement, *supra* note 212.

218. See, e.g., Supplement V to the Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 216.

219. See, e.g., Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 212, at 1; see also Mainland and Macao Closer Economic Partnership Arrangement, *supra* note 205, at 1.

220. See Supplement V to the Mainland and Macao Closer Economic Partnership Arrangement, China-Maca., art. II, July 29, 2008, <http://tid.gov.hk/english/cepa/legaltext/cepa6.html>.

221. See Supplement III to the Mainland and Hong Kong Closer Economic Partnership Arrangement art. II(1), China-H.K., June 27, 2006, <http://www.tid.gov.hk/english/cepa/legaltext/cepa4.html>.

222. *Id.* art. II(2).

223. *Id.* art. II(3).

224. *Id.* art. II(2).

225. See Supplement V to the Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 216, art. II(2).

protection.²²⁶ Article II.3 specifies the issues of branding.²²⁷ Article II.3(1) amends Paragraph 1 of Article 17 of the CEPA to include “branding” as a subject of the cooperation.²²⁸ Article II.3(2) requires the amendment of Article 2 of Annex 6 so that Article 2 now declares the cooperation on branding.²²⁹ Lastly, Article II.3(3) adds another article in Annex 6 (Article 11), which creates the framework of cooperation on branding and recognizes the importance of branding.²³⁰

C. *Supplements to the Macau CEPA*

Supplement V to the Macau CEPA was signed on July 30, 2008.²³¹ It changed Paragraph 1 of Article 17 of the CEPA to include “protection of intellectual property rights” and “cooperation on brand promotion” as additional tasks.²³² It also amended Article 2 of Annex 6, reaffirming cooperation on protection of IP rights and, particularly, on branding.²³³ Lastly, it created a new article in Annex 6, Article 11.²³⁴ Article 11 of Annex 6 recognizes the importance of branding promotion and establishes the cooperative framework.²³⁵

Supplement VI to the Macau CEPA was signed May 11, 2009.²³⁶ It created a cooperative framework on trademark protection, but did not add or amend any article of Annex 6 of the Macau CEPA.²³⁷

226. *Id.* art. II(2).

227. *Id.* art. II(3)(1).

228. *Id.*

229. *Id.* art. II(3)(2).

230. *Id.* art. II(3)(3).

231. See Supplement V to the Mainland and Macao Closer Economic Partnership Arrangement, China-Maca., July 29, 2008, <http://tid.gov.hk/english/cepa/legaltext/cepa6.html>.

232. See *id.* art. II.

233. See *id.*

234. See *id.*

235. See *id.*

236. Supplement VI to the Mainland and Macao Closer Economic Partnership Arrangement, China-Maca., May 11, 2009, http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_CEPA_VII&locale=en_US.

237. See *id.* art. II.

D. Comments

The fact that Hong Kong and Macau are part of China does not result in a free trade area without IP concerns.²³⁸ Each CEPA imposes certain obligations regarding IP on the parties by attaching supplementary agreements.²³⁹ However, China's CEPA practice is quite different from its regular FTA practice. First, a CEPA is not an agreement in the context of state-to-state FTA negotiations.²⁴⁰ Instead, a CEPA is developed under the principles of "one country, two systems."²⁴¹ So, the document name for each CEPA is "arrangement."²⁴² Second, China amends each CEPA regularly through supplements, while China does not frequently change its FTAs.²⁴³ Third, IP-related Supplements to each CEPA have a very limited IP scope, and the relevant provisions are general.

Compared with the Hong Kong and Macau CEPAs, the ECPA does not recite the principles of "one country, two systems."²⁴⁴ This is reasonable because had China insisted on the addition of "one country, two systems" in the ECPA, there might have been a revolution against the Ma Ying-Jeou Administration.²⁴⁵ Then, the question becomes how did China

238. *See id.*; *see also* Supplement V to the Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 216.

239. *See, e.g.*, Supplement VI to the Macao Closer Economic Partnership Arrangement, *supra* note 236 (explaining that each CEPA was signed by the parties in accordance with the previous agreements between the parties); *see also* Supplement V to the Hong Kong Closer Economic Partnership Arrangement, *supra* note 216.

240. *See* Wei Wang, *supra* note 206, at 654.

241. *Id.*

242. *See id.*

243. *Compare* Mainland and Hong Kong Closer Economic Partnership Arrangement, *supra* note 212 (including six supplementary agreements), *with* Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, *supra* note 165 (including no supplementary agreements), *and* Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan, *supra* note 161 (including only one supplementary agreement), *and* Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, *supra* note 156 (including only one supplementary agreement).

244. *See* Hsieh, *supra* note 5, at 139 (explaining that the 'one China, two systems' precondition in the Hong Kong CEPA was unacceptable to Taiwan).

245. *See id.* at 139–40 (describing the measures taken by the Taiwanese

still implement the “one country, two systems” principles through the formation of the ECFA and avoid the ECFA from being characterized as a state-to-state FTA.²⁴⁶

IV. ECFA WITHOUT IP-RELATED PROVISIONS: IMPLEMENTATION OF THE “ONE CHINA” PRINCIPLES

A. “One-China” Prerequisite

China always considers Taiwan as either Hong Kong or Macau, and its trade policy also treats Taiwan as Hong Kong or Macau.²⁴⁷ Recently, China has characterized the Taiwan-China relationship as an outcome of “1992 consensus,” where both parties “recognize[d] there is only one China, but agree to differ on its definitions.”²⁴⁸ China even successfully pushed the Ma Ying-Jeou Administration to adopt such a political statement.²⁴⁹

The implementation of the principles of “one country, two systems” was first done by the formation of the ECFA.²⁵⁰ The

government to distinguish the ECFA from the CEPA due to strong Taiwanese opposition to adoption of the CEPA’s principles).

246. Cf. Xin Qiang, *Mainland China’s Taiwan Policy Adjustments*, 5 CHINA SECURITY 53, 55 (2009) (explaining that the agreement between China and Taiwan is based on a “one China” framework, but with differing interpretations).

247. See Ministry of Commerce, PRC, *Main Mandate of the Ministry of Commerce*, CHINA-CARIBBEAN ECON. & TRADE COOPERATION FORUM 2007 (Sept. 5, 2007, 3:58 PM), cncforumenglish.mofcom.gov.cn/2007/aarticle/zb/200709/20070995965042.html (“To formulate and implement economic and trade policies as well as mid-term and long-term trade planning for the Hong Kong Special Administrative Region (HK SAR), Macao Special Administrative Region (Macao SAR) and Taiwan region. To hold economic and trade talks with the competent authorities in charge of trade and economic affairs of HK SAR and Macao SAR as well as authorized non-governmental organizations of Taiwan and sign the relevant documents. To be in charge of the commercial and trade liaison mechanism between the mainland and the HK SAR and Macao SAR. To organize the direct trading activities with Taiwan, and to be responsible for bilateral and multilateral trade issues involving Taiwan.”).

248. See Xin Qiang, *supra* note 246, at 55.

249. See *id.*; see also “1992 Consensus” Crucial for Peaceful Development: Taiwan Leader, GLOBAL TIMES, Nov. 11, 2012, <http://www.globaltimes.cn/content/743503.shtml>; Ben Blanchard, *China Dangles More Incentives Ahead of Taiwan Election*, REUTERS, Dec. 14, 2011, <http://www.reuters.com/article/2011/12/14/us-china-taiwan-idUSTRE7BD0DE20111214> (indicating that China has pushed Ying-jeou with economic incentives for recognition).

250. See Chou, *supra* note 14, at 2–3.

ECFA was originally planned to be titled “Comprehensive Economic Cooperation Arrangement” (CECA).²⁵¹ Definitely, China’s strategy was to create a phenomenon where Taiwan is part of China so that both parties would decide to form an economic relationship like what Hong Kong or Macau did with China.²⁵² However, such ambition was not achieved because of the political concerns of the Ma Ying-Jeou Administration.²⁵³

The failure to use the name “arrangement” was not a big problem.²⁵⁴ The Strait Exchange Foundation Chairman Chiang Pin-kung (江丙坤) publicly said that the “1992 consensus” was the basis for cross-strait negotiations.²⁵⁵ The statement of the government representative for ECFA negotiations indicates that the “1992 consensus” of “one China” is the prerequisite of the ECFA.

B. Role of a Separate IP Agreement

The second strategy was to separate IP issues from the ECFA formation.²⁵⁶ This separation makes Taiwan look more like a local government of China.

IP rights are territorial rights based on the power of a sovereign state.²⁵⁷ A state can create an IP right by domestic laws or recognize an IP right by following certain international

251. See *id.* at 5; see also *Normalizing Cross-Strait Economic Relations is Vital*, CHINA POST, Feb. 4, 2009, <http://www.chinapost.com.tw/editorial/taiwan-issues/2009/02/04/194522/Normalizing-cross-strait.htm> [hereinafter *Normalizing Cross-Strait Economic Relations*] (“Negotiations will get under way shortly between the two sides of the Taiwan Strait to sign a Comprehensive Economic Cooperation Arrangement (CECA), for which Chinese President Hu Jintao promised support in a New Year message on Wednesday.”).

252. See Hsieh, *supra* note 5, at 139 (discussing the Hong Kong CEPA as a result of China’s supremacy over Hong Kong).

253. See *id.* (noting the Taiwanese leadership’s opposition to China’s political motives).

254. See *id.* at 140 (explaining the use of the term “agreement” as a means of reducing Chinese-Taiwanese tensions).

255. See Vincent Y. Chao, *ECFA: No ‘One China’ Prerequisite: DPP*, TAIPEI TIMES, July 01, 2010, <http://www.taipeitimes.com/News/taiwan/archives/2010/07/01/2003476824>.

256. See *Normalizing Cross-Strait Economic Relations*, *supra* note 251.

257. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 584–85 (1997).

treaties.²⁵⁸ International IP treaties, except for the TRIPS, are joined by sovereign states.²⁵⁹ The recent development of Chinese IP laws is based on China's duties under several international treaties including the TRIPS.²⁶⁰ Because discussing IP issues are acts done by a state, it is necessary for China to exclude IP provisions in the EFCA to avoid an image of state-to-state negotiations the issues IP rights is so much like an act done by a state.

Then, the question is why China made a separate IP agreement. China does this on purpose China claims Taiwan to be its territory but has never physically controlled it, a similar situation to that of Hong Kong and Macau.²⁶¹ Taiwan has a different legal system, where court decisions are not subject to the review of the Chinese Government.²⁶² On the other hand, Hong Kong and Macau have a separate legal system; China does this by making basic law for each Special Administrative Region.²⁶³ In terms of IP rights, the creation of any kind of IP right in either Hong Kong or Macau is not subject to the approval of the central government.²⁶⁴ Likewise, Taiwan has its unique IP system.²⁶⁵ Therefore, the question becomes how to

258. See Masaaki Kotabe, *Evolving Intellectual Property Protection in the World: Promises and Limitations*, 1 U. PUERTO RICO BUS. L.J. 1, 11–12 (2010).

259. See Note, *Keeping Our Balance in the Face of Piracy and Counterfeiting: Limiting the Scope of Intellectual Property Rights Enforcement Provisions in Free Trade Agreements*, 42 GEO. WASH. INT'L L. REV. 159, 160 (2010).

260. See Ping-Hsun (Quincy) Chen, *China as a Technology Exporter: A Question Mark After the Third Amendment of the China Patent Law in 2009*, 34 EUR. INTELL. PROP. REV. 853, 854–57 (2012) (recounting China's history of joining international IP treaties).

261. See Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429, 473 (2012) (describing Taiwan as autonomous yet, from the Mainland's perspective, part of China).

262. Cf. Hsieh, *supra* note 5, at 139 (explaining that, unlike Hong Kong, Taiwan does not fall under the Mainland's jurisdiction).

263. See Castellucci, *supra* note 213, at 675–76 (discussing Beijing's enactment of basic laws for Hong Kong and Macau, which may only be definitively interpreted by Beijing).

264. See *id.* (implying that IP laws fall outside the basic laws over which the Mainland has control, and as such may be created through the Special Administrative Regions' legislative powers).

265. See *Normalizing Cross-Strait Economic Relations*, *supra* note 251.

incorporate Taiwan's IP system into the Chinese IP system. The Taiwan-China IP Agreement plays a role in such an achievement.

The ECFA does not have supplements to address IP issues.²⁶⁶ Instead, a separate IP agreement, Taiwan-China IP Agreement, was signed at the same time as the ECFA.²⁶⁷ Unlike the IP supplements to the two CEPAs, the Taiwan-China IP Agreement does not recite "ECFA" as its origin.²⁶⁸ It indicates that the ECFA is related only to the issues of tariffs, services, and investment.²⁶⁹ Therefore, signing the ECFA has nothing to do with IP, so there is no implication of recognition or acknowledgement of the statehood of Taiwan.

In addition, the Taiwan-China IP Agreement does not reaffirm the parties' duties under the TRIPS.²⁷⁰ It indicates that China still removes its IP issues with Taiwan from the TRIPS regime.²⁷¹ Thus, while admitting Taiwan-granted IP rights, China can avoid recognizing Taiwan's statehood.

Further, The Taiwan-China IP Agreement plays an affirmative role when it requires both parties to recognize the "right of priority" of applications for patents, trademarks, or plant varieties.²⁷² "Right of priority" means that the filing date of the first application for an invention in one country is treated

266. See Cross-Strait Economic Cooperation Framework Agreement, *supra* note 215.

267. See *id.*

268. Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation, China-Taiwan, June 29, 2010, <http://www.tipo.gov.tw/public/Attachment/37259595574.pdf>.

269. See Chou, *supra* note 14, at 4.

270. See Hsieh, *supra* note 5, at 145.

271. See *id.* (indicating that the right of priority is granted by the Cross-Straits IPR Agreement, not by TRIPS).

272. See *Cross-Strait Agreement Provides Priority Intellectual Property Rights*, COUNCIL FOR ECON. PLAN. AND DEV. (Jan. 24, 2011), <http://www.cepd.gov.tw/encontent/m1.aspx?sNo=0014748> (noting applications for priority rights were accepted beginning on November 22, 2010, granting recognition to patents, trademarks, and plant varieties first filed as early as September 12, 2010); see also *Cross-Strait IPR Protection Cooperation Agreement Implemented Effectively*, MINISTRY OF COMMERCE (May 5, 2011, 2:58 PM), http://www.chinaipr.gov.cn/newsarticle/news/government/201105/1220971_1.html.

as the filing date of any following application for the same invention in another country.²⁷³ So, the evidence for rejecting the following application can only exist before the first filing date of the application.²⁷⁴

The “right of priority” issue is based on the Paris Convention for the Protection of Industrial Property, an international treaty joined by states.²⁷⁵ To avoid an implication that China admits the “rights of priority” of Taiwan’s applications because of its duty based on the Paris Convention, China required Taiwan to change the “right of priority”-related provisions of certain IP laws before the “right of priority” provision of the Taiwan-China IP Agreement became effective.²⁷⁶ On Aug. 17, 2010, Articles 27 and 28 of the Patent Act, Articles 4 and 94 of the Trademark Act, and Article 17 of the Plant Variety and Plant Seed Act were amended by the Legislative Yuan.²⁷⁷

The amendment was strange because there was no significant change in the statutory language. For example, Articles 27 of the old patent law states, “in WTO members or in foreign states which mutually recognize the priority claim with the Republic of China,”²⁷⁸ while Articles 27 of the amended patent law states, “in states which recognize the priority claim with the Republic of China or in WTO members.”²⁷⁹ Article 28 of

273. See Matt Richter, Comment, *Spurring Innovation in Uganda: Strategies to Assist Developing Countries in Drafting TRIPS-Compliant Patent Legislation That Fosters University Research and Innovation*, 30 WIS. INT’L L.J. 229, 233–34 (2012).

274. See Kotabe, *supra* note 258, at 12 (noting that applications filed within the twelve-month grace period are to be treated as if they were filed on the same date as the original, implying that evidence for rejecting the following application arising after the date of first filing may not be considered).

275. See *id.* (demonstrating that there are currently 140 signatories).

276. See *Cross-Strait Agreement on IPR Protection and Cooperation’ and Supplementary Legislation Approved by Legislative Yuan*, *supra* note 12; see also Hsieh, *supra* note 5, at 124–25 (explaining China’s refusal to recognize Taiwan’s right of priority under the Paris Convention).

277. See *Cross-Strait Agreement on IPR Protection and Cooperation’ and Supplementary Legislation Approved by Legislative Yuan*, *supra* note 12.

278. See Chuanlifa (在世界貿易組織會員或與中華民國相互承認優先權之外國) [Patent Law of the Republic of China] (promulgated by Presidential Order No. hua-tzung-1-yi-tzu 0929917760, Feb. 6, 2003, effective July 1, 2004), XIANXING FAGUI HUIBIAN, art. 27 (Taiwan) [hereinafter 2003 Patent Law].

279. See Chuanlifa (在與中華民國相互承認優先權之國家或世界貿易組織會員),

the old patent law states, in a state which received that application,”²⁸⁰ while Article 28 of the amended patent law states, “in a state, or a *WTO member*, which received that application.”²⁸¹ Thus, the Taiwan-China IP Agreement-related amendment indicates that China requires Taiwan to recognize China as a WTO member in terms of IP-related affairs.

However, China has never made similar amendments of its patent law, trademark law, or plant variety law.²⁸² For example, the “right of priority”-related provision in the Chinese Patent Law remains:

If, within twelve months from the date the applicant first files an application for an invention or utility model patent in a *foreign country*, or within six months from the date the applicant first files an application for a design patent in a *foreign country*, he files an application for a patent in China for the same subject matter, he may enjoy the right of priority in accordance with the agreements concluded between the *said foreign country* and China, or in accordance with the international treaties to which *both countries* have acceded, or on the principle of mutual recognition of the right of priority.²⁸³

The Chinese patent law states “foreign country” rather than “WTO member.”²⁸⁴ This indicates that China’s recognition of the “rights of priority” of Taiwanese applications for patents, trademarks, or plant varieties is not based on the TRIPS.²⁸⁵ In other words, the recognition is based on an intra-national relationship. China, as a central government, grants a privilege

[Patent Law of the Republic of China] (promulgated 2010), XIANXING FAGUI HUIBIAN, art. 27 (Taiwan) [hereinafter 2010 Patent Law].

280. See 2003 Patent Law, *supra* note 278, art. 28.

281. See 2010 Patent Law, *supra* note 279, art. 28.

282. See, e.g., Patent Law of the People’s Republic of China, (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 27, 2008, effective Oct. 1, 2009); *Patent Law of the People’s Republic of China* art. 29, para. 1, WORLD INTELL. PROP. ORG., <http://www.wipo.int/wipolex/en/details.jsp?id=5484>, [hereinafter Patent Law of the People’s Republic of China] (emphasis added).

283. *Id.* ¶ 1 (emphasis added).

284. See *id.*

285. See *id.*

to Taiwan.²⁸⁶ As a result, the Taiwan-China IP Agreement and the priority-claim amendment of some IP laws as a whole conclude that the Taiwan IP system is incorporated into the China IP system.

V. AFTERMATH OF THE ECFA

Two years after the ECFA, Taiwan's economy has not improved.²⁸⁷ In September 2012, Standard & Poor's (S&P) Ratings Services predicted Taiwan's gross domestic product (GDP) growth forecast as 1.9%, compared with China's 7.5%, Japan's 2.0%, Korea's 2.5%, and Singapore's 2.1%.²⁸⁸ Taiwan is behind other neighboring countries.²⁸⁹ Worse, in October 2012, the government-supported think tank, Chung-Hua Institution for Economic Research (CIER, *zhong hua jing ji yan jiu yuan*, in Mandarin), even cut Taiwan's GDP growth forecast to 1.52%.²⁹⁰

The job market is not good, either.²⁹¹ In August 2012 the government announced that there were 502,000 people unemployed and that the jobless rate went up to 4.4%.²⁹² At the same time, Korea's unemployment rate was 3.1%.²⁹³ While the unemployment rate provided by the Directorate-General of Budget, Accounting and Statistics (DGBAS) is decreasing, it still remains about 4.3 to 4.5%.²⁹⁴ In fact, the data is not reliable

286. *See id.* (stating the applicant "may enjoy the right of priority" based on an agreement with China, an international treaty signed by both parties, or both parties' recognition of the right of priority).

287. *See* Kevin Chen, *S&P Cuts Forecasts for Taiwan and Most of Asia*, TAIPEI TIMES, Sept. 25, 2012, <http://www.taipeitimes.com/News/biz/archives/2012/09/25/2003543579>.

288. *See id.*

289. *See id.*

290. Amy Su, *CIER Cuts GDP Forecast for Fifth Consecutive Time*, TAIPEI TIMES, Oct. 17, 2012, <http://www.taipeitimes.com/News/biz/archives/2012/10/17/2003545357>.

291. *See* Amy Su, *Unemployment Keeps Rising*, TAIPEI TIMES, Sept. 25, 2012, <http://www.taipeitimes.com/News/biz/archives/2012/09/25/2003543573>.

292. *See id.*

293. *See* Cynthia Kim, *South Korea's Workforce Expands as Unemployment Rate at 3.1%*, BLOOMBERG, Sept. 11, 2012, <http://www.bloomberg.com/news/2012-09-11/south-korea-s-workforce-expands-as-unemployment-rate-at-3-1-.html>.

294. *See, e.g.,* Amy Su, *Unemployment Rate Declined Last Month*, TAIPEI TIMES, Oct. 23, 2012, <http://www.taipeitimes.com/News/biz/archives/2012/10/23/2003545842>.

because the Ma Ying-Jeou Administration has encouraged companies to adopt an “unpaid leave” practice, where employees are unpaid for a leave of absence, but still remain “employed.”²⁹⁵

The ECFA is not working the way Taiwan expected. It is definitely necessary for Taiwan to look at the ECFA again to figure out the problems and issues caused by this politically-economic scheme. Taiwan has to think about whether the “one-China” economy is the only choice for survival. Perhaps Taiwan should realize that the ECFA serves the purpose of reuniting Taiwan rather than mutually benefiting both parties economically.²⁹⁶

VI. CONCLUSION

China always objects to other countries’ FTA negotiations with Taiwan.²⁹⁷ It is understood that China did not intend to form a FTA with Taiwan through the ECFA.²⁹⁸ There must be some underlying reasons for the ECFA. This Article singles out one unique feature of the ECFA. That is, the ECFA does not have IP-related provisions. It is an interesting case because both China and Taiwan always include IP-related provisions in their FTA negotiations.²⁹⁹ A possible explanation is that IP rights usually result from a state’s power. China has been changing its IP laws to comply with the duties imposed by several international treaties other than the TRIPS.³⁰⁰ Therefore, including IP-related provisions might create an image that China recognizes the IP rights of Taiwan, which might lead to an indirect admission of Taiwan’s statehood.

295. See Feng-yi Chang, *Despair in Store for Taiwan’s Workers*, *TAIPEI TIMES*, Dec. 7, 2011, <http://www.taipeitimes.com/News/editorials/archives/2011/12/07/2003520111> (noting workers are being forced into the unpaid leave practice).

296. See Guiguo Wang, *China’s FTAs: Legal Characteristics and Implications*, 105 *AM. J. INT’L L.* 493, 505 (2011).

297. See Barfield, *supra* note 200, at 110.

298. See Chou, *supra* note 14, at 3.

299. See, e.g., Free Trade Agreement Between the Republic of China and the Republic of Panama, *supra* note 64, art. 16.01; see also Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Chile, *supra* note 156, art. 111.

300. See Chen, *supra* note 260, at 856–57.

However, during the formation of the ECFA, a separate IP agreement was signed.³⁰¹ It plays a certain role. The Taiwan-China IP Agreement does not recite “ECFA” as its origin, and it does not reaffirm the obligations under the TRIPS.³⁰² With respect to the right of priority, Taiwan was required to amend the relevant provisions in different IP laws, while China did nothing.³⁰³ The amendment in Taiwan IP laws treats China as a WTO member.³⁰⁴ That allows Taiwan to recognize the priority claim of Chinese applications for patents, trademark, or plant varieties.³⁰⁵ Therefore, Taiwan is more like China’s local government. The issue of priority claim is handled under one China.³⁰⁶ The overall phenomenon of the formation of the ECFA indicates that both parties are now under one China.

301. See *Normalizing Cross-Strait Economic Relations*, *supra* note 251.

302. See *id.* (“The IPR agreement is independent from the ECFA”); see also Hsieh, *supra* note 5, at 145.

303. Compare 2003 Patent Law, *supra* note 278, art. 28, with 2010 Patent Law, *supra* note 279, art. 28, and Patent Law of the People’s Republic of China, *supra* note 282.

304. See 2010 Patent Law, *supra* note 279, art. 28 (indicating Article 28 applies uniformly to all WTO members).

305. See *id.*

306. See *id.*; see also Patent Law of the People’s Republic of China, *supra* note 282.