A Fake Right of Priority under the Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation

Ping-Hsun Chen, National Chengchi University
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Ping-Hsun Chen

Assistant Professor, Graduate Institute of Technology, Innovation and Intellectual Property Management, National Chengchi University; J.D. 10’, Washington University in St. Louis School of Law. Contact email: cstr@nccu.edu.tw.

Abstract

On June 26, 2010, Taiwan and China entered into a “Cross-Strait Agreement on Intellectual Property Rights Cooperation and Protection” (“Cross-Strait IP Agreement”). This Cross-Strait IP Agreement was renowned for China’s admission of a right of priority of Taiwanese patent applications or trademark applications. Under the TRIPS Agreement, China is obligated to admit a right of priority of Taiwanese applications, but it has never fulfilled such obligation. China’s particular concern is that a right of priority is rooted from the Paris Convention which only allows a state to join, so by admitting a right of priority of Taiwanese applications it may admit the statehood of Taiwan. This article is intended to argue that China provides a fake right of priority and still violates its duty to the TRIPS Agreement. First, the Agreement does not recite the TRIPS Agreement or Paris Convention. Second, the signing representatives are not regular representatives for international affairs or trade affairs in both countries. Third, China has not changed its IP laws to comply with the treaty requirements while Taiwan did so. Though, China promulgates regulations regarding a right of priority claimed by Taiwanese applicants. Those regulations are only applicable to Taiwanese applicants.
not to Taiwanese applications filed by a non-Taiwanese entity. Last, China does not treat the ECPA as a free trade agreement.

Keywords: TRIPS Agreement, Right of Priority, Paris Convention, Taiwan, China
I. Introduction

On June 26, 2010, Taiwan and China entered into a “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; hereinafter, “ECFA”) which was overwhelmingly claimed to be a major step of the Taiwan-China relationship.1 Because of the “One-China” policy, even before Taiwan joined the World Trade Organization (‘WTO’), China had tried to boycott the membership application of Taiwan.2 When Taiwan started to negotiate for its entry into the General Agreement on Tariffs and Trade (GATT, a predecessor of the WTO), the Chairman of the GATT Council clarified that because of the “One-China” policy, Taiwan cannot enter into the GATT until China finishes its accession.3 When China

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proposed its accession, it tried to persuade other WTO members to characterize Taiwan as a “Separate Customs Territory of China,” but failed because of the opposition from the United States. After Taiwan joined the WTO, China constantly refused to negotiate with Taiwan about trade matters under the WTO framework because it was afraid of an impression that Taiwan is not part of China. China made its best efforts to keep its trade talk with Taiwan as an internal Chinese matter. Finally, in 2008, China got a chance to implement its agenda because a pro-China party KMT won the presidential election in Taiwan. China began its trade negotiations with the KMT-led government while both parties treated the negotiations as internal matters. As a result, the ECFA was signed.

The ECFA is special in terms of intellectual property protection. Contrary to other free trade agreements (“FTAs”) signed by both nations, no intellectual property (“IP”) clause was included in the ECFA. Instead, two countries signed a separate “Cross-strait Agreement on Intellectual Property Rights Cooperation and Protection” (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; hereinafter, “Cross-Strait IP Agreement”). This significant feature indicates that both nations agree with some form of “One China” which unfortunately has restrained Taiwan from developing a formal, diplomatic relationship with other

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4 See Kong, Cross-Taiwan Straight Relations, supra note 2, at 98.  
5 See id. at 98-100.  
6 See id. at 100.  
7 See Chou, supra note 1, at 2.  
8 See id. at 4-6.  
10 See id.

The Cross-Strait IP Agreement was renowned for China’s admission of a right of priority of Taiwanese applications for patents, trademarks, or plant varieties.\footnote{See Executive Yuan of Taiwan, supra note 9.} In fact, under the Agreement on Trade-Related Aspects of Intellectual Property Rights (\textit{“TRIPS Agreement”}), China should have been obligated to admit a right of priority of Taiwanese applications.\footnote{See Pasha L. Hsieh, The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law, 14 J. INT’L ECONOMIC L. 121, 124 (2011).} But, China had never fulfilled such obligation. China’s special concern was that a right of priority is rooted from the Paris Convention for the Protection of Industrial Property (\textit{“Paris Convention”}) which only allows a state to join, so by admitting a right of priority of Taiwanese applications China may admit the statehood of Taiwan directly or indirectly.\footnote{See id. at 124-25.} As a result, this special concern was codified in the Cross-Strait IP Agreement.

national treatment and a right of priority. 17 While the national treatment doctrine requires a member country to treat its own citizens and foreign nationals of other member country equally, 18 the right of priority helps an applicant establish a universal filing date of the same subject matter in her own country as well as in other member country. 19 Both principles were intended mainly to increase foreign patenting by eliminating obstacles against foreign patent applicants. 20

The national treatment is governed by Articles 2 and 3 of the Paris Convention. 21 In terms of protection of industrial property under domestic laws, Article 2 requires a member state to treat nationals of any other member state as its own nationals. 22 Article

390 (1997).
18 See Moy, supra note 15, at 484-85.
19 See id. at 482-83.
20 See id. at 478-79.
21 See G. H. C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED AT STOCKHOLM IN 1967 27, 33 (United International Bureaux for the Protection of Intellectual Property 2007), available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/611/wipo_pub_611.pdf (last visited Jan. 15, 2015). The doctrine of national treatment is also addressed in Article 3 of the TRIPS Agreement which requires a member state to treat nationals of other member states “no less favourable” than its own nationals. See TRIPS Agreement art. 3.1 (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.”). In other words, Article 3 of the TRIPS Agreement allows a member state to grant more protection to foreign right owners than domestic right owners. See Thomas Cottier & Christophe Germann, Agreement on Trade-Related Aspects of Intellectual Property Rights (Articles 1-8), in CONCISE INTERNATIONAL AND EUROPEAN IP LAW 5, 16-17 (Thomas Cottier & Pierre Véron ed., 2011).
22 See Paris Convention art. 2(1) (“Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”). Article 2 mandates a member state to offer “all without prejudice to the rights specially provided for by” the Paris Convention. See Paris Convention art. 2(1). However, Article 2 does not require a member state to grant to its own nationals all the rights under the Paris Convention. See BODENHAUSEN, supra note 21, at 31 (“The protection of a national in his own country...
3 extends the national treatment to nationals of countries outside the Union as long as they “are domiciled or [they] have real and effective industrial or commercial establishments in the territory of [a member state].”

The right of priority is vested in Article 4 of the Paris Convention. Under Article 4, the right of priority is a right granted to a foreign applicant for a patent, trademark, or industrial design. Such priority right mandates a member state to treat the filing date of the prior application filed in any foreign country as the filing date of the domestic application for the same subject, if such foreign country is also a member state.

China has been a member state of the Paris Convention since 1985, but Taiwan is not. Since both countries joined the WTO, several provisions of the Paris Convention have become binding to both countries under the TRIPS Agreement.
TRIPS Agreement provides that “[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).” Therefore, China should comply with Articles 2, 3, and 4 of the Paris Convention and grant the rights under those articles to Taiwanese applicants for industrial property. China should have granted a right of priority to an application.

While the Cross-Strait IP Agreement grants some form of a right of priority, this article is intended to explain that China has not granted to Taiwan applicants a real right of priority under the Paris Convention. In this article, Part II introduces a right of priority under the Paris Convention. Particularly, Part II describes the fundamental features of a right of priority. Then, Part III analyzes the “right of priority” provision of the Cross-Strait IP Agreement. Part III also addresses several distinctive features of the Cross-Strait IP Agreement and its formation, which may reflect China’s unspoken concern. Part IV discusses China’s implementation of the Cross-Strait IP Agreement and argues that China offers to Taiwan a fake right of priority.

II. A Right of Priority under the Paris Convention

A. Eligibility

1. Applicants

A right of priority is vested in Article 4 of the Paris Convention which includes several sub-provisions. Article 4.A(1) provides that “[a]ny person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial...
design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.”

The subject matters cover patents, utility models, industrial designs, and trademarks. “Trademarks” do not cover service marks.

“Any person” in Article 4.A(1) includes a national defined in Article 2. “Nationals” include “natural persons” and “legal persons.” “Natural persons” are persons of nationality of a member state. The determination of nationality is governed by the law of the member state whose nationality is claimed. On the other hand, “legal persons” are categorized into public status and private status. “Public status” covers “the States themselves, or State enterprises, or other bodies of public status,” whose nationality is their country. “Private status” covers “corporate bodies of private status, such as companies and associations,” whose nationality is defined by the law of the state under which they are established.

“Any person” in Article 4.A(1) also includes a national defined in Article 3. For “natural persons,” the “domicile” requirement under Article 3 refers to the “residency” status in any member state other than the member state where a right of priority is claimed. For “legal persons,” the “domicile” status depends on “the place of their

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30 Paris Convention art. 4.A(1).
31 See BODENHAUSEN, supra note 21, at 37.
32 See id. at 35.
33 See id. at 27-28.
34 See id. at 27.
35 See id.
36 See id. at 27-28.
37 Id. at 27.
38 See id. at 27-28.
39 Id. at 28.
40 See id.
41 See id. at 35. A member state is allowed to grant to its own nationals a right of priority based on their foreign patent application. See id. at 35-36.
42 See id. at 33 (“It is generally believed that the Convention has not sought, by using the expression
actual headquarters.” To claim a right of priority in one member state, the actual headquarters of a legal person under Article 3 must be located in any other member state.

In addition, the competence of such Article 4.A(1) person has to be met at the filing date of the foreign application the right of priority is based on and at the date of claiming the right of priority.

Last, the applicant of the first application may claim a right of priority. Such applicant may transfer the right of priority to another person (or successor in title) independently in the other member states. The right of priority may even be transferred to different persons in different countries. However, after the right of priority was claimed by one application, it becomes “an accessory of such application” and, therefore, cannot be transferred again elsewhere.

2. Periods

“Periods” in Article 4.A(1) include periods for four types of industrial property:

“domicile,” to indicate a legal situation, but rather a more or less permanent situation of fact. The purpose of the provision under consideration would thus be to admit to the benefits of the Convention foreign nationals residing in a country of the Union.

43 Id. at 34.
44 See id.
45 See id. at 36 (“The conditions as to the competence of persons to claim the right of priority under the Convention must be fulfilled both at the time of the application on which the right of priority is based and at the time when the right is invoked, but not necessarily during the whole period of priority.”).
46 See id. at 37.
47 See id. at 37-38.
49 See BODENHAUSEN, supra note 21, at 38 (“It remains an independent right until, during, the period of its duration, it is used as the basis for an application in one or more countries of the Union, in which case it becomes an accessory of such application.”).
patents, utility models, industrial designs and trademarks. The periods for patents and utility models are twelve months, while the periods for industrial designs and trademarks are six months. The starting date of a period is the filing date of the first application for an invention, but the starting date is counted in the calculation of the period. Besides, a period shall be extended if the end of the period is an official holiday or not a working date of the patent office.

The determination of the first application is a key to the determination of the first filing date and the starting date of a period. Articles 4.A(2) and 4.A(3) define the first application as what is “duly filed” under Article 4.A(1). Under Article 4.A(2), the first application is “a regular national filing under the domestic legislation” of a member state. “A regular national filing” is further defined in Article 4.A(3) and means “any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.” When the first application fulfills the formality requirement of an application under the domestic legislation, it becomes “a regular national filing.” Moreover, the establishment of the first application is not affected by the consequence of such first application. Even the first application is later “withdrawn, abandoned or rejected,” the right of priority still exists.

50 See Paris Convention art. 4.C(1).
51 See Paris Convention art. 4.C(1).
52 See Paris Convention art. 4.C(2).
53 See Paris Convention art. 4.C(3).
54 See Bodenhausen, supra note 21, at 38.
55 See Paris Convention art. 4.A(2).
56 See Bodenhausen, supra note 21, at 39.
57 See id.
58 See Bodenhausen, supra note 21, at 40.
59 See id.
60 See id.
But, if a subsequent application concerning the same subject is filed in the same member state as the first application did, such subsequent application may be considered as the new first application under Article 4.C(4). Such subsequent application becomes the new first application when four conditions are satisfied at the time of filing such the subsequent application. First, the original first application “has been withdrawn, abandoned, or refused.” Second, it has not “laid open to public inspection.” Third, it does not leave “any rights outstanding.” Fourth, it “has not yet served as a basis for claiming a right of priority.”

The third condition is not clear in its words. The United Kingdom Intellectual Property Office (“UKIPO”) has provides some examples of “any rights outstanding.” If the original first application is withdrawn, “an outstanding right may be the right to request correction of an erroneous withdrawal.” If the original first application is abandoned, “the right to request reinstatement” may be an outstanding right. If the original first application is refused, “an outstanding right may be the right to appeal that decision, or the right to request reinstatement of the application.” To make sure that “any rights outstanding” have been exhausted, the UKIPO has suggested that the applicant may make an explicit statement that the withdrawal, abandonment, or refusal

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61 See id. at 45.
62 See id. at 46.
63 Paris Convention art. 4.C(4).
64 Paris Convention art. 4.C(4).
65 Paris Convention art. 4.C(4).
66 Paris Convention art. 4.C(4).
68 Id. at § 5.28.2.
69 See id.
70 Id.
is done without leaving any rights outstanding.\textsuperscript{71}

Finally, as long as the period of a right of priority is determined\textsuperscript{72} Article 4.B provides that a subsequent application which benefits from the right of priority “shall not be invalidated by reason of any acts accomplished in the [period], in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession.”\textsuperscript{73} Particularly, “another filing” means another application “during the period of priority cannot invalidate the subsequent filing for which the right of priority is claimed.”\textsuperscript{74} If such “another filing” claims the same subject matter, it must be invalidated by the authority or courts.\textsuperscript{75}

Article 4.B also mandates that the listed acts “cannot give rise to any third-party right or any right of personal possession.”\textsuperscript{76} That is, all rights created through those listed acts will remain in the applicant, so any challenge of novelty, inventive step, or innovation will not be based on those acts.\textsuperscript{77}

\textbf{B. China’s Problem with the Recognition of a Right of Priority Based on a Taiwan Patent Application}

In 1988, China began to allow Taiwanese people to file a patent application by promulgating a regulation “tai-wan tong-bao lai da-lu shen-qing zhuan-li de ju-ti gui-ding” (台湾同胞来大陆申请专利的具体规定, Rules of the Mainland Patent

\textsuperscript{71} See id. at § 5.28.3.
\textsuperscript{72} An applicant needs to meet other requirements so as to claim the right of priority. See Paris Convention arts. 4.D, 4.E, 4.F, 4.G, 4.H, & 4.I: see also BODENHAUSEN, supra note 21, at 46-60.
\textsuperscript{73} Paris Convention art. 4.B.
\textsuperscript{74} BODENHAUSEN, supra note 21, at 41.
\textsuperscript{75} See id.
\textsuperscript{76} Paris Convention art. 4.B.
\textsuperscript{77} See Pflüger & Prüfer-Kruse, supra note 48, at 217-18.
Applications Filed by Taiwanese People; hereinafter, “1988 Patent Rule”) which governs Taiwan citizens’ patent filing.\(^{78}\) Article 1 of the 1988 Patent Rule provided Taiwan citizens have the same right to file a patent application under the Chinese patent law as Chinese citizens do.\(^{79}\) Regarding a right of priority, Article 3 provided that a Taiwanese applicant may rely on her Chinese application to claim a right of priority in other country because China joined the Paris Convention.\(^{80}\) In 1989, China issued a supplementary rule “zhong-guo zhu-an-lj-ju guan-yu shou-li zhu-an-lj shen-qing de bu-chong gui-ding” (中国专利局关于受理台胞专利申请的补充规定, Supplementary Rule of the Patent Office’s Accepting Taiwanese Applicants’ Patent Filing; hereinafter, “1989 Patent Supplementary Rule”).\(^{81}\) The Patent Supplementary Rule permitted a Taiwanese applicant to ask her family members in China to retain a local Chinese patent agent to prosecute her application.\(^{82}\)

In 1993, China amended the 1988 Patent Rule (hereinafter, “1993 Patent Rule”)\(^{83}\) and began to permit a Taiwanese applicant to retain a Chinese patent agent to file a patent application.\(^{84}\) In addition, China first addressed the issue of a right of priority by announcing a guideline “zhong-guo zhu-an-li-ju guan-yu tai-bao shen-qing zhu-an-li


\(^{79}\) See Article 1 of the 1988 Patent Rule.

\(^{80}\) See Article 3 of the 1988 Patent Rule.


\(^{82}\) See Article 2 of the 1989 Patent Supplementary Rule.


\(^{84}\) See Article 4 of the 1993 Patent Rule.
Guidelines for the Solutions of Some Problems Caused by the Patent Filing Procedure of the Patent Office Concerning Taiwanese Applicants; hereinafter, “1993 Patent Guideline”\(^\text{85}\). Article 6 of the 1993 Patent Guideline provided two rules regarding a right of priority claimed by a Taiwanese applicant.\(^\text{86}\) First, Article 6 admitted a right of priority which is based on a prior patent application filed in a member state of the Paris Convention and in China.\(^\text{87}\) Second, Article 6 denied a right priority which is based on a prior patent application filed in Taiwan.\(^\text{88}\)

The 1993 Patent Guideline continued to be applicable after China joined the WTO. China did not permit a Taiwanese applicant to claim a right of priority based on a Taiwan patent application until the implementation of the Cross-Strait IP Agreement. The ultimate question was whether a patent application filed in Taiwan is a foreign patent application or domestic patent application.\(^\text{89}\)

China amended its patent law in 1984 for purposes of joining the Paris Convention and the revision became effective in 1985 (hereinafter, “1985 Patent Law”\(^\text{90}\)). Article 29 of the 1985 Patent Law provided that a patent applicant may claim a right of priority


\(^{86}\) See Article 6 of the 1993 Patent Guideline.

\(^{87}\) See Article 6 of the 1993 Patent Guideline.

\(^{88}\) See Article 6 of the 1993 Patent Guideline.

\(^{89}\) See Yue-Feng He & Hua-Hui Fu, kan-si cuo-wu de ming ti: tai-wan zhuan-li shi guo-nei shen-qing hai-shi guo-wai shen-qing [Facially Wrong Proposition: Whether a Taiwan Patent is an International Application or Domestic Application], [http://www.cpo.cn.net/zscqb/lilun/t20020225_4134.htm](http://www.cpo.cn.net/zscqb/lilun/t20020225_4134.htm) (last visited Jan. 15, 2015) (in Mandarin).

based on the filing date of the first application for the same invention filed in a “foreign country” which has an agreement with China, joins the same international treaty with China, or recognizes a right of priority based on a Chinese patent application.\textsuperscript{91} In 1992, China amended its patent law again and the amendment became effective in 1993 (hereinafter, “1993 Patent Law”).\textsuperscript{92} The “right of priority” provision remained the same.\textsuperscript{93}

When China was about to join the WTO, the Chinese patent law was amended again in 2000 and the amendment became effective on July 1, 2001 (hereinafter, “2001 Patent Law”).\textsuperscript{94} The “right of priority” provision was unchanged.\textsuperscript{95} Because of the “foreign country” requirement, recognizing a right of priority based on an application filed in Taiwan was considered equal to admitting the statehood of Taiwan.\textsuperscript{96} Consequently, China chose to violate the TRIPS Agreement when Taiwan joined the

\textsuperscript{91} See Article 29, Paragraph 1 of the 1985 Patent Law.
\textsuperscript{93} See Article 29, Paragraph 1 of the 1993 Patent Law (“Where, within 12 months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.”).
\textsuperscript{95} See Article 29, Paragraph 1 of the 2001 Patent Law (“Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.”).
\textsuperscript{96} See He & Fu, \textit{supra} note 89.
The current Chinese patent law was amended in 2008 and became effective in 2009 (hereinafter, “2009 Patent Law”). The “right of priority” provision existed without any change. The policy of denying a right of priority based on a Taiwan application continued until the Cross-Strait IP Agreement was enforced.

III. A Right of Priority under the Cross-Strait IP Agreement

A. Cross-Strait IP Agreement as a TRIPS-Minus Treaty

In addition to the WTO framework, free trade agreements (“FTAs’) have been used for regional economic integration. While FTAs mainly deal with tariff reductions and elimination of trade restrictions, many FTAs have an intellectual property chapter to address a higher standard of protection than the TRIPS Agreement.

Generally, IP clauses in FTAs are TRIPS-plus because they offer protection beyond the scope of the TRIPS Agreement. There are three categories. The first category is a clause addressing new types of intellectual property which are not covered by the

97 See Hsieh, supra note 13, at 124-25.
99 See Article 29, Paragraph 1 of the 2009 Patent Law (“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.”).
102 See id. at 68.
103 See id. at 67-68.
104 See id. at 68.
TRIPS Agreement. For example, the FTA between Taiwan and Guatemala extends the IP protection to traditional knowledge, folklore, and genetic resources. The FTA between China and Peru also addresses the protection on those subjects.

The second category is a clause that requires parties to give up the flexibilities or exceptions allowed by the TRIPS Agreement. For example, the FTA between the United States and Jordan limits unauthorized use of a patent in the context of public non-commercial use or a national emergency or other circumstances of extreme urgency to the use only by government entities or legal entities on behalf of a government. Though, Article 31 of the TRIPS Agreement does not require that.

The third category is a clause expanding the scope of protection on any of those listed subjects of intellectual property covered by the TRIPS Agreement. For example, the FTA between the United States and Chile extends the term of copyright protection to no less than the life of the author plus seventy years after the death of the author or to no less than seventy years if the calculation is not based on the life of the author. On the other hand, Article 12 of the TRIPS Agreement and Article 7 of the Berne Convention for the Protection of Literary and Artistic Works require only a fifty

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105 See id. at 68-72. The listed intellectual property rights include (1) copyright and related rights, (2) trademarks, (3) geographical indications, (4) industrial designs, (5) patents (including the protection of new varieties of plants), (6) layout-designs (topographies) of integrated circuits, and (7) protection of undisclosed information. See WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO TRIPS AGREEMENT 10, 247 (Antony Taubman, Hannu Wager, & Jayashree Watal ed., Cambridge University Press 2012) [A HANDBOOK].

106 See Chen, Cross-Straits Economic Cooperation Framework Agreement, supra note 11, at 73.

107 See id. at 84.


109 See LO, supra note 101, at 73.

110 See TRIPS Agreement art. 31(b).

111 See LO, supra note 101, at 68, 77-84.

112 See id. at 77.
years protection.  

Contrary to the general FTA practice, the Cross-Strait IP Agreement is not TRIPS-plus and does not fall into any of those three categories. First, the Cross-Strait IP Agreement covers limited subjects: patents, trademarks, copyright, and new varieties of plants. Second, the Cross-Strait IP Agreement does not address any issue regarding the flexibilities or exceptions permitted by the TRIPS Agreement.

Third, the Cross-Strait IP Agreement does not broaden the protection of those covered subjects. Rather, it reduces the protection on patents and copyright. The issue of a right of priority is one thing which will be discussed in details later. Regarding copyright, Article 6 of the Cross-Strait IP Agreement creates a copyright verification mandate specifically for audiovisual works. Article 6 provides that for the publication of an audiovisual work in one country, the other country agrees to assign a relevant association or organization for matters of verification. The provision imposes a prerequisite of verification on a copyrighted work when the protection is claimed. Therefore, it violates Article 5(2) of the Berne Convention which provides, “The enjoyment and the exercise of these rights shall not be subject to any formality.” The verification is similar to a registration system for foreign copyright owners, while

113 See, e.g., TRIPS Agreement art. 12; Berne Convention art. 7. Article 7 of the Berne Convention is incorporated in the TRIPS Agreement through Article 9 thereof. See TRIPS Agreement art. 9.1 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”).

114 See Cross-Strait IP Agreement art. 1. “New varieties of plants’ are protected under the patent section of the TRIPS Agreement. See TRIPS Agreement art. 27.3(b) (“Members may also exclude from patentability: … (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”).

115 See Cross-Strait IP Agreement art. 6.

116 See Berne Convention art. 5(2).
registration of a foreign copyrighted work as a condition of copyright protection is not permitted under the Berne Convention.\textsuperscript{117}

Last, the Cross-Strait IP Agreement does not recite the TRIPS Agreement to reaffirm the obligations. Contrarily, both countries did refer to the TRIPS Agreement in their previous FTAs.\textsuperscript{118} It seems that both countries intentionally ignored their TRIPS obligations when entering into the Cross-Strait IP Agreement.

Therefore, the Cross-Strait IP Agreement may be called a TRIPS-minus treaty. The Agreement does not advance the protection and provide something better than the TRIPS Agreement. Rather, it limits the protection of patents and copyright below the TRIPS Agreement.

\textbf{B. Formality Issues in the Context of the ECFA}

Three formality issues have to be highlighted because they indicate that the Cross-Strait IP Agreement is not related to China’s obligations under the TRIPS Agreement. First, in addition to no recitation of the TRIPS Agreement, the Cross-Strait IP Agreement is an unusual practice for both countries because it is separated from the ECFA.\textsuperscript{119} This distinctive feature makes the Cross-Strait IP Agreement more remote from the TRIPS Agreement.

Although the preamble of the ECFA states “in line with the basic principles of the

\textsuperscript{117} See Chris Dombkowski, \textit{Simultaneous Internet Publication and the Berne Convention}, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 643, 647 (2013) (“The drafters of the Convention defined formalities as legal requirements imposed on authors in order to ensure that the rights of the author came into existence. More precisely, registration and deposit requirements were expressly identified as formalities prohibited under the Convention.”).


\textsuperscript{119} See \textit{id.} at 63-64.
World Trade Organization,”¹²⁰ China has tried to avoid an image that the ECFA is considered as a FTA. The ECFA has not been recognized as a FTA by China. On the China’s official website which reports the information of China’s FTAs,¹²¹ the ECFA is not on the list of China’s FTAs.¹²² Besides, while reporting to the WTO the status of the ECFA as a regional trade agreement (“RTA”) “for which an early announcement has been made,” China has never transformed the ECFA into an FTA status in the WTO RTAs database.¹²³ Taiwan has treated the ECFA in the same way.¹²⁴ However, the Taiwan’s official website of FTAs does list the ECFA as one of Taiwan’s FTAs.¹²⁵ This inconsistency creates a question of whether both countries have really entered into a FTA governed by the WTO agreements.

The China’s attitude toward to the ECFA indicates that the Cross-Strait IP Agreement is detached from the TRIPS Agreement. Without reciting the TRIPS Agreement, China does not confirm its duties under the TRIPS Agreement with respect to Taiwan. That shows its consistency of objecting to the application of Article 2.1 of the TRIPS Agreement as well as Article 4 of the Paris Convention to Taiwan nationals.

The second formality issue is that the signing representatives of the ECFA and Cross-Strait IP Agreement are not regular representatives for international affairs or

¹²⁰ See Preamble of the ECFA.
¹²² See Ministry of Commerce of the P.R.C., China’s Free Trade Agreements, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited Jan. 15, 2015) (showing a list of China’s FTAs, however, not including the ECFA).
trade affairs in both countries. The formal representative of China for international
treaties is the Minister of Commerce (e.g., China-Costa Rica FTA) or the Head of the
State (e.g., China-New Zealand FTA). The formal representative of Taiwan for
international treaties is the Minister of Economic Affairs (e.g., Taiwan-El
Salvador-Honduras FTA), President (e.g., Taiwan-Panama FTA), or Head of a
diplomatic delegate (like an embassy).126 But, in the ECFA and Cross-Strait IP
Agreement, the China’s side is the Association for Relations across the Taiwan Straits
(海峡两岸经贸交流协会, hai-xia liang-an jing-mao jiao-liu xie-hui; hereinafter, “ARATS”), while the Taiwan’s side is the Strait Exchange Foundation (海峡交流基金会, hai-xia jiao-liu ji-jin-hui; hereinafter, “SEF”).127

The ARATS and SEF were created by China and Taiwan respectively to handle the
matters related to each other.128 The agreements signed by the ARATS and SEF are
considered by China as internal agreements.129 However, in Taiwan, the agreements are
treated as either internal or international affairs, depending on whether KMT or DPP
(Democratic Progressive Party) becomes a ruling party because of their different China
policies.130 While Taiwan has recognized that the SEF is an unavoidable instrument in
matters of China, China has utilized the ARATS-SEF mechanism as an instrument of
consistently denying the statehood of Taiwan in the context of the Cross-Strait

126 Recently, Taiwan and New Zealand entered into a FTA, where the representative of Taiwan was
Taipei Economic and Cultural Office (TECO) in Wellington which is a diplomatic delegate of Taiwan in
New Zealand. See Ministry of Economic Affairs, Taiwan, ANZTEC to Enter into Force (TECO New Zealand
Press Release),
visited Jan. 15, 2015).
127 See Davidson, supra note 1, at 45.
128 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, 230 (2012).
129 See Kong, Cross-Taiwan Strait Relations, supra note 2, at 98.
130 See Chi Chung, The Bilateral Investment Treaty between China and Taiwan and its Historical
relationship. The fact that Taiwan considered the ECFA as a FTA does not change the China’s policy that the Cross-Strait relationship is merely an internal matter. The ARATS is assigned as a representative for the ECFA and Cross-Strait IP Agreement. The level of the ARATS as a representative is even lower than the level of the China’s representatives for 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”), where in the Hong Kong CEPA and Macau CEPA, the China’s representative was the Vice Minister of Commerce. Therefore, the ECFA or Cross-Strait IP Agreement is formed as an internal agreement between China and Taiwan. For China, the obligations under both agreements can bypass the WTO review or international law doctrines.

The last formality issue is that the ECFA and Cross-Strait IP Agreement do not have an official English version. That creates a barrier for other WTO members to understand the ECFA and Cross-Strait IP Agreement, so they cannot figure out whether these two treaties satisfy any requirements under WTO-related agreements. The omission of an official English version is also an unusual practice for both countries. When forming a FTA with other state, China or Taiwan always provides an English version for such FTA. China even provides the English versions of the Hong Kong CEPA and Macau CEPA. Contrarily, while Taiwan has offered an English version of

131 See, e.g., Der-Chin Horng, The EU Model for a Taiwan-China Free Trade Agreement, 26 Chinese (Taiwan) Y.B. Int’I L. & Aff. 35, 52 (2008); Newman M. K. Lam & Ian Scott, Gaming, Governance and Public Policy in Macao 230 (Hong Kong University Press 2011).
132 See, e.g., Ministry of Commerce of the P.R.C., China’s Free Trade Agreements, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited Jan. 15, 2015) (showing the links to China’s FTAs with the main text, supplements, and news reports); Bureau of Foreign Trade, Ministry of Economic Affairs, Taiwan, FTAs Signed with Trading Partners, http://www.trade.gov.tw/english/Pages/List.aspx?modeID=672 (last visited Jan. 15, 2015) (showing the links to Taiwan’s FTAs with the main text and supplements).
133 See Ministry of Commerce of the P.R.C., Mainland and Hong Kong Closer Economic and Partnership
the ECFA, the English version has never been admitted by China. Both countries have never published the English version of the Cross-Strait IP Agreement.

China’s effort to detach the ECFA from the WTO framework makes the Cross-Strait IP Agreement more irrelevant to the TRIPS Agreement. Therefore, China’s recognition of a right of priority based on a Taiwan patent application does not mean that China intends to comply with Article 2.1 of the TRIPS Agreement. The recognition of a right of priority based on a Taiwan application is not a compliance with Article 4 of the Paris Convention.

C. Problematic “Right of Priority” Provision

China’s solution to the permission of a right of priority based on a Taiwan application without admitting Taiwan as a state is Article 2 of the Cross-Strait IP Agreement which provides that “[b]oth parties agree to confirm the effectiveness of the first filing date of an application for a patent, trademark, or plant variety of the other party under their own regulations and to actively promote and implement relevant arrangements to protect a right of priority for cross-strait people.”

Article 2 makes a right of priority based on a Taiwan application very limited. First, only “Taiwan nationals” can claim a right of priority based on their Taiwan applications. That is still a violation of Article 4 of the Paris Convention because Article 4 protects “any person” who is a national of a WTO member other than China. Under Article 4,
not only Taiwan nationals but also nationals of a WTO member other than Taiwan and China may claim a right of priority based on their Taiwan application. The “right of priory” provision also violates Article 4 of the TRIPS Agreement which relates to the doctrine of “Most-Favoured-Nation (MFN) Treatment.”

Under Article 4 of the TRIPS Agreement, “[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.” While the grant of “a right of priority based on a Taiwan application” is an obligation China must comply with, such a right of priority is also an advantage, favour, or privilege granted to Taiwan nationals. Thus, under the MFN doctrine, nationals of other third party WTO members shall enjoy a right of priority based on a Taiwan application filed by them. Otherwise, the MFN doctrine is violated.

IV. China’s Implementation of the “Right of Priority” Provision

China has not changed its IP laws to comply with the “right of priority” provision of the Cross-Strait IP Agreement while Taiwan did so. However, China has promulgated three regulations regarding a right of priority claimed by Taiwanese applicants. Those regulations are only applicable to Taiwanese applicants but not to Taiwan applications filed by non-Taiwanese entities.

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136 See WORLD TRADE ORGANIZATION, A HANDBOOK, supra note 105, at 17.
137 TRIPS Agreement art. 4.
139 These three regulations can be found at the website of the Taiwan Affairs Office of the State Council of the P.R.C. See Taiwan Affairs Office of the State Council of the P.R.C., http://www.gwytb.gov.cn/guide_rules/ (last visited Jan. 15, 2015) (in Mandarin).
140 See Owen Gee, Not All Priority Claims Extended by New Cross-Strait Cooperation, in REMARKS CHINA IP UPDATE SPRING 2011 2 (Marks & Clerk LLP 2011) (“The validity of the following priority claims are yet to be confirmed as allowable: (i) a SIPO application claiming priority from a TIPO application filed by a foreign applicant, unless there is also a co-applicant that is a national or resident of..."
A. Patent


The “right of priority” provisions of the 2010 Patent Rule were structured to be parallel to corresponding provisions in the 2009 Patent Law and Implementing Rule. For instance, the 2010 Patent Rule does not recite Article 29 of the Patent Law as a legal source. However, Article 2 of the 2010 Patent Rule is similar to Article 29 of the 2009 Patent Law which defines the periods of claiming a right of priority for different types of patent. Article 4, Paragraph 1 of the 2010 Patent Rule is similar to Article 30 of the 2009 Patent Law which requires the declaration of claiming a right of priority on the filing date and three-month grace period for submitting the documents proving the

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142 See Articles 2 to 10 of the 2010 Patent Rule.
Articles 31 and 32 of the Patent Implementing Rule govern a procedure of claiming a right of priority. Article 31, Paragraph 1 of the Patent Implementing Rule which requires submission of a certified copy of the prior application is similar to Article 6, Paragraphs 1 and 3 of the 2010 Patent Rule. Article 31, Paragraph 2 of the Patent Implementing Rule which provides how to correct an error in a form for claiming a right of priority is similar to Article 4, Paragraph 2, Article 5, and Article 6, Paragraph 2 of the 2010 Patent Rule. Article 31, Paragraph 3 of the Patent Implementing Rule which requires proof of the transfer of a right of priority is similar to Article 7 of the 2010 Patent Rule. Article 32.1 of the Patent Implementing Rule which relates to multiple priority rights is similar to Article 3 of the 2010 Patent Rule. Article 93, Paragraph 1(1) and Article 95, Paragraph 2 of the Patent Implementing Rule which require fee payments and provide consequences of not paying fees are similar to Article 9 of the 2010 Patent Rule. Article 6 of the Patent Implementing Rule which relates to the revival of a lost right is similar to Article 10 of the 2010 Patent Rule.


See, e.g., Article 6, Paragraphs 1, 3 of the 2010 Patent Rule; Article 31, Paragraph 1 of the Patent Implementing Rule.

See, e.g., Article 4, Paragraph 2, Article 5, and Article 6, Paragraph 2 of the 2010 Patent Rule; Article 31, Paragraph 2 of the Patent Implementing Rule.


See, e.g., Article 9 of the 2010 Patent Rule; Article 93, Paragraph 1(1) and Article 95, Paragraph 2 of the Patent Implementing Rule.

There are some provisions in both the 2010 Patent Rule and Patent Implementing Rule which cannot find their equivalent provision in the other Rule. For example, Article 31, Paragraph 4 of the Patent Implementing Rule which recognizes a right of priority for industrial design based on an application without design description does not have a corresponding clause in the 2010 Patent Rule. The Patent Implementing Rule does not include a provision similar to Article 6, Paragraph 4 of the 2010 Patent Rule which governs submission of a copy of the prior foreign application for claiming a priority right for another domestic application. Last, the Patent Implementing Rule does not specify a procedure of withdrawing the claim of a right of priority, while Article 8 of the 2010 Patent Rule particularly provides such procedure.

Those features of the 2010 Patent Rule indicate that a right of priority claimed by a Taiwanese applicant is different from a right of priority claimed by a normal applicant. In other words, China shows that it has never grant to a Taiwan applicant a right of priority mandated by the Paris Convention.

B. Trademark

Unlike the implementation with respect to patent filing, the regulations for trademarks and plant varieties are simple. On November 18, 2010, the Trademark Office of the State Administration for Industry and Commerce issued a regulation “tai-wan di-qu shang-biao zhu-ce shen-qing-ren yao-qi you-xian-quan you-guan shi-xiang de gui-ding” (台湾地区商标注册申请人要求优先权有关事项的规定, Rules on the Matters Regarding a Right of Priority Claimed by A Trademark Registration Applicant from the Taiwan Region; hereinafter, “2010 Trademark Rule”; hereinafter,
“2010 Trademark Rule”).\textsuperscript{152} This is the first trademark regulation specifically for Taiwan applicants. Compared with the 2010 Patent Rule which has nine provisions related to a right of priority, the 2010 Trademark Rule only has four provisions to handle the same matter.

In 2010, Article 24 of the Chinese trademark law (hereinafter, “2001 Trademark Law”) provided a right of priority.\textsuperscript{153} Article 24, Paragraph 1 defined the eligibility of a claim of a right of priority.\textsuperscript{154} Article 24, Paragraph 2 provided a three-month grace period for submitting relevant documents.\textsuperscript{155} Because Article 24, Paragraph 1 of the 2001 Trademark Law had the “foreign country” requirement as the Chinese patent law does, the 2010 Trademark Rule could not recite that provision. Instead, Article 1 of the 2010 Trademark Rule copied similar wording of Article 24, Paragraph 1 of the 2001 Trademark Law but replaced “foreign country” with “Taiwan region.”\textsuperscript{156} As for other requirements, Article 2 of the 2010 Trademark Rule simply referred to Article 24, Paragraph 2 of the 2001 Trademark Law and Article 20, Paragraph 1 of the 2002 Trademark Implementing Rule.\textsuperscript{157}

\textsuperscript{154} See Article 24, Paragraph 1 of the 2001 Trademark Law (“Where an applicant, within six months from the date he applies for registration of his trademark for the first time in a foreign country, again applies in China for registration of one and the same trademark for the same goods, he may, in accordance with any agreement concluded between the foreign country concerned and the People’s Republic of China or any international treaty to which both countries are parties, or on the basis of the priority principle mutually accepted, enjoy priority.” (emphasis added)).
\textsuperscript{155} See Article 24, Paragraph 2 of the 2001 Trademark Law.
\textsuperscript{156} See, e.g., Article 1 of the 2010 Trademark Rule; Article 24, Paragraph 1 of the 2001 Trademark Law.
\textsuperscript{157} See Article 2 of the 2010 Trademark Rule. The 2002 Trademark Implementing Rule (a.k.a
The simple structure of the 2010 Trademark Rule results in a limited claim of a right of priority for a Taiwanese trademark applicant. The 2001 Trademark Law governs not only trademarks for goods but also service trademarks (service marks). Although the text of Article 24, Paragraph 1 covers only “trademarks for goods,” “service trademarks” still benefit from Article 24 because Article 4, Paragraph 3 provides that “[p]rovisions regarding the goods trademarks in this Law shall be applicable to service trademarks.” Like Article 24, Paragraph 1 of the 2001 Trademark Law, Article 1 of the 2010 Trademark Rule only mentions “goods trademarks.” But, there is no provision in the 2010 Trademark Rule reciting Article 4, Paragraph 3 of the 2001 Trademark Law. Therefore, relying on the 2010 Trademark Rule, a Taiwanese applicant can only base a right of priority on a Taiwan trademark application designated to a category of goods.

The failure to protect service trademarks is actually a violation of the MFN (Most-Favoured-Nation) treatment under the TRIPS Agreement. Article 4 of the TRIPS Agreement mandates each member state to treat the nationals of all other member states equally in term of IP protection. Because foreign applicants other than Taiwanese applicants may claim a right of priority for their service trademark applications in China.


158 See Article 3 of the 2001 Trademark Law (“Registered trademarks refer to trademarks that are registered with the approval of the Trademark Office, including trademarks for goods and services, collective trademarks and certification trademarks.”).

159 See Article 4, Paragraph 3 of the 2001 Trademark Law.

160 See TRIPS Agreement art. 4 (“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”); see also Rafael Leal-Arcas, The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas, 32 FORDHAM INT’L L.J. 345, 351-52 (2009).
Taiwanese applicants are discriminated. Taiwanese applicants cannot enjoy a right of priority for their service trademark applications as a national of any other WTO member state can under the Chinese trademark law. Therefore, by not referring to service trademarks in the 2010 Trademark Rule, China violates the MFN treatment.

Moreover, when the Chinese trademark law was amended in 2013,\(^{161}\) Article 24 of the 2001 Trademark Law was changed to Article 25.\(^{162}\) But, the Trademark Office has not made any amendment to the 2010 Trademark Rule. That indicates China’s carelessness about trademark filing of Taiwanese applicants.

C. Plant Variety

Regarding plant varieties, on November 22, 2010, the Ministry of Agriculture announced “guan-yu tai-wan di-qu shen-qing-ren zai da-lu shen-qing zhi-wu xin-pin-zhong-quan de zhan-xing gui-ding” (关于台湾地区申请人在大陆申请植物新品种权的暂行规定)\(^{163}\) whose official English title is “Provisional Measures on Application from Taiwan Applicants for Plant Variety Rights in the Mainland” (hereinafter, “2010 Plant Variety Rule”).\(^{164}\) The 2010 Plant Variety Rule provides

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\(^{162}\) See Article 25 of the 2013 Trademark Law.


guidance for Taiwan applicants. It is the first regulation of the Ministry of Agriculture regarding Taiwan applicants for plant varieties. It has ten provisions where only Article 5 relates to the claim of a right of priority.\footnote{See Article 5 of the 2010 Plant Variety Rule.}

In 2010, the Chinese plant variety law (hereinafter, “1997 Plant Variety Law”\footnote{See World Intellectual Property Organization, Regulations of the People’s Republic of China on Protection of New Varieties of Plants, http://www.wipo.int/wipolex/en/details.jsp?id=846 (last visited Jan. 15, 2015). The 1997 Plant Variety Law was enacted on Mar. 20, 1997 and became effective on Oct. 1, 1997. See id. The English version can be found at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn008en.pdf (last visited Jan. 15, 2015); the Chinese version can be found at http://www.wipo.int/edocs/lexdocs/laws/zh/cn/cn008zh.pdf (last visited Jan. 15, 2015).}} included Article 23 addressing a procedure of claiming a right of priority. Article 23, Paragraph 1 provided a twelve-month period during which a right of priority may be claimed.\footnote{See Article 23, Paragraph 1 of the 1997 Plant Variety Law (“Where, within 12 months from the date on which any applicant has first filed an application for variety rights in a foreign country, the said applicant files an application for variety rights in China in respect of the same new plant variety, he or it may, in accordance with any agreement concluded.”).} Article 23, Paragraph 1 also included the “foreign country” requirement.\footnote{See Article 23, Paragraph 1 of the 1997 Plant Variety Law.}

Article 23, Paragraph 2 provided the formality requirements for claiming a right of priority, such as a three-month grace period of document submission.\footnote{See Article 23, Paragraph 2 of the 1997 Plant Variety Law.} On the other hand, Article 5 of the 2010 Plant Variety Rule had one paragraph which combines two paragraphs of Article 23 the 1997 Plant Variety Law, however, without reciting the “foreign country” requirement.\footnote{See Article 5 of the 2010 Plant Variety Rule.}

addressed the formality of declaring a right of priority.\textsuperscript{172} On the other hand, Article 9 of the 2010 Plant Variety Rule referred to the 2008 Plant Variety Implementing Rule as a source for the matters regarding plant variety applications. Thus, the declaration requirement under the 2008 Plant Variety Implementing Rule was actually incorporated in the 2010 Plant Variety Rule.

In 2013, the Chinese plant variety law was amended,\textsuperscript{173} and Article 23 kept the same.\textsuperscript{174} The implementing rule was later amended in 2014,\textsuperscript{175} and Article 25 was unchanged.\textsuperscript{176}

D. Role of the Taiwan Intellectual Property Office

In 2014, the Taiwan Intellectual Property Office ("TIPO") began to issue a monthly report or presentation on its website.\textsuperscript{177} Each report either in a WORD file or PPT file

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\textsuperscript{172} See Article 25 of the 2008 Plant Variety Implementing Rule.
\textsuperscript{174} See Article 23 of the 2013 Plant Variety Law.
\textsuperscript{176} See Article 25 of the 2014 Plant Variety Implementing Rule.
\textsuperscript{177} The reports can be found at http://www.tipo.gov.tw/lp.asp?ctNode=6792&CtUnit=3295&BaseDSD=7&mp=1 (last visited Jan. 15, 2015). But, the TIPO will remove previous reports regularly.
briefs the implementation of the Cross-Strait IP Agreement.\textsuperscript{178}

In the November 2014 report, the TIPO wrote,

With respect to whether “Priority Claim Rights” (Article 2) apply to branch company or constituent company of foreign enterprises in Taiwan, since the emphasis of the Agreement is to protect enterprises and residents in and of Taiwan, as long as they are a juridical person of Taiwan (e.g., Siemens Taiwan), they may claim priority rights with mainland China. Furthermore, if one of the applicants in a multiple-applicant case is a Taiwanese national and filed as first applicant, such application may request for priority claim with mainland China, regardless of the nationality of the remaining applicants.\textsuperscript{179}

This statement explains three rules. First, a branch office or subsidiary of a foreign company cannot benefit from the Cross-Strait IP Agreement. Second, a child company of a foreign company incorporated under the Taiwan corporate law may enjoy the protection under the Cross-Strait IP Agreement. Third, if an application is filed by multiple applicants at least one of whom is a Taiwan applicant, a right of priority may


be granted to such application.

The behavior of the TIPO by giving that interpretation is very abnormal because the TIPO acts as a subsidiary of any corresponding administrative agency of China to interpret the regulation regarding a right of priority claimed by a Taiwan applicant based on her Taiwan application. On the other hand, the SIPO, Trademark Office, or Ministry of Agriculture has never announced any rule interpretation about those three rules.

Even the TIPO’s interpretation is true, China still violates Article 4 of the Paris Convention because a right of priority based on a Taiwan application should be granted to nationals of any WTO member other than Taiwan.

V. Conclusion

A real right of priority has to be based on Article 4 of the Paris Convention. To comply with the Article 4 requirements, China must grant a right of priority based on a prior application filed in other member state to a national of any member state other than China, if other formality requirements are also met. As a member of the WTO, China should follow Article 2.1 of the TRIPS Agreement which requires a member to comply with Article 4 of the Paris Convention. As a result, China should permit a Taiwanese applicant to claim a right of priority based on her Taiwan application without entering into the Cross-Strait IP Agreement with Taiwan. An applicant of the nationality of any other WTO member should also enjoy a right of priority based on her Taiwan application. However, China intentionally ignores such duty.

The Cross-Strait IP Agreement does not save China’s violation of the TRIPS Agreement because a right of priority is granted only to Taiwanese applicants. In fact, China has never tried to comply with Article 4 of the Paris Convention. The separation
of the Cross-Strait IP Agreement from the ECFA indicates the signing of either the Cross-Strait IP Agreement or ECFA is not a matter of signing a FTA. Refusal to admit the FTA status of the ECFA and no recitation of the TRIPS Agreement in the Cross-Strait IP Agreement indicate that the conclusion of the Cross-Strait IP Agreement does not mean that China’s compliance with the TRIPS Agreement. As a result, China’s consistency of denying a Taiwan applicant’s right of priority based on a Taiwan application under Article 4 of the Paris Convention remains.