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TRIPS-Plus in China: How the United States can use TRIPS to Strengthen Trademark Minimum Standards in an FTA with China

Neal Hillam¹

Trademarks are an important part of modern commerce. In order for a Free Trade Agreement (FTA) to work efficiently, the minimum standards for trademark laws must incorporate the desires of each country while helping them implement modern laws that will aid their economic progression. The United States (U.S.) is involved in FTAs with twenty different countries, and is likely to make an FTA with the Peoples Republic of China (China). Negotiations between the U.S. and China have been ongoing for several years. The situation between the two countries is delicate at best, leaving a small margin of error for the potential FTA. This paper proposes that the standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) be made the backbone of the trademark minimum standards in an FTA between the U.S. and China.

This paper is organized into two sections. The first is a general background, which includes an examination of the United States-Mexico-Canada Agreement (USMCA) to identify the current trade approach taken by the U.S.. This approach centers upon unilateral rather than multilateral efforts with the intent of getting the most out of multilateral agreements without full participation. The second section covers trademark standards in an FTA with China. I will identify several ubiquitous trademark problems in China such as squatting and counterfeit. This paper will show that adherence to certain TRIPS principles will abate these internal issues and satisfy U.S. trade interests. By doing so, the U.S. inherently uses a sort of TRIPS-Plus method. This paper will show that the TRIPS-Plus method to be deployed by the U.S. differs from the traditional sense of TRIPS-Plus because of its intent of use. Rather than being forceful and abusive, the intent of the TRIPS-Plus in this agreement is to help China create an environment for trademarks that is nothing short of outstanding.

I: Background

In order to pay off any debts incurred in the process of investing and creating, U.S. companies take their goods or products to international consumers. In order to sell their products in different countries, companies register for their marks to be protected by trademarks. A trademark, a type of intellectual property (IP), is a type of protection which secures the rights of the mark — such as a company logo — of a provider of goods or services to a particular region.

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Trademarks protect marks from being illegally copied. This allows the owners of a mark to provide their good and services without any competition from another company profiting off their mark and establish a reputation in the marketplace. This reputation allows the company to charge more for their goods and services and as a result increases the company's revenue.

Trademark laws are, in general, considerably territorial. With a few exceptions², companies must register their marks within each country they wish to conduct business in. Trading with developing countries has historically presented problems for U.S. companies for various issues. Some developing countries do not comply with international trademark laws. In addition, it is common for developing countries to not recognize IP protections as an economic desideratum³. Some countries that implement trademark laws do not respect and enforce the trademarks they have granted, which allows counterfeited goods and services to go into the marketplace unimpeded. This undermines the benefits of the trademark protections and benefits which were assured to the companies. The U.S. implemented the Trade Act of 1974 which gives the United States Trade Representative the ability to identify "problem" countries not enforcing IP laws. Section 301 of this act gives the President of the United States the ability to impose tariffs on other countries on the grounds of IP negligence.

The implementation of intellectual property laws, and specifically trademark laws, has come a long way since the twentieth century. The 1967 Paris Convention for the Protection of Industrial Property (Paris) was the first large-scale international treaty to include trademark protections. Although limited in its scope and coverage, the U.S. used the Paris Convention standards for trademark laws in their FTAs, including the North American Free Trade Act (NAFTA). Several years after NAFTA was signed, the WTO was created and developed a new international treaty covering intellectual property called TRIPS. TRIPS is "the most comprehensive multilateral agreement on intellectual property"⁴ to date. The trademark minimum standards in TRIPS are significantly more extensive than the standards covered by the Paris Convention.

Building off of the trademark coverages in the Paris Convention, TRIPS coverage additionally includes administrative provisions such as what shall be eligible for consideration in

² There are several groups, including the African Intellectual Property Organization and the European Union Trade Mark, which allow applicants to register for one mark which will be recognized in every state which is a part of the particular organization. See *Introduction to Trademarks*, INT'L. TRADEMARK ASS'N. (Aug. 2016), <http://www.inta.org/TrademarkBasics/FactSheets/Pages/InternationalTrademarkRightsFactSheet.aspx>.

³ As consumers of intellectual property, certain Third World countries see little to gain from vigorously protecting intellectual property licensed to them from the West." See MARSHALL A. LEAFFER, PROTECTING AMERICAN INTELLECTUAL PROPERTY ABROAD: TOWARD A NEW MULTILATERALISM, 76 IOWA L. R. 271 (1991).

⁴ *Overview: the TRIPS Agreement*, WORLD TRADE ORG.: TRADE TOPICS, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 15, 2019).

trademark registration⁵ and what the time length of a mark's non-use shall be to determine a reasonable claim for its cancellation⁶. TRIPS protects companies from being subject to unnecessary requirements intended to discourage trademark applicants⁷. TRIPS expounds on Article 10bis 3-3 of the Paris Convention⁸ by adding a section identifying more specific aspects of false indications⁹. Because of its relation to the World Trade Organization, TRIPS members can take disputes to the WTO's Dispute Settlement Body (DSB)¹⁰ which was created as "a central element in providing security and predictability to the multilateral trading system"¹¹ The U.S. has used the DSB on many occasions¹².

TRIPS is more extensive in its trademark coverage than the agreements it preceded¹³. Some developing countries believed that TRIPS subscribed to the idea of a homogenized system of trade in which it would be the omniscient rule regarding intellectual property rights. Developed countries like the U.S. did not want a homogenized system of trade and saw TRIPS as "a floor rather than a ceiling"¹⁴ for intellectual property laws. The developed countries still felt that higher trademark standards could be achieved in the international community. The U.S. began to focus on creating bilateral agreements which specified additional laws and promoted

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15.1, Jan. 1, 1995 U.N.T.S. 326.

⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 19.1 and 19.2, Jan. 1, 1995 U.N.T.S. 327.

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights art 15.2, Jan. 1, 1995 U.N.T.S. 326.

⁸ Paris Convention for Industrial Property art. 10bis.3.3, Sep. 28, 1979.

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22; 23; 24 U.N.T.S. 328-330.

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 64, Jan. 1, 1995.

¹¹ *Understanding on Rules and Procedures Governing Settlement and Disputes*, WORLD TRADE ORG.: TRADE TOPICS https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm.

¹² As of Monday, October 22, 2018, at 4:35 MDT, the US has been the complainant on 131 cases in the DSB.

Statistics compiled from: *Disputes by Member*, WORLD TRADE ORG.: TRADE TOPICS https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

¹³ In 1991, before the formation of the WTO and TRIPS, Marshall A. Leaffer observed that "U.S. companies traditionally have looked to basic international treaties as a remedy against the piracy of their intellectual property. ...however, these traits fall short of providing effective protection because they lack the power to enforce rights or to settle disputes." By creating an efficient Dispute Settlement Body, the World Trade Organization was able to create an environment of accountability among its members that was quite rare for an international organization of its size. This made TRIPS a desirable treaty to be a part of. See Marshall A. Leaffer, *Protecting American Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. R. 275 (1991).

¹⁴ Susy Frankel, *TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12.4 J. INT. ECON. L. 1023, 1024 (2009).

stricter adherence to TRIPS. When a developed country creates a bilateral agreement with a developing country and reinforces adherence to the standards in TRIPS while adding more laws, it is defined as TRIPS-plus.

In the twenty-first century alone, the U.S. has created FTAs with 18 countries¹⁵. Some of these FTAs have been reconfigurations of old deals, including the United States - Korea Free Trade Agreement and the USMCA. The USMCA shows the current attitudes which the U.S. has towards international trade. Rather than upholding TRIPS standards, the U.S. used the USMCA deal to muzzle TRIPS. Footnote 7 to Article 20.B.4.(a) of the USMCA deal reads, “The Parties recognize the importance of multilateral efforts to promote the sharing and use of search and examination results, with a view to improving the quality of search and examination processes and to reducing the costs for both applicants and [intellectual property] offices”. This essentially mimics a TRIPS-plus advantage, but TRIPS has been demoted to a mere footnote rather than being included in the main body of the agreement. It is indicative of what the U.S. wants to do with international trade—they want to give less power to the WTO and other international organizations and place more focus on national interests. The U.S. wants the benefits of the international organizations without the negative stipulations of full participation¹⁶. Tying down multilateral obligations through bilateral agreements allows the U.S. to focus on unilateral efforts¹⁷ while reaping the benefits of a hands-free multilateral approach.

The U.S. and China are two of the world’s largest economic powers. China remains of particular interest to the U.S. when making an FTA. China has the second largest GDP in the

¹⁵ *Free Trade Agreements, OFF. OF THE U.S. TRADE REP.*, <https://ustr.gov/trade-agreements/free-trade-agreements>.

¹⁶ There were two major attempts made by the U.S. toward the WTO in 2018 which show current attitudes toward international organizations. The U.S. blocked the sustaining of several judges to the WTO Appellate Body over the course of 2018. The Appellate Body is the highest court of the WTO and the central functioning group of the organization, and the Body was not able to function properly because of the blocked sustaining by the U.S.. In July 2018, the President of the United States released the Fair and Reciprocal Tariff Act, which was intended to nullify the effects of the WTO on the U.S. while still keeping their developed country status within the organization. It was not approved by Congress. Although the act was not enacted, the attempt shows signs of disinterest in full participation in international organizations like the WTO. See *United States Fair and Reciprocal Tariff Act (Draft)*, VOLTAIRE NETWORK (July 2, 2018), <https://www.voltairenet.org/article201812.html>.

¹⁷ Kevin Hassett, Chairman of the Council of Economic Advisors, showed “significant” increases in small business optimism, business investment, capital goods orders and shipments, EIN applications for new businesses, and prime-age workers reentering the labor force since January 20, 2017. Press Briefing by Press Secretary Sarah Sanders and CEA Chairman Kevin Hassett. (2018). [online] Available at: <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-cea-chairman-kevin-hassett-091018/> [Accessed 16 Jan. 2019].

world¹⁸ and demands to be treated as an economic giant, yet most of its population is poor¹⁹. Although the two countries do not have an FTA, there have been smaller joint efforts which have kept the interest alive and in some instances have helped the U.S. influence China to make changes which will accommodate U.S. companies²⁰.

II. A Free Trade Agreement with China

Why do these two nations not have an FTA with each other? Leah Chan Grinvald has stated that “an American theory of trademarks... has inhibited U.S. reform efforts in China”²¹. On the fundamental level, the U.S. and China do not agree on what a trademark should be²².

¹⁸ *List of Countries by Projected GDP*, STAT. TIMES (2018),

<http://statisticstimes.com/economy/countries-by-projected-gdp.php>.

¹⁹ In 2015, the average annual household income in China was 21,586.95 yuan, which is equal to \$3,206.20. Yi Wen, *Income and Living Standards across China*, FEDERAL RESERVE BANK OF ST. LOUIS: ON THE ECONOMY BLOG (Jan. 8, 2018), <https://www.stlouisfed.org/on-the-economy/2018/january/income-living-standards-china>.

²⁰ Two of these smaller joint efforts include the Memorandum of Understanding (MoU) in 2015 and the U.S.-China Joint Commission on Commerce and Trade. The U.S. signed an MoU in 2015 with China, but it left the issue of intellectual property untouched. The 2015 U.S.- China MoU should then be seen as unproductive with regards to promoting intellectual property laws. The U.S.- China Joint Commission on Commerce and Trade was created as an annual “dialogue” between the two countries to discuss commerce and trade issues. The 2013 meeting brought about the 2014 Chinese Trademark law which was revamped to accommodate Western interests. The 2016 meeting of the U.S. - China Joint Commission on Commerce and Trade held in Washington D.C. yielded some results, or at least got China on track. China promised that they would “[ensure] full implementation of past commitments”. Trademarks were specifically addressed, including a section on “bad faith trademarks”, a big issue in China. China agreed that they would “prioritize the issue of bad faith trademark filings”. *U.S. Fact Sheet for the 27th U.S.-China Joint Commission on Commerce and Trade* (2016), OFF. OF THE U.S. TRADE REP. (Sep. 22, 2018) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2016/november/us-fact-sheet-27th-us-china-joint>.

²¹ Leah Grinvald, *Making Much Ado About Theory: The Chinese Trademark Law*, 15(1) MICH. TELOCOMM. AND TECHN. L. R. 57 (2008).

²² China and the U.S. have differing views on the purpose of trademarks. China initially began creating trademarks and other intellectual property laws because it would attract foreign companies to bring their works to China. In the U.S., trademarks and other intellectual property are used as a reward system. Designs which represent the quality products of a company are awarded trademarks. Once received, a trademark becomes a symbol of quality. The owners of the trademark are trusted and valued in the marketplace. As such, companies are able to raise the prices of their products and earn more revenue. This incentivizes quality of production in the U.S. to create better products. China, a socialist state, uses trademarks to feed their paternalistic agenda. Trademarks act as a sort of minimum standard for quality. This is expressed in Article 7

Nevertheless, these differing views must be overcome if the U.S. wants access to China's growth as China has become a world leader in trademark applications with half of the world's trademark application activity²³.

While China has become a statistical powerhouse²⁴ for trademark applications, its laws are too flaccid to be considered a true trademark hot bed. China has many large-scale problems such as fraud, non-specific laws²⁵, a first-to-file system which often favors criminals familiar with the Chinese legal system over qualified international applicants, and many more. All these problems can make it difficult for U.S. companies to get their marks registered in China. In addition, these problems make it difficult for companies with registered marks to reap the full benefits which China granted to them. China became a Member²⁶ of the World Trade Organization (WTO) in 2001, and as such promised to implement the minimum standards for trademark laws outlined in TRIPS. In general, China has not done so. TRIPS allows for some autonomy in its implementation, and China has added TRIPS guidelines in certain instances²⁷, but there are still parts of TRIPS that are not in China's Trademark Law (The Trademark Law). China should not be able to continue to refrain from implementing TRIPS standards. A clear way for the U.S. to influence China towards a safer trademark environment is to add explicit adherence to TRIPS in an FTA. An FTA with an emphasis on adherence to TRIPS, as well as repercussions for disobedience, will hold China to a higher standard of accountability for the failure of compliance with international trademark laws.

In addition to problems surrounding trademark laws, China has not adhered to the rights and obligations²⁸ of WTO Membership. In the last decade, China has redone their Trademark

of the Trademark Law. China is bent on the preservation of a minimum standard for trademark quality. Trademarks in China do not necessarily foster a sense of quality creation and improvement as is in the U.S.; rather, trademarks in China act as a bar that companies must meet to sell products and services in China. See Trademark Law of the Peoples' Republic of China, P.R.C. LAWS art. 7 (2014).

²³ *China Tops Patent, Trademark, Design Filings in 2016*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Dec. 6, 2017), https://www.wipo.int/pressroom/en/articles/2017/article_0013.html.

²⁴ Xuan-Thao Nguyen, "The World's New Trademark Powerhouse: A Critique of China's New Trademark Law", 40 SEATTLE U. L. REV. 901, 901 (2017).

²⁵ Danny Friedmann, *protecting Against Abuse of Trademark Law in Greater China: A Brief Analysis of the Peoples Republic of China, Hong Kong, Macau, and Taiwan*, 47 CAL. WESTERN INT'L. L. J. (2017).

²⁶ China became a member of the WTO on December 11, 2001. *China and the WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/china_e.html.

²⁷ China's Trademark Law (2014) says that the Chinese government will consider for a mark an application that "is designed to certify the indications of the place of origin... of the said goods or services". Trademark Law of the Peoples' Republic of China, P.R.C. LAWS, Art. 3 (2014). This is in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22, Jan. 1, 1995.

²⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights art 1.1, Jan. 1, 1995

Law to become more modern and contain laws that are similar to the laws of TRIPS²⁹. China's Trademark Law brings them closer to fulfilling their rights and obligations, but it lacks specifics. The U.S. can work with what China already has created and include explicit adherence to TRIPS in a bilateral agreement. This will help the U.S. reinforce TRIPS standards and steer China in the right direction by holding them to a higher sense of accountability. A trade deal with China becomes quite complex though, with regards to what exactly should be constitute trademark minimum standards. China is a two-edged sword. On one edge, China is an economic powerhouse. On the other edge, China is still a developing country and is not close to being considered completely developed³⁰. While its GDP is high, China's per capita GDP is quite low, and poverty is still rampant¹⁸. Unlike the USMCA, an FTA must go further in its adherence to TRIPS, and it starts with deliberate, explicit adherence. The adherence must be explicit rather than assumed or simply referred to. Because of China's trademark issues, explicit adherence to TRIPS will help to reinforce China's commitment to the trademark minimum standards in TRIPS.

The U.S. can start with a generalized approach by including provisions similar to those in their FTA with Australia: "the Parties affirm their rights and obligations with respect to each other under the TRIPS Agreement"³¹. This would help the U.S. reaffirm their standing in and compliance with TRIPS. A TRIPS-Plus method is the best approach to the trademark minimum standards for an FTA with China. There are several things that the explicit adherence to TRIPS should include that target the specific needs of China as an economy. The parts of TRIPS that can be highlighted in the agreement should draw from certain areas of China's trademark economy that are deficient. The following is a topic coverage of sections and articles in TRIPS that would help China with certain trademark issues, influenced by explicit adherence to TRIPS stated in an FTA with the U.S.. The U.S. can use the following parts of TRIPS in a U.S.-China agreement to make it stronger.

A. *Fraud and Counterfeit – TRIPS Article 46; 59; and 61*

One of the biggest problems within China is counterfeit, especially intellectual property counterfeit. Trademarks are not immune. Many registered marks and domain names are copied

²⁹ One of these laws is Geographical Indications, a section originally in TRIPS. Trademark Law of the Peoples Republic of China, P.R.C. LAWS art. 13 (2014).

³⁰ "China is not a developed country. Despite having the world's second-largest economy and third-largest military, China is still not classified as a developed country. The biggest reason: Its per capita GDP remains below any accepted minimum threshold for developed-country status. Other attributes indicating China is not developed include its high proportion of agriculture and low level of technological innovation. Poverty is widespread in China; in fact, more Chinese people live in poverty than the entire population of England. Over one-sixth of the country's residents live on less than \$2 per day." *Top 25 Developed and Developing Countries*, INVESTOPEDIA: MARKETS AND ECONOMY (Sep. 28, 2016), <https://www.investopedia.com/updates/top-developing-countries/#ixzz5UuyGJmvV>.

³¹ Free Trade Agreement, Austl.-U.S., art 17.3, May 18, 2004.

and used illegally. There has even been an increase in fake lawyers³². China has violated its own law in Article 57 of the Trademark Law, particularly Article 57.4. The Trademark Law includes actions China should take against counterfeit, but once again the wording is timid and vague. It says that “the relevant local administrative department for industry and commerce shall stop such acts, [and] order the party to make [the] correction within a time limit.” No explanation is given for ways to hold perpetrators accountable.

In the civil courts of China, victims of trademark fraud and counterfeit are not rewarded with just compensations. The Chinese Government claims that they have “always attached great importance to the protection of intellectual property³³,” but the numbers show a different story. Chinese lawyers have heralded the government for significantly increasing the amount of compensation in the judgment of intellectual property infringement cases, but imposed fines are rather low at only 2% of funds generated from trademark fraud. Adherence to TRIPS Article 61 would likely aid the growth of fines from 2%, as Article 61 calls for fines “sufficient to provide a deterrent.” It is arguable that China’s current fines are too low to provide a true deterrent for those who participate in trademark fraud. In addition to raising compensation for victims of trademark fraud, the U.S. can help China reduce trademark fraud through adherence to other parts of TRIPS. Article 46 states, “In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” In other words, removing the counterfeit mark is not enough. Article 59 expounds, “In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.” Adherence to both of these articles will require China to go beyond just removing the counterfeited mark, and not allow counterfeited goods and marks to go back out into the marketplace as a different brand.

B. Squatting – TRIPS Article 16.2

Trademark squatting occurs when a person or entity applies for the protection of a mark that is the mark of another entity that has not yet been registered in that particular country³⁴. This is done with the intent of gaining recognition through the mark and then selling the mark over to the company with the original invention and ownership elsewhere when they apply for a mark in that particular country. Squatters will also sue the company with the original mark when they bring their products to China, claiming them to be counterfeit marks. Apple® has been a victim

³² Dan Harris, *China Trademarks: Too Good to Be True*, CHINA L. BLOG (Oct. 17, 2018), <https://www.chinalawblog.com/2018/10/china-trademarks-too-good-to-be-true.html>.

³³ Christopher Bodeen, *China Criticizes US Moves on Intellectual Property, Telecoms*, FOX BUS.: MKT. (Jan. 18, 2018), <https://www.foxbusiness.com/markets/china-criticizes-us-moves-on-intellectual-property-telecoms>.

³⁴ Jessica Martin, *Two Steps Forward, One Step Back: A Need For China to Further Amend its 2013 Trademark Law in Order to Prevent Trademark Squatting*, 42 BROOK. J. of INT’L L. 1002 (2017).

of this approach to squatting³⁵. Whole Foods® has not been able to use their internationally recognized mark, “365 EVERYDAY VALUE” in China because of opposition in Applications Nos. 12640703 and 12640704 concerning food and beverages. These Chinese squatters have copied marks, which actions were not done “in good faith,” as stated in Article 7 of the Trademark Law. Article 32 (Chapter III) of the Trademark Law already addressed the issue of squatting to an extent by saying that an applicant cannot, “by illegitimate means, rush to register a trademark that is already in use by another person and has certain influence.”

The Trademark Law fails to define trademark squatting clearly. It gives a vague description of what “illegitimate means” to apply for a trademark law are. In addition, there is a lot of discretion about determining if a mark already in use has “certain influence.” Often if a mark could be found to have “certain influence,” it is superseded by the first-to-file jurisdiction³⁶ in China. The squatter is allowed the trademark if they have rushed to get their paperwork submitted first. Not only have companies with recognizable trademarks been unable to register their marks in China and had to pay a hefty price to squatters to gain ownership of them, but some companies also steer clear of the market in China for fear of not being recognized as a well-known mark. Hermes® has been in a significant struggle in China for many years³⁴ as the result of a trademark squatter. Although the person was clearly squatting, Chinese courts ruled in 2012 that the mark was acquired illegally or that Hermes® was a well-known mark among citizens in China. While the 2012 ruling on the Hermes® case may not have necessarily changed if TRIPS standards were enforced, it would provide an environment for a much bigger change for Chinese Courts to rule in favor of victims of trademark squatting. TRIPS Article 16.2 says, “In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.” China’s Trademark Law follows much of this in its requirements for the recognition of a well-known mark already, so the U.S. should reinforce adherence to the third paragraph of Article 13 the Trademark Law which bans granting rights to a mark which is the same as a mark not registered in China but well-known to the Chinese public.

C. Letters and Numbers – TRIPS Article 15.1 and 20

While China has taken steps forward with the 2014 Trademark Law, the Trademark Law still blatantly enacts laws which run contrary to the standards they agreed to in TRIPS. China requires that a mark must have at least three letters to count as distinctive³⁷. This contradicts TRIPS, which allows “letters, (and) numerals... (to) be eligible for registration as

³⁵ *France's Hermes loses China Trademark Fight: Report*, REUTERS: WEALTH (Feb. 26, 2012), <https://www.reuters.com/article/us-hermes-china/frances-hermes-loses-china-trademark-fight-report-idUSTRE81Q05420120227>.

³⁶ William M. Leahy & Stephen Kho, *Is China's Amended Trademark a Law With Teeth, or a Paper Tiger?*, Boao Review 105 (2015). The first-to-file process is found in Trademark Law of the Peoples Republic of China art. 31 (2014).

³⁷ Matthew Dresden, *China Trademarks – For a Few Characters More*, HARRIS BRICKEN: CHINA L. BLOG (May 28, 2018), <https://www.chinalawblog.com/2018/05/china-trademarks-for-a-few-characters-more.html>.

trademarks”(Article 15.1). No limits, constraints or stipulations are stated. TRIPS allows for further requirements to be established when a country desires to have more grounds for resistibility³⁸, but letters and numbers are still upheld as plausible for mark consideration. They do not appear to be redacted. TRIPS does not give Members the autonomy to use letters and numbers to create parameters with quantifications. Laying certain regulations on numbers and letters goes beyond the scope of TRIPS, which allows letters and numerals to be considered marks without constraint. Adherence to TRIPS Article 20 then becomes important, which requires that trademarks “shall not be unjustifiably encumbered by special requirements.” Assigning specific limits for letters and numbers could count as “special requirements,” and certainly, given the amount of applicants in China each year, they are “unjustifiably encumbered.” Explicit adherence to TRIPS Article 20 in an FTA with China puts the U.S. in a powerful position to influence China’s ability to set extra laws on trademark applications. In addition to strengthening China’s obedience to TRIPS, the U.S. can hold China accountable through the World Trade Organization’s Dispute Settlement Body.

D. Non-Specific Laws – TRIPS Article 17 and 20

Non-specific laws are a central issue with China’s Trademark Law. The non-specific parts in these laws allow for those who have committed fraud and squatting to either not be found guilty or only be penalized a small amount. Certain parts of the Trademark Law, such as Article 14.2 and the aforementioned issues under the squatting section, have given trademark applicants a great deal of trouble. The U.S. needs China to amend Article 14 of their Trademark Law to be more specific by detailing what a trademark ought to be and expounding on how variables such as “duration” should be viewed.

There are no laws in TRIPS which explicitly cover non-specificity or vagueness, so the U.S. can add a clause in their FTA which would target vagueness and non-specificity. The clause would require that both countries update their trademark laws so that they are specific enough to determine a direct course of action. In addition, the U.S. should add further adherence to TRIPS. Because TRIPS does not cover vagueness, using TRIPS to fortify non-specificity is not an obvious solution, but it can deliver a lot of strength in fortifying these particular standards.

The approach the U.S. should take is to state adherence to Article 20 and add an addendum of adherence to the ‘principle’ or ‘spirit’ of Article 20. Article 20 bans unnecessary requirements for trademark applications with the intent of making the application process seamless, logical, and process-based. The point is to give the trademark application process more structure while eradicating ill-meaning attempts to discourage trademark applicants. Article 20 requires that members do not make laws “unjustifiably encumbered by special requirements.” China has done exactly that. This makes China a less-attractive place to take trademarks because they can be considered as an attempt to discourage more applicants. In this “spirit” of Article 20, neglecting to give enough information in the law creates a system that is not seamless, logical, and process-based. Although it has improved, China’s Trademark Law could be further amended to improve its process. Therefore, the U.S. can use the “spirit” and intent of TRIPS Article 20 to hold China to a higher level of accountability for creating laws that are specific and purposeful. The addendum could look something as follows: “The United States and China agree to uphold the

³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15.1, Jan. 1, 1995.

standards in Article 20 of TRIPS and any revisions that may be undergone which are ratified by both parties, and to keep the spirit of Section 20 which is to make the trademark application process as smooth as possible.” The U.S. can attack China’s vagueness by tagging the “spirit” of the law to the actual law, which then would include not only the addition but also omission of necessary requirements as well.

Adherence to Article 17 of TRIPS would eradicate the vagueness of Chinese law regarding the grounds for a trademark. Danny Friedmann has explained, “Article 17... [prescribes] that members may ‘provide limited exceptions to trademark rights ... providing that such exceptions take account of the legitimate interests of the owner of the trademark and third parties.’”

E. Sidestepping Compulsory Licensing

Compulsory licensing allows countries to lift intellectual property protections on certain goods to make them more affordable. TRIPS allows for compulsory licensing, particularly for countries which are deemed as “developing”. Most developed countries, including the U.S., do not favor compulsory licensing. When exercised, compulsory licensing is often used at the financial expense of the IP owner. In addition, products whose trademarks are lifted can be counterfeited. These products are dangerous to the public health³⁹. Under the WTO, China is still considered a developing country and is able to use compulsory licensing. In addition to TRIPS, compulsory licensing has also been allowed in Chinese law since 2008. In order to protect U.S.-based companies, the U.S. has made sure to address the issue of compulsory licensing. The U.S. has used several different tactics in previous FTAs⁴⁰. In order to quell compulsory licensing in China, the U.S. should add something they have added before: “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 16 (Intellectual Property Rights) of this Agreement”⁴¹. This is a classic example of a U.S. approach as a TRIPS-Plus agreement.

³⁹ This is especially the case with counterfeited pharmaceuticals. Erwin A. Blackstone, PhD, Joseph P. Fuhr, Jr, PhD, and Steve Pociask, MA, have concluded that counterfeited pharmaceuticals “pose a public health hazard”, and that counterfeited pharmaceuticals have caused “considerable harm to consumers, including death.” See Erwin A. Blackstone, PhD et al, *The Health and Economic Effects of Counterfeit Drugs*, AMERICAN HEALTH & DRUG BENEFITS, June 2014, at 216.

⁴⁰ See the following for an overview on U.S. moves to quell compulsory licensing. Sara V. Dobb, *Compulsory Trademark Licensure as a Remedy for Monopolization*, 26 CATH. U. L. R. 589-604 (1977).

⁴¹ *Free Trade Agreement*, United States-Singapore art. 15.6.5, Nov. 16, 2000.

III. Conclusion

The TRIPS-Plus method to be deployed by the U.S. in an FTA with China differs from the traditional sense of TRIPS-Plus in its intent of use. The TRIPS-Plus method has come under condemnation for being a bully mechanism used by the U.S. to rope weaker countries into implementing laws they want. While the U.S. does use bilateral agreements to reinforce adherence to TRIPS, TRIPS-Plus in an FTA with China should be seen as compassionate rather than mean. Indignant adherence to TRIPS will help China to enforce their trademark problems and create better laws, which will allow US companies to feel safer about applying to trademarks in China, leading to more U.S. companies penetrating China, and help the two countries find common ground on a topic upon which they have historically had different views. By reinforcing adherence to TRIPS, the U.S. will help China eliminate the deficiencies in their trademark culture, such as fraud, counterfeit, squatting, over specificity, and non-specificity. China will thereby grow as a strong, appealing country for trade with U.S. companies.