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Protecting Intellectual Property in Taiwan—Non-Recognized United States Corporations and Their Treaty Right of Access to Courts

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PROTECTING INTELLECTUAL PROPERTY IN TAIWAN*—NON-RECOGNIZED UNITED STATES CORPORATIONS AND THEIR TREATY RIGHT OF ACCESS TO COURTS

As global trade grows, intellectual property rights become increasingly important. United States corporations must often seek redress for infringement of their intellectual property rights in foreign forums. Taiwan has an international reputation for commercial counterfeiting.[1] United States corporations with no presence in Taiwan are sometimes victims of infringement there. This Note describes the problems a non-recognized United States corporation presently faces in protecting its intellectual property rights in Taiwan and proposes a solution embodied in the United States-Republic of China (ROC) Treaty of Friendship, Commerce, and Navigation (FCN Treaty).[2] A criminal case instituted by Apple Computer in Taiwan[3] illustrates the issues involved.

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* This Note, in accord with the practice of the United States Government, uses "Taiwan" in place of the term "Republic of China" wherever practical. *See* Taiwan Relations Act, 22 U.S.C. § 3314 (1982). In light of Taiwan's continued use of Wade-Giles romanization, however, this Note adopts that system of romanization whenever it is necessary to refer to terms in the Chinese language.

1. *See* Chang, *Wei Ching Jen Hsu Chih Wai-kuo Fa Jen Tsai Wo-kuo Teh Tang-shih-jen Neng-li, pt. 2*, 1108 FA WU T'UNG HSUN 3 (1983); Huang, *Foreign Enterprise and Chinese Trademark and Patent Laws—A Digest-Commentary on Some Important Cases*, 12 INT'L LAW. 397 (1978) (infringements of foreign patents and trademarks are common in Taiwan); Pow & Lee, *Taiwan's Anti-Counterfeit Measures: A Hazard to Trademark Owners*, 72 TRADEMARK REP. 157 (1982); Walker, *A Program to Combat International Commercial Counterfeiting*, 70 TRADEMARK REP. 117, 131 (1980) (Taiwan enjoys "unenviable reputation as a haven for counterfeiting"); Comment, *The Protection of American Copyrights Under Nationalist Chinese Law*, 12 HARV. INT'L L.J. 71, 71 (1971) (Americans have been "plagued by the problem of protecting American copyrights in China ever since the beginning of the twentieth century"); Address by Michael K. Kirk, Assistant Commissioner for External Affairs, before the American Patent Law Association (May 12, 1983) (copy on file with the *Washington Law Review*) (describing continuing diplomatic efforts to fight counterfeiting).

Some infringement stems from a general lack of public awareness of the sanctity of intellectual property rights. *See* Stewart, *International Copyright in the 1980s—The Eighteenth Annual Jean Geiringer Memorial Lecture*, 28 BULL. OF THE COPYRIGHT SOC'Y 351, 352 (1981) ("Convincing the general public even in the great democracies that copyright infringement is theft is a long and arduous process, scarcely begun."). But no doubt other infringers act with full knowledge, motivated by the lure of quick profit gained by riding on the coattails of established international businesses. Whatever its source, infringement activity in Taiwan is of major concern for many United States industries.

2. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871 [hereinafter cited as FCN Treaty]. The FCN Treaty was signed in 1946 after little more than nine months of negotiations. *See Treaty of Friendship, Commerce and Navigation with China*, 15 DEP'T ST. BULL. 866 (1946); Department of State, file no. 711.932 (1946), Minutes of Meetings, Negotiations Concerning Draft Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of China [hereinafter Dep't of State, file no. 711.932] (available in the University of Washington Law School Library). This was China's first major modern commercial treaty. Cabot, *An American Answer to Chinese Communist Propoganda*, 20 DEP'T ST. BULL. 179, 180 (1949). Indeed, this treaty was described as

In 1982, Apple Computer instituted a private prosecution in Taiwan for criminal copyright infringement.[4] The district court dismissed the case because Apple Computer had not been recognized and admitted to do business in Taiwan.[5] On appeal, Apple Computer argued that the FCN Treaty gave it the right to initiate this private criminal prosecution irrespective of any recognition to do business under municipal law.[6] Although the appellate court did not address the merits of the treaty issues, it nevertheless vacated the judgment of dismissal and remanded for a trial on the merits.[7] At trial, Apple Computer prevailed.[8]

This Note focuses on the treaty issues the appellate court avoided in the Apple Computer decision: whether the FCN Treaty's access to courts

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the "first post-war comprehensive commercial treaty to be signed by either Government." *Treaty of Friendship, Commerce and Navigation with China*, 15 DEP'T ST. BULL. 866 (1946).

During this period, China was in the throes of a civil war. The republican government was still in its formative stage. Extraterritoriality, which refers to the jurisdiction exercised by foreign nations within the territory of China, was a thing of the recent past. The United States had only given up its extraterritorial rights in China three years before the conclusion of this commercial treaty. Treaty for the Relinquishment of Extraterritorial Rights in China, Jan. 11, 1943, United States-Republic of China, 57 Stat. 767, T.S. No. 984. Moreover, the Chinese domestic economy was near collapse. Yet the government was pressing forward with comprehensive national legislation, much of which affected foreign business interests in China. *See* Dep't of State, file no. 793.003/1048: Telegram No. 119 (Jan. 6, 1943), *reprinted in* DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1942, CHINA 416, 417 (1956) (praising the spirit of the Chinese government in enacting new codes and establishing a modern legal system).

This legislation was enacted in an atmosphere of intellectual tension. Some wished to guide China down the path of free enterprise. But most fought for more protective measures, fearing the possibility of renewed extraterritoriality and economic exploitation by Western enterprise.

The United States, on the other hand, was attempting to create a free world market. Commercial treaties, including the one negotiated with the Chinese, were intended to accomplish this goal. *See* R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 20–21 (1960). *See also Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece Before the Special Subcomm. on Commercial Treaties and Consular Conventions of the Sen. Comm. on Foreign Relations*, 82d Cong., 2d Sess. 6–7 (1952) (statement of Harold F. Linder, Deputy Assistant Sec. of State for Economic Affairs, Dep't of State) (Department of State regards postwar treaties as "an important element in promoting our national interests and building a stronger economy within the free world through the traditional American means of private enterprise").

To some extent, the FCN Treaty accomplished this goal. *See* S. EXEC. REP NO. 8, 80th Cong., 2d Sess. 3–4 (1948). It was the first treaty in United States history to deal extensively with the rights of corporations. *Id.* at 5.

3. Criminal Judgment of Jan. 28, 1983, Taipei District Court (copy on file with the *Washington Law Review*), *vacated and remanded*, Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

4. Criminal Judgment of Jan. 28, 1983, Taipei District Court (copy on file with the *Washington Law Review*).

5. *Id.*

6. Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

7. *Id.*

8. Wall St. J., Jan. 27, 1984, at 34, col. 5 (eastern ed.).

provision includes the right to initiate a private criminal prosecution, and if so, whether a United States litigant can exercise the right absent municipal legislation. First, this Note presents a brief overview of Taiwan's legal system. Second, it summarizes the Apple Computer case as an example of the attempt to use the FCN Treaty to gain full access to Taiwan's courts. Third, the relevant treaty provisions allowing access to courts[9] are discussed and interpreted. Fourth, this Note discusses the implications of the proper interpretation of the FCN Treaty for a non-recognized United States corporation seeking to protect its intellectual property rights in Taiwan. Fifth, practical aspects of advocating treaty rights, including the selection and advocacy of an appropriate interpretive methodology, are discussed. Finally, this Note concludes that by proper exercise of their FCN Treaty rights, non-recognized United States corporations can expect full access to Taiwan's courts in the future, including access for the purpose of initiating a private criminal prosecution.

I. TAIWAN'S LEGAL SYSTEM

A. Taiwan's Civil Law System

Taiwan is a civil law country.[10] Its legal norms are generally not judge-created. Instead, comprehensive legal codes are the primary source of law. Taiwan's codes are eclectic, but the laws are primarily based on the Japanese, German and Swiss codes.[11] Codification based on these models occurred in the early twentieth century.[12] Despite its Japanese and European and in practice.[13]

9. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

10. Ma, *Legal System of the Republic of China*, 37 RABELS ZEITSCHRIFT FUR AUSLANDISCHES INTERNATIONALES PRIVATRECHT 101, 107 (1973); *see generally* A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977).

11. The first draft of a civil code, completed in 1911, drew on Japanese and German sources, and the final modern version was heavily influenced by the German and Swiss codes. The criminal code went through a series of revisions which drew from the codes of Poland, Japan, Italy, Spain, Germany, and Russia. *See* Ma, *The Legal System of the Republic of China*, 5 LAWASIA 96, 99 (1974). Despite this grab bag of sources for the criminal code, Professor Ma concludes that the basic laws of modern Taiwan were "particularly" influenced by German and Swiss law. *Id.* at 103.

12. *See, e.g.*, MIN FA (CIVIL CODE), 32 CHUNG-HUA MIN-KUO HSIEN-HSING FA-KUEI HUI-PIEN [CMHFH] 19,789 (1981 & Supp. 1983) (originally enacted in 1929); HSING FA (CRIMINAL CODE), 32 CMHFH 20,197 (1981 & Supp. 1983) (originally enacted in 1935).

13. *E.g.*, MIN FA (CIVIL CODE), art. 1, 32 CMHFH 19,789 (1981 & Supp. 1983) (custom is a legitimate source of law); *see also* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 479 (2d ed. 1978); Chew-LaFitte, *The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide for U.S. Practitioners*, 8 YALE J. WORLD PUB. ORDER 236, 251–52 (1982).

Taiwan's civil law system affects the orientation of judicial thinking. The judge in Taiwan is a civil servant who is usually selected by examination.[14] The judge in Taiwan does not create law based on perceptions of public policy. Instead, as in all civil law countries, the judge's task is to find the appropriate law in the codes and apply that legal norm to the pending case. Policy decisions are left wholly to the legislators. The code embodies public policy; the judge is a technician who uses the code to resolve disputes. Thus, the focus in most cases is on adapting the facts to codified legal norms. Textual interpretations of the law are likely to be literal.[15] Sensitivity to individual factual settings is not promoted by the legal system, which values societal norms more highly than individual equities.[16]

In addition, Taiwan has no pervasive judicial precedent system. The doctrine of stare decisis is severely limited. The first level of appellate review includes review of both legal and factual issues. The only judicial decisions that are binding authority are interpretations of the law by a panel of the Judicial Yüan,[17] and Supreme Court decisions which that

14. *See* Ma, *General Features of the Law and Legal System of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN 1, 30–31 (1973). Because judges are selected by examination, age and peer prestige are irrelevant. Most civil law judges are selected in this way. *See* A. VON MEHREN & J. GORDLEY, *supra* note 10, at 1148–49 (noting that French and German judges are ordinarily recruited by examination).

15. The Civil Code's provision on sources of law specifically authorizes a non-literal approach to interpretation. Custom is the authority of choice if the Code does not provide an answer. *See* MIN FA (CIVIL CODE) art. 1, 32 CMHFH 19,789 (1981 & Supp. 1983). Although this may indicate a non-mechanistic approach to judicial decisionmaking, other factors in the legal system contribute to a more mechanistic approach. For instance, legal education conducted by lecture trains deductive thinkers, who may approach interpretation of laws logically and mechanistically.

The form of judicial decisions also reflects a mechanistic approach. Written decisions in Taiwan are often brief statements of the law followed by a summary application to fact. Case reporting, which is often unofficial and severely edited, also fosters a mechanistic approach by its emphasis on doctrine to the exclusion of fact and policy. *See* A. VON MEHREN & J. GORDLEY, *supra* note 10, at 1138–42 (analysis of mechanistic approach in German and French legal systems).

16. Neither lawyers nor judges are trained to be sensitive to factual considerations. Rather than using the case method, which often fosters attention to factual detail, civil law legal education is conducted mostly by lecture that directly explicates the broad theoretical underpinnings of the legal doctrine. *See* A. VON MEHREN & J. GORDLEY, *supra* note 10, at 1139.

17. The Judicial Yüan is the highest judicial organ of the state. CHUNG-HUA MIN-KUO HSIEN-FA (Constitution) art. 77 (Republic of China). Among other things, the Judicial Yüan is charged with interpreting the Constitution and with providing uniform interpretation of law in case of conflict. *Id.*, art. 78.

There are three levels of courts in Taiwan. District courts have original jurisdiction over most civil and criminal matters. The Taiwan High Court is the intermediate appellate court for most cases. The court of last resort is the Supreme Court. The Supreme Court reviews only issues of law, not factual determinations. *See generally* Ma, *supra* note 14, at 20–21. *See also* H. LIU, THE STATUS AND PROTECTION OF ALIENS IN TAIWAN, REPUBLIC OF CHINA 17 (Asia & The World Forum, Monograph No. 9, 1978).

Court specifically selects as binding precedent.[18] No other judicial decisions have formal precedential value although courts naturally tend to follow their own prior decisions.[19]

B. Legal Effect of Treaties in Taiwan

Although treaties are not the supreme law of the land in Taiwan,[20] any treaty ratified by the government on Taiwan necessarily must be at least the equivalent of national legislation.[21] The ROC Constitution declares that as a matter of basic national policy, the government "shall . . . respect treaty [obligations]."[22] Moreover, the courts of Taiwan have previously relied on treaties in their decisions.[23] Thus, as a general matter, the courts of Taiwan can use treaties as a source of law.

II. *APPLE COMPUTER COMPANY v. LI*

A. The Court's Decision

Apple Computer, although not recognized as a foreign corporation with authority to do business in Taiwan, registered its copyrights in certain computer manuals and software programs there.[24] After learning that two companies in Taiwan were apparently infringing these registered copyrights, Apple Computer instituted a private criminal prosecution[25] in

18. A special committee of the Supreme Court selects and edits binding precedents for publication, subject to the approval of the president of the Judicial Yüan. *See* H. LIU, *supra* note 17, at 20.

19. Only Supreme Court decisions are reported. They are reported only in digest form. *See* Ma, *supra* note 14, at 16–17. Thus, the bench in Taiwan is largely anonymous. Aside from the lures of promotion within the court system, which can depend in part on a willingness to adhere to the views of appellate courts, this anonymity effectively removes the bench from the possibility of criticism from the public and most of the practicing bar. There are no additional incentives to adhere to precedent.

20. *Cf.* U.S. CONST. art. VI. Neither the ROC Constitution nor general code provisions clearly delineate the status of treaty obligations in Taiwan's municipal law.

21. CHUNG-HUA MIN-KUO HSIEN-FA (Constitution) art. 63 (Republic of China), declares that the Legislative Yüan must pass on treaties, just as it does for national legislation in its capacity as the national legislature. Because the process of ratification is the same as the process of passing national legislation, by implication treaties and national legislation are of equal stature. There is no constitutional distinction in Taiwan between treaties and other international agreements, but the FCN Treaty was approved by the Legislative Yüan. S. EXEC. REP. No. 8, 80th Cong., 2d Sess. 1–2 (1948).

22. CHUNG-HUA MIN-KUO HSIEN-FA (Constitution) art. 141 (Republic of China).

23. *See, e.g.*, Note, *Public Procurator v. John A. Wilson*, 61 AM. J. INT'L L. 816 (1967) (applying United States-ROC agreement concerning the status of American armed forces in Taiwan to a jurisdictional issue in a case against a United States national charged with manslaughter).

24. Criminal Judgment of Jan. 28, 1983, Taipei District Court (copy on file with the *Washington Law Review*), *vacated and remanded*, Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

25. HSING-SHIH SU-SUNG FA (CODE OF CRIMINAL PROCEDURE) arts. 319–43, 32 CMHFH

the Taipei district court. The complaint accused nine defendants,

20,310–12 (1981 & Supp. 1983). The private criminal prosecution has no analog in any United States jurisdiction. *See* H. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 376 (4th rev. ed. 1981). In Taiwan, a victim of crime can become a civil party to a criminal suit, HSING-SHIH SU-SUNG FA (CODE OF CRIMINAL PROCEDURE) art. 487, 32 CMHFH 20,328 (1981 & Supp. 1983), or initiate a private criminal prosecution, *id.*, art. 319, 32 CMHFH 20,310. Apple Computer attempted to use the latter procedure against its infringers.

The private criminal prosecution is available only to victims of crimes that involve violation of private rights. *See id.* (victims of crimes may institute a private criminal prosecution). Infringement victims, due to the injury to their private rights, can bring private criminal prosecutions against their infringers. Chuan-li Fa (Patent Law) art. 128, 21 CMHFH 12,977 (1981 & Supp. 1983); Chu-tsuo-ch'üan Fa (Copyright Law) art. 40, 7 CMHFH 4121 (1981 & Supp. 1983).

In a private criminal prosecution, the victim brings an action directly to court, thus avoiding the intervention of the public procurator. *See* HSING-SHIH SU-SUNG FA (CODE OF CRIMINAL PROCEDURE) arts. 319–20, 32 CMHFH 20,301 (1981 & Supp. 1983). This type of criminal prosecution requires the complainant to actively conduct the procedural aspects of the suit in court proceedings, *id.*, art. 329, 32 CMHFH 20,311, which can be burdensome for ordinary parties.

The private prosecution, however, offers the practical advantage of bringing the investigatory powers of the court to bear on the case. *See id.*, art. 163, 32 CMHFH 20,291 (1981 & Supp. 1983) (discretionary power for court to investigate); *id.*, art. 288, 32 CMHFH 20,306 (court must investigate the evidence after interviewing the defendant). Notice of the action is sent to the public procurator, who may also join the investigation. *Id.*, art 330, 32 CMHFH 20,311. The fruits of these investigations are available to the complainant. *See id.*, arts. 162–63, 32 CMHFH 20,291. Since Taiwan has no system of civil discovery, *see* Ginsberg, *A Study Tour of Taiwan's Legal System*, 66 A.B.A. J. 165, 168 (1980), the private criminal prosecution allows the foreign complainant to gather information about the alleged infringement vicariously through the offices of the courts and perhaps the public procurator. Without this access to information, the victim would have to undertake an investigation on its own. Administration and supervision of such an investigation can be impossible for the foreign victim unfamiliar with local conditions in Taiwan. Thus, the private criminal prosecution is a device for the infringement victim to build its case in an efficient and effective manner.

As an alternative, an infringement victim may seek an indictment through the public procurator's office. This type of action, however, presents tactical dangers to the foreign corporation. The procurator conducts the case. The initial decision to indict is a matter of procuratorial discretion. But since a procurator has a statutory duty to indict, HSING-SHIH SU-SUNG FA (CODE OF CRIMINAL PROCEDURE) art. 251, 32 CMHFH 20,302 (1981 & Supp. 1983), a decision of no indictment can be reviewed through the hierarchy of the procurator's office. *Id.*, arts. 256–60, 32 CMHFH 20,303–04. However, this alternative places the non-recognized foreign corporation at the mercy of the procurator, since foreign corporations have historically been denied the right to seek review of a procuratorial decision. *See* Chang, *Wei Ching Jen Hsü Chih Wai-kuo Fa-jen Tsai Wo-kuo Teh Tang-shih-jen Neng-li, pt. 1*, 1107 FA WU T'UNG HSUN 3 (1983) [hereinafter Chang, pt. 1].

Finally, a civil action for infringement is available. *See* Chang, *supra*. But a civil suit is inadequate for two reasons. First, no discovery is available. *See* MIN-SHIH SU-SUNG FA (CODE OF CIVIL PROCEDURE) arts. 286–97, 32 CMHFH 19,969–70 (1981 & Supp. 1983) (describing the investigatory duties and powers of the court); *see also* Ginsberg, *supra*, at 168 (no discovery devices are available to parties in Taiwan). Second, the plaintiff must prove damages. Chuan-li Fa (Patent Law) arts. 81–82, 21 CMHFH 12,972 (1981 & Supp. 1983) (giving damages remedy to patentee and authorizing the court to seek an estimate of damages from the Patent Office); Chu-tsuo-ch'üan Fa (Copyright Law) art. 27, 7 CMHFH 4120 (1981 & Supp. 1983) (plaintiff is entitled to damages for losses due to copyright infringement); Shang-piao Fa (Trademark Law) art. 64, 21 CMHFH 12,941 (1981 & Supp. 1983) (although damages for trademark infringement are presumed to be the infringer's illicit profit or the trademark owner's loss of profit, the trademark owner is also entitled to claim damages for injury to goodwill). Proving damages may be difficult for a foreign corporation that conducts worldwide business. Due to the disparities in the economies of the United States and Taiwan, civil judg-

managers and officers of the two companies, of criminal copyright infringement.[26]

The district court dismissed Apple Computer's complaint on the basis of a 1931 binding Judicial Yüan precedent,[27] and Apple Computer's lack of juridical status under municipal law because Apple Computer had not been recognized and admitted[28] as a foreign corporation.[29] Apple

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ments obtained in Taiwan are not as large as those obtained in the United States. Generally speaking, the deterrent value of an adverse civil judgment is less than the deterrence that can result from imposition of criminal sanctions.

26. Criminal Judgment of Jan. 28, 1983, Taipei District Court (copy on file with the *Washington Law Review*), *vacated and remanded,* Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*). Specifically, Apple Computer relied on both the Copyright Law, Chu-tso-ch'üan Fa (Copyright Law), arts. 19, 25, 33(1), 7 CMHFH 4119, 4120 (1981 & Supp. 1983), and the Criminal Code, HSING FA (CRIMINAL CODE), arts. 210, 216, 32 CMHFH 20,225 (1981 & Supp. 1983).

27. Judicial Yüan Interpretation Yüan Tse No. 533 Aug. 7, 1931 (from the Juducial Yüan to the Hupei High Court) (copy on file with the *Washington Law Review*). That 1931 interpretation of law declares that a non-registered foreign corporation lacks the capacity to institute a private criminal prosecution. This is conceptually accurate under municipal law, because the civil code requires that a fictional entity, such as a corporation, must be organized in accord with the law to enjoy juridical status, *see generally* MIN FA (CIVIL CODE) art. 25, 32 CMHFH 19,791 (1981 & Supp. 1983) (dealing with legal persons or *fa-jen*).

28. Recognition and admission is the author's translation of the term *jen hsü,* the statutory precondition that applies to foreign corporations that seek to do business through a branch in Taiwan. *See* Kung-szu Fa (Company Law) arts. 371–86, 21 CMHFH 13,049–51 (1981 & Supp. 1983) (special provisions for foreign companies). Admission and recognition is in some ways similar to registration of a foreign corporation in any state of the United States. To be recognized and admitted in Taiwan a foreign corporation must provide corporate information to the Ministry of Economic Affairs. *See id.* art. 435, 21 CMHFH 13,059. If the Ministry grants recognition and admission, the foreign corporation must then establish a branch office in Taiwan. This requires the head office to consent to the jurisdiction of the local authorities for matters concerning the branch. *See id.* art. 375, 21 CMHFH 13,050. It also requires an investment of at least US$25,000. *See* Yu-hsien Kung-szu Chi Ku-fen Yu-hsien Kung-szu Tzuei Ti Tse-pen-e Piao-chun (Standards for Minimum Capital of Limited Companies and Companies Limited by Shares), 21 CMHFH 13,063–64 (1981 & Supp. 1983).

29. Criminal Judgment of Jan. 28, 1983, Taipei District Court (copy on file with the *Washington Law Review*), *vacated and remanded,* Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*). The law also declares that a foreign corporation can obtain the capacity to undertake legal action only through recognition and admission. *See* Min Fa Tsung-tse Shih-hsing Fa (Law Governing the Application of the General Provisions of the Civil Code) arts. 11, 12, 32 CMHFH 19,806 (1981 & Supp. 1983). Although this approach to juridical status is objectionable because it equates capacity to do business with access to courts, it is nevertheless logically consistent. Purely as a matter of municipal law, the non-recognized foreign corporation is denied access to the courts of Taiwan. Apple Computer, without the help of its treaty rights, fits this category.

Computer appealed the dismissal, arguing that article VI, paragraph 4 of the FCN Treaty[30] established its right of access to Taiwan's courts.[31]

Apple Computer's argument did not convince the Taiwan High Court.[32] In its brief opinion, the High Court expressly reserved its decision on the two treaty issues, stating that it was reluctant to decide these issues without more extensive research and briefing.[33] The first issue was whether the FCN Treaty's access to courts provision[34] requires municipal legislation to be effective.[35] If not, the second treaty issue was whether the access to courts provision includes the right to initiate a private criminal prosecution.[36] Nevertheless, the High Court vacated the district court's judgment of dismissal and remanded for trial on the merits.[37] On remand, Apple Computer prevailed. The district court found six defendants guilty and imposed unprecedented fines.[38]

B. *The Continuing Problem of Full Access to Courts for United States Corporations Without a Presence in Taiwan*

Although Apple Computer won on the merits after remand, the problem of access to Taiwan's courts for non-recognized United States corporations persists.[39] Apple Computer itself may face an appeal in which the treaty issues are raised. Moreover, the judgment in favor of Apple Computer has no formal precedential value because it was not based on recognized treaty rights and was obtained in district court.[40]

30. FCN Treaty, *supra* note 2, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11. The treaty states that corporations shall enjoy freedom of access to courts on a national treatment basis. For the full text of the treaty provision, see *infra* text accompanying note 73.

31. *See* Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

32. *Id.*

33. *Id.*

34. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

35. Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

36. *Id.*

37. *Id.*

38. Wall St. J., Jan. 27, 1984, at 34, col. 5 (eastern ed.). This case is also noteworthy because it extended copyright protection to computer software which is not expressly covered by Taiwan's current copyright law. *Id.* However, a revision of the copyright law that includes software within its protection is currently pending before the Legislative Yüan. *See Chu-tso-ch'üan Fa Hsiu-cheng Tsao-an Shuo Ming (Explanation of the Draft Revision of the Copyright Law)* (1983) (copy on file with the *Washington Law Review*). In its zeal to protect Apple Computer's rights in its software, the court apparently revised the copyright law before the legislature acted to explicitly provide copyright protection for computer software. *See infra* note 132 and accompanying text.

39. Chang, *supra* note 1, at 3. *See* Address by Michael K. Kirk, *supra* note 1, at 5–6.

40. *See* Ma, *supra* note 11, at 108 (district court judgment has no precedential value); *see also supra* text accompanying notes 17–19 for a further discussion of judicial precedent in Taiwan's legal system.

The non-recognized United States corporation seeking to protect its intellectual property rights in Taiwan needs a sure-footed approach. To achieve this, the treaty issues of the *Apple Computer* case must be resolved. The courts of Taiwan must be convinced that the FCN Treaty confers free and full access to Taiwan's courts regardless of whether the corporate complainant has been recognized and admitted in Taiwan.

III. THE OPERATION OF THE FCN TREATY UNDER INTERNATIONAL AND DOMESTIC LAW

Prior to asserting a substantive interpretation of the FCN Treaty, a United States complainant in Apple Computer's position must persuade the courts of Taiwan of two things.[41] First, the complainant must demonstrate that the treaty's access to courts provision is self-executing. Second, the complainant must demonstrate that the treaty prevails over municipal law, which bars suits by foreign corporations not recognized and admitted in Taiwan.

A. The Access to Courts Provision Is Self-Executing

The access to courts provision, central to a non-recognized United States corporation's right to initiate a private criminal prosecution, is self-executing. Some theoreticians have doubted whether the access to courts provision is self-executing, but there is no basis for that conclusion in the language of the treaty itself. The language of article VI of the FCN Treaty, which grants the right of access to courts, is mandatory in both English and Chinese.[42] Most significantly, a decision of the Supreme Court in Taiwan has declared[43] that a related provision of the FCN Treaty, the arbitration clause, is indeed self-executing.[44] That provision's

41. Note that the FCN Treaty continues in force despite diplomatic derecognition of the government of the ROC by the United States. *See generally* Randolph, *The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs*, 15 INT'L LAW. 249 (1981); Sheikh, *The United States and Taiwan After Derecognition: Consequences and Legal Remedies*, 37 WASH. & LEE L. REV. 323 (1980). Most significantly, the governments of both the United States and Taiwan continue to recognize that the FCN Treaty remains in force. DEPARTMENT OF STATE, TREATIES IN FORCE 197 (1984) (listing the 1946 treaty as in force on Jan. 1, 1984); Chang, *supra* note 1, pt. 1, 1107 at 3 (citing Ministry of Foreign Affairs letters declaring that this and other United States-ROC treaties are still in force).

42. The English text states that foreign corporations "shall enjoy freedom of access to the courts," FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 7. The Chinese text uses the verb *ying*, which is clearly mandatory. *Id.* art. VI, para. 4, 63 Stat. at 1371, T.I.A.S. No. 1871 at 77 (Chinese text).

43. For a discussion of judicial precedent in Taiwan, see *supra* text accompanying notes 17–19.

44. *See* Chang, *supra* note 1, at 3. Chang cites an unpublished opinion, Supreme Court decision

operative language is identical to the mandatory language of the access to courts provisions.[45] Based on the plain language of article VI, paragraph 4, the issue of self-execution raised by the Taiwan High Court[46] must be resolved in favor of non-recognized United States corporations.

B. The Treaty Provision Prevails Over Municipal Law Governing Foreign Corporations

The access to courts provision, read in context, does not directly conflict with municipal legislation governing the legal status of foreign corporations. In fact, the provision was designed to meet the requirements of Taiwan's municipal law. Article III of the FCN Treaty mandates recognition of juridical status in Taiwan for all United States corporations.[47] This recognition serves as the statutory precondition for bringing a private criminal prosecution.[48] Moreover, both the recognition provision and the access to courts provision are based on national treatment.[49] Rather than creating a conflict with municipal law, these provisions are consonant with the code provisions covering foreign corporations in general.[50] While municipal law bars suit generally by non-United States foreign corporations, the FCN Treaty avoids operation of that bar for United States corporations.

On the other hand, one could assert that the FCN Treaty implicitly conflicts with municipal legislation. Because one could read recognition and

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No. 426 (1974), which reportedly declares that the arbitration clause of the FCN Treaty is self-executing.

45. Both the English and Chinese texts of the arbitration clause use mandatory language exactly the same as the mandatory language in the access to courts sentences. FCN Treaty, *supra* note 2, art VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 7–8 (English); *id.*, 63 Stat. at 1369–71, T.I.A.S. No. 1871 at 70–73 (Chinese).

46. Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

47. FCN Treaty, *supra* note 2, art. III, para. 2, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7.

48. Recognition and admission, the statutory precondition for doing business, should not be required. *See infra* note 79 and accompanying text.

49. FCN Treaty, *supra* note 2, art. III, para. 2, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7 (recognition); *id.* art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11 (access to courts).

50. Taiwan's municipal law requires recognition and admission for a foreign corporation to have capacity to perform any juristic act. *See* Min Fa Tsung-tse Shih-hsing Fa (Law Governing the Application of the General Provisions of the Civil Code) arts. 11–15, 32 CMHFH 19,806 (1981 & Supp. 1983). The treaty preserves these requirements in its doing business provisions. *See infra* text accompanying notes 62–66. The treaty right of access to courts, however, only requires recognition of juridical status. *See infra* text accompanying notes 81–93. Although Taiwan's municipal law may extract the price of both recognition and admission from any non-American corporation that seeks to undertake any juristic act in Taiwan, including bringing suit, the United States corporation need only be recognized to use Taiwan's courts.

admission in the codes as a single lexical unit,[51] one could conclude that under municipal law both recognition and admission are required before any foreign corporation can undertake any activity in Taiwan. Under this interpretation of municipal law, a foreign corporation would have no juridical status and therefore lack the right to institute any sort of suit in Taiwan's courts. Even if the courts were to adopt this view, the treaty provision should still prevail. The Constitutional requirement that treaties shall be respected[52] will have meaning only if the treaty prevails, particularly since this treaty provision is self-executing. A decision of the Supreme Court in Taiwan with precedential value declares that in case of conflict with municipal law, a treaty prevails.[53] Finally, as further support for resolving any conflict in favor of the treaty provisions, the minutes of the negotiations for the FCN Treaty indicate that the Chinese embraced this position.[54] Even if a court concludes that the access to courts provision, as applied to a United States corporation not recognized and admitted in Taiwan, conflicts with municipal law, there is ample support for the position that the treaty should prevail.[55]

IV. ANALYSIS OF THE RELEVANT TREATY PROVISIONS

The FCN Treaty contains three provisions relevant to the unresolved issues of *Apple Computer Company v. Li:* the provision for doing business,[56] the provision providing for recognition of the juridical status of corporations,[57] and the specific provision dealing directly with access to

51. *Jen hsü*, two Chinese characters, are used throughout the relevant provisions. *See, e.g.*, Min Fa Tsung-tse Shih-hsing Fa (Law Governing the Application of the General Provisions of the Civil Code) arts. 11–15, 32 CMHFH 19,806 (1981 & Supp. 1983). *Jen* means "to recognize." *Hsü* means "to permit or allow." Thus, when read together as a unit, *jen-hsü*, the municipal law precondition to any sort of juridical status for a foreign corporation, would require both recognition and admission, the latter in the sense of a charter allowing a corporation to undertake legal acts.

52. CHUNG-HUA MIN-KUO HSIEN-FA (Constitution) art. 141 (Republic of China). *But see* H. LIU, *supra* note 18, at 21–23 (concluding that most scholars view this article of the Constitution as merely emphasizing a national policy of international cooperation through respect for treaties).

53. Supreme Court Precedent No. 1074, (1934), *digested in* 2 TSUI-KAO FA-YÜAN P'AN-LI YAO-CHIH (HSING SHIH) 562 (1969).

54. *See* Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Feb. 21, 1946, at 1–2; *id.*, Memorandum of Conversation, Mar. 16, 1946, at 8.

55. Nevertheless, the commentators seem to be in disagreement. *Compare* H. LIU, *supra* note 18, at 24–25 (concludes that a majority assert that a treaty should prevail in case of conflict with municipal law, but concedes that there is an opposing minority among scholars in Taiwan) *with* Chiu, *The Position of Customary International Law and Treaties in Chinese Law*, in TRADE AND INVESTMENT IN TAIWAN 191, 203–04 (1973) (highly optimistic that a treaty provision would win out over municipal law).

56. FCN Treaty, *supra* note 2, art. III, para. 3, 63 Stat. at 1302–03, T.I.A.S. No. 1871 at 7–8.

57. *Id.*, art. III, para. 2, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7.

courts.[58] The interpretation of these provisions provides the answer to the dilemma of the non-recognized United States corporation that seeks to protect its intellectual property rights through a private criminal prosecution. Generally, the FCN Treaty provides a broad spectrum of rights for corporations.[59] As a whole, the FCN Treaty's relevant provisions were designed to give national treatment[60] whenever possible to the corporations of both the United States and China.[61] Within this framework, the relevant treaty provisions, properly interpreted, provide all non-recognized United States corporations access to the courts of Taiwan, including the right to initiate a private criminal prosecution.

A. *The Doing Business Provision*

The doing business provision of article III gives "corporations and associations"[62] the right to conduct certain businesses in the territories of the parties to the treaty.[63] The expressed goal of the parties is to treat each other's corporations consistent with the standard of national treatment, but each party also reserves the right to discriminate against foreign corporations.[64] Discriminatory control over businesses conducted by foreign corporations, however, cannot occur on less than a most-favored-nation basis.[65] Thus, under the doing business provision, Taiwan may

58. *Id.*, art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

59. *E.g.*, *id.*, art. III, 63 Stat. at 1302–03, T.I.A.S. no. 1871 at 7–8 (granting recognition of juridical status; the right to establish branches; and allowing a range of activities, including commercial, manufacturing, processing, financial, scientific, educational, religious, and philanthropic activities); *id.*, art. IV, 63 Stat. at 1303–04, T.I.A.S. No. 1871 at 8–9 (granting the right to organize, participate in, control, and manage corporations that undertake specified activities); *id.*, art. V, 63 Stat. at 1304, T.I.A.S. No. 1871 at 9–10 (mining rights on a most-favored-nation basis).

60. National treatment means that United States corporations in China would be treated just like Chinese corporations operating there; the same would apply to Chinese corporations operating in the United States. Simply stated, national treatment requires treatment equal to that of one's own nationals. No discrimination against foreign corporations is allowed when rights are secured on a national treatment basis. *See* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, part VII, § 801(2) (Tent. Draft No. 4, 1983).

61. FCN Treaty, *supra* note 2, art. III, para. 3, 62 Stat. at 1302–03, T.I.A.S. No. 1871 at 7–8.

62. *Id.* art. III, para. 1, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7: "[T]he term 'corporations and associations' shall mean corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which have or may hereafter be created or organized under the applicable laws and regulations enforced by the duly constituted authorities."

63. *Id.*, art. III, para. 3, 63 Stat. at 1302–03, T.I.A.S. No. 1871 at 7–8.

64. *Id.*, art. III, para. 3, 63 Stat. at 1303, T.I.A.S. No. 1871 at 5. Under the treaty, Taiwan can impose conditions on United States corporations seeking to do business in Taiwan, and the United States can do likewise with Chinese corporations seeking to do busines in the United States. Conceivably, foreign corporations might even be excluded from conducting certain businesses. For example, if the growth of the national economy required protection of any given industrial sector, Taiwan could exclude United States corporations from that sector.

65. *Id.*, art. III, para. 4, 63 Stat. at 1303, T.I.A.S. No. 1871 at 8. Most-favored-nation treatment

discriminate against foreign corporations by denying them recognition and admission as a matter of municipal law.[66] Such discrimination would not violate the doing business provision so long as the requirements of recognition and admission apply equally to all foreign corporations, regardless of nationality.

B. The Juridical Status Provision

The treaty sentence covering recognition of juridical status in article III, on the other hand, contains unqualified language.

> Corporations and associations created or organized . . . within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their juridical status recognized within the territories of the other High Contracting Party, whether or not they have a permanent establishment, branch or agency therein.[67]

The subsequent sentence deals with admission to do business through a branch,[68] and it allows discriminatory treatment by permitting foreign corporations to establish branches in Taiwan only if the corporation complies with the municipal law requirements of admission.[69] These sections of the treaty demonstrate that disparate standards apply to two separate legal concepts. Recognition of juridical status is on a pure national treatment basis.[70] The right to do business and the right to establish a branch,

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means that treatment given corporations of the party to the treaty must be equal to treatment given corporations of any third party nation. For example, if Taiwan granted special privileges for Japanese corporations to conduct certain businesses in Taiwan, this treaty clause would automatically confer the same privileges on United States corporations. In general, most-favored-nation status promotes equality of international treatment. *See* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, part VII, § 801(1) (Tent. Draft No. 4, 1983).

66. Min Fa Tsung-tse Shih-hsing Fa (Law Governing the Application of the General Provisions of the Civil Code) arts. 11–15, 32 CMHFH 19,806 (1981 & Supp. 1983); *see also* Kung-szu Fa (Company Law) art. 435, 21 CMHFH 13,049 (1981 & Supp. 1983) (documents needed and application procedures for recognition and admission).

67. FCN Treaty, *supra* note 2, art. III, para. 2, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7.

68. *Id.*:

> Corporations and associations of either High Contracting Party shall have the right to establish their branch offices in the territories of the other High Contracting Party and to fulfill their functions therein after they have complied with requirements of admission . . . , provided that the right to exercise such functions is accorded by this Treaty or the exercise of such functions is otherwise consistent with the laws and regulations of such other High Contracting Party.

69. *Id.*

70. *Id.*

however, which both require admission, are conditional rights; discrimination against foreign corporations is permitted.[71]

C. *The Access to Courts Provision*

The access to courts provision is contained in a separate article IV.[72] The relevant language states:

> The . . . corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies in the territories of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights . . . and shall be permitted to exercise all these rights and privileges, in conformity with the applicable laws and regulations, if any, . . . on terms no less favorable than the terms which are or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party and no less favorable than are or may hereafter be accorded to the nationals, corporations and associations of any third country. Moreover, corporations and associations of either High Contracting Party which do not have a permanent establishment, branch or agency within the territories of the other High Contracting Party shall be permitted to exercise the rights and privileges accorded by the preceding sentence upon the filing, at any time prior to appearance . . . , of reasonable particulars required by the laws and regulations of such other High Contracting Party without any requirement of registration or domestication.[73]

The meaning of this provision is best discerned by analyzing the sentences both independently and in juxtaposition. The first sentence clearly states a national treatment standard. The second sentence guarantees freedom of access to courts for a United States corporation without a "permanent establishment, branch or agency" in Taiwan. Recognition and admission, the lack of which the district court used to bar Apple Computer's suit,[74] are the municipal law prerequisites for organizing a branch office in Taiwan.[75] If a foreign corporation must be recognized and admitted in

71. *Id.* (establishing branches); *id.*, art. III, para. 3, 63 Stat. at 1302–03, T.I.A.S. No. 1871 at 7–8 (doing business).

72. *Id.*, art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

73. *Id.*

74. *See supra* notes 27–29 and accompanying text.

75. *See* Kung-szu Fa (Company Law) art. 371, 21 CMHFH 13,049 (1981 & Supp 1983). There are significant disincentives to this recognition and admission process. Far from being merely ministerial, it imposes obligations that can be onerous. Within fifteen days following recognition and admission, the foreign corporation must apply to the Ministry of Economic Affairs to establish its branch in Taiwan. *See id.*, art. 436, 21 CMHFH 13,059. In addition, setting up a branch requires a minimum capital of US$25,000, none of which can be repatriated. *See id.*, art. 372, 32 CMHFH

Taiwan before it can enjoy full access to Taiwan's courts, the second sentence of the quoted treaty provision, which confers access to courts on entities without branches in Taiwan, is ineffective. Recognition and admission, then, should not be prerequisites to access to courts under this treaty provision.

Moreover, the context provided by the doing business provision and the juridical status provision suggests that recognition and admission were not meant to be prerequisites to access to courts. Although the right to organize branches is qualified and subject to discriminatory control under the doing business provision,[76] recognition of juridical status is not. The juridical status provision states that all United States corporations, including those with no presence in Taiwan, must be recognized by Taiwan.[77] Access to courts is similarly unqualified because the FCN Treaty grants this right on pure national treatment terms.[78]

Finally, common sense suggests that recognition of juridical status should be the only condition precedent to bringing any suit.[79] If recognition and admission are both conditions precedent to access to Taiwan's courts, even the corporation with no presence in Taiwan would be required to invest at least US$25,000 and establish a branch office[80] to bring a simple contract claim or enforce United States judgment against a Taiwanese seller. Doing business or setting up a branch office cannot be equated with the right to prosecute, defend, sue, or be sued.

Documents from the treaty negotiations support this conclusion.[81] The

19,049; *see also* M. LIN & M. HICKMAN, LEGAL ASPECTS OF DOING BUSINESS IN TAIWAN 1984 at 79–81 (1984).

76. FCN Treaty, *supra* note 2, art. III, para. 2, 63 Stat. at 1302, T.I.A.S. No. 1871 at 7 (The right to organize branches is conditioned on compliance with "requirements of admission" and the functions of a branch must be "consistent with the laws and regulations" of the admitting nation).

77. *Id.*

78. *Id.* art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

79. The treaty right of access to courts for United States corporations without any presence in Taiwan can be likened to the same right guaranteed to foreign corporations within our federal system by the United States Constitution. Doing business clearly requires recognition and admission, much as a Delaware or any other non-Washington corporation must register in Washington to do business there. *See* WASH. REV. CODE § 23A.32.010 (1983). Only if a foreign corporation does business in Washington without registering is access to Washington courts denied. *Id.* § 23A.32.190. Denial of access to courts is thus a penalty for failing to comply with Washington's registration requirements.

Denial of access to courts to foreign corporations not doing business in Washington is an entirely different matter. Such a denial implicates the equal protection and due process clauses of the fourteenth amendment. Because corporations are "persons" within the meaning of the fourteenth amendment, Washington cannot deny the right to institute suits in its courts to a foreign corporation not doing business in Washington state. *See, e.g.*, Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923).

80. *See* M. LIN & M. HICKMAN, *supra* note 75, at 79–81. Recognition and admission also impose additional burdens. *See infra* note 83.

81. The minutes themselves state their legal effect. They are to be used as a source of the parties' intentions when needed to explain ambiguities, in accord with 5 G. HACKWORTH, DIGEST OF INTERNA-

drafters consciously separated the provisions for recognition of juridical status, doing business, and access to courts.[82] They did not intend lack of registration in Taiwan to be a barrier to recognition of status,[83] nor a barrier to access to courts.[84] Thus, the treaty grants the right of access to Taiwan's courts for United States corporations that have no "permanent establishment, branch or agency" in Taiwan if the corporation, prior to its court appearance, files "reasonable particulars . . . without any requirement of registration or domestication."[85] The "reasonable particulars" required are procedural.[86] This is not the equivalent of recognition and admission, which is a substantive precondition only to doing business.[87] Indeed, the United States proposed and the Chinese accepted this provision intending to provide full access to courts regardless of registration or recognition and admission for doing business.[88]

TIONAL LAW § 497 at 259–63 (1942). *See* Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Aug. 21 and 22, 1946, at 2. If Taiwan's courts are to give this declaration effect, use of the minutes must first be legitimized by some other means. *See infra* notes 110–20 and accompanying text.

82. Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Feb. 20, 1946, at 8; *id.*, Memorandum of Conversation, Feb. 21, 1946, at 2; *id.*, Memorandum of Conversation, Mar. 16, 1946, at 4; *id.*, Memorandum of Conversation, June 7, 1946, at 1.

83. *See id.*, Memorandum of Conversation, Feb. 14, 1946, at 2.

84. *Id.*, Memorandum of Conversation, Feb. 14, 1946, at 3; *id.*, Memorandum of Conversation, Feb. 20, 1946, at 7–8; *id.*, Memorandum of Conversation, Feb. 21, 1946, at 1–2.

85. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305–06, T.I.A.S. No. 1871 at 11.

86. Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Mar. 16, 1946, at 8; *id.*, Memorandum of Conversation, Mar. 28, 1946, at 5; *id.*, Memorandum of Conversation, Apr. 3, 1946, at 4.

87. *See* Min Fa Tsung-tse Shih-hsing Fa (Law Governing the Application of the General Provisions of the Civil Code) arts. 11–12, 32 CMHFH 19,806 (1981 & Supp. 1983). *See also supra* notes 28 and 29.

88. *See* Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Feb. 14, 1946, at 3; *id.*, Memorandum of Conversation, Feb. 20, 1946, at 7–8; *id.*, Memorandum of Conversation, Feb. 21, 1946, at 1–2.

The minutes of Feb. 20, 1946, in particular, show the intent of these provisions by reference to the *Chickering* case decided by the Mexican Supreme Court in 1930, which is reported in 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 292 at 713–14 (1942), and to the Protocol Embodying a Declaration on the Juridical Personality of Foreign Companies, *opened for signature* June 25, 1936, 55 Stat. 1201, T.S. No. 973, 161 U.N.T.S. 217.

The *Chickering* case is significant for its determination that a United States corporation had the right to maintain an action for trademark infringement in the courts of Mexico even though it had not registered there as required by the Mexican Commercial Code. *See* 3 G. HACKWORTH, *supra*, § 292 at 713 (1942). The Mexican Supreme Court drew a clear line between conducting commercial activities, which required registration, and access to courts. *Id.* at 713–14. Although a Mexican constitutional question was also involved, *id.* at 713, the reasoning employed in the *Chickering* case applies equally well to the situation in Taiwan. A similar rule is found in the Protocol Embodying a Declaration on the Juridical Personality of Foreign Companies, *opened for signature* June 25, 1936, 55 Stat. at 1204, T.S. No. 973 at 4, 161 U.N.T.S. at 218.

D. Resolution of Textual Ambiguities

The access to courts provision contains internal ambiguities. These specific ambiguities can affect the scope of rights conferred on the non-recognized corporation, depending on how the language is interpreted.

1. Right to Institute a Private Criminal Prosecution

First, the Taiwan High Court in *Apple Computer Company v. Li* doubted whether the access to courts provision includes the right to initiate a private criminal prosecution.[89] The court's doubt seems based on the language that describes freedom of access as access exercised "in pursuit and in defense of their [nationals', corporations', and associations'] rights."[90] At first glance, this phrase suggests that the treaty limits the foreigner's access to courts to civil litigation.[91] Civil litigation involves private rights: plaintiffs seek to enforce their rights, and civil defendants defend their rights. Criminal suits, on the other hand, are often said to involve public rights. Close analysis, however, indicates that the phrase "in pursuit and defense of their rights" includes initiation of a private criminal prosecution.

In Taiwan, the private criminal prosecution involves both private and public rights. It vindicates public rights by imposing criminal sanctions. A private criminal prosecutor must also demonstrate that the alleged criminal conduct has affected its private rights.[92] A complainant such as Apple Computer is thus pursuing its rights within the treaty language[93] when it initiates a private criminal prosecution.[94]

2. Recognition and Admission

Another ambiguity exists because the FCN Treaty's drafters qualified the right of access to Taiwan's courts. It must be exercised "in

89. Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

90. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 11.

91. At least one practicing attorney in Taiwan has come to this conclusion. Cheng, Mei Shang Tsai Wo-kuo Tsu-su Shih-ko Cheng-tien Suo-she Shih-hsi at 2 (1983) (unpublished manuscript) (copy on file with the *Washington Law Review*).

92. *See* T. TSAI, HSING-SHIH SU-SUNG FA LUN 396, 400–01 (3d ed. 1982).

93. The treaty provision is reproduced *supra* text accompanying note 73.

94. Moreover, unless the access to courts provision includes this type of action, its broad stipulation that "nationals, corporations and associations . . . shall enjoy freedom of access to the courts" rings hollow. Access is access, not limited access. The spirit of this provision thus also supports an intepretation that places the right to bring a private criminal prosecution within its scope.

conformity with the applicable laws and regulations, if any."[95] Considered alone, this qualification could be interpreted to allow statutory or regulatory discrimination against foreign entities. The sentence, however, concludes with a statement of unqualified national treatment. This national treatment language governs the terms of the grant of the substantive right of access to courts.

The structure of the sentence viewed as a whole indicates that the phrase "in conformity with the applicable laws and regulations" refers to procedural matters. The phrase modifies the verb "to exercise." The object of that verb is the substantive right of access to courts. The applicable laws and regulations are those governing the manner in which the right of access to courts must be exercised; they cannot govern the scope of that substantive right, which is granted on national treatment terms.[96]

The context of the "applicable laws and regulations" clause[97] also demonstrates that the clause refers to procedural requirements only. If this clause referred to the substantive requirements of recognition and admission, the sentence immediately following, which provides access to courts for entities that by definition have not been recognized and admitted,[98] would be effectively read out of the treaty. It is unlikely that any treaty provision, least of all one subject to extensive redrafting and negotiation,[99] would have been intended to have no actual effect. Thus, the clause declaring that the right of access to courts must be exercised "in conformity with the applicable laws and regulations, if any"[100] imposes only ordinary procedural requirements.

3. *The Scope of Access to Courts*

The fact that both Chinese and English are authentic languages for this treaty[101] gives rise to yet another potential ambiguity in the access to courts provision. Although the English text guarantees "freedom of access to the courts,"[102] the Chinese text says freedom to "*ch'en su.*"[103] The meaning of the term *ch'en su* is debatable, and some Chinese writers have concluded that it only encompasses bringing a civil action.[104] How-

95. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 11.
96. The treaty provision is reproduced *supra* text accompanying note 73.
97. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 11.
98. *See id.*
99. *See* Dep't of State, file no. 711.932, *supra* note 2.
100. FCN Treaty, *supra* note 2, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 11.
101. *Id.*, signatures, 63 Stat. at 1322, T.I.A.S. No. 1871 at 30.
102. *Id.*, art. VI, para. 4, 63 Stat. at 1305, T.I.A.S. No. 1871 at 11.
103. *Id.*, art. VI, para. 4, 63 Stat. at 1370, T.I.A.S. No. 1871 at 76 (Chinese text).
104. *See* Chang, pt. 1, *supra* note 25.

ever, *ch'en su* seems to be a generic term, much as the "access to courts" term in English. Clearly, *ch'en su* is not a specific procedure; rather, it is defined as "pleading"[105] or "the victim's act of informing a court."[106] Either definition is sufficiently broad to cover any specific procedure or pleading, including initiation of a private criminal prosecution.

Contextual advantages follow from this broad reading of *ch'en su*. First, it reconciles the English and Chinese texts of the treaty.[107] Second, it is in harmony with the additional treaty guarantee of "effective remedy"[108] for patent and trademark infringement. The FCN Treaty specifically defines "effective remedy" to include remedies by other than civil action.[109] Thus, the term *ch'en su* must be read broadly, because reading it narrowly would deny the right to seek non-civil remedies for patent and trademark infringement.

V. ADVOCATING TREATY RIGHTS IN TAIWAN: THE CHOICE OF INTERPRETIVE METHODOLOGY

Given that the FCN Treaty is a legitimate source of law and that its provision for access to courts is self-executing, the United States complainant in a court of Taiwan must convince the court that its interpretation of the substantive language is correct. At this juncture, choice of interpretive methodology is crucial. Preliminarily, the United States litigant should recognize that a textual approach is most likely,[110] and that

105. MATHEWS' CHINESE-ENGLISH DICTIONARY 41 (rev. Am. ed. 1931); LIN YUTANG'S CHINESE-ENGLISH DICTIONARY OF MODERN USAGE 549 (1972).

106. 3 KUO-YU TZ'U-TIEN 2849 (n.d.); 2 KUO-YU TZ'U-TIEN 1280 (n.d.).

107. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 33(3)–(4), 8 I.L.M. 679, 692–93 (1969) (entered into force Jan. 27, 1980) [hereinafter cited as Vienna Convention]. The Convention is reprinted in SEN. EXEC. DOC. L, 92d Cong., 1st Sess. (1971) and in 63 AM. J. INT'L L. 875 (1969). The documentation on the Conference debates is voluminous. For a partial list of background material and commentary, see RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES part III, introductory note (Tent. Draft No. 1, 1980); *see also* T. ELIAS, THE MODERN LAW OF TREATIES (1974).

108. FCN Treaty, *supra* note 2, art. IX, 63 Stat. at 1308–09, T.I.A.S. No. 1871 at 14–15.

109. *Id.*, Protocol, para. 5(b), 63 Stat. at 1323–24, T.I.A.S. No. 1871 at 32. The private criminal prosecution is such a non-civil remedy.

Moreover, the United States government was aware that such a remedy existed in Chinese law as far back as 1930. *See* Agreement Relating to the Chinese Courts in the International Settlement at Shanghai, Feb. 17, 1930, art. V, 47 Stat. 2713, 2713–14, E.A.S. No. 37, at 1–2, 102 L.N.T.S. 87, 90 (Procurators are to exercise their function in all criminal cases involving certain provisions of the criminal code, "except where . . . *the party concerned* has already initiated prosecution . . . . In other cases arising within the jurisdiction of the Courts, the Municipal Police *or the party concerned* shall prosecute.") (emphasis added).

110. *See* Keum, *On the Interpretation of Treaties*, 1981 ANNALS OF THE CHINESE SOC'Y OF INT'L L. 81, 87 (stating that even the Vienna Convention is a textual approach; the text is the best guide for finding the parties' intentions); *see also supra* text accompanying notes 15–16.

the chances of a correct interpretation under this approach are fairly good. The probability of an interpretation favorable to one in Apple Computer's position increases if the court bases its interpretation in part on the record of negotiations.[111] The dilemma is clear. Because the court is initially predisposed to ignore the negotiations and focus only on the text, which harbors potential ambiguities,[112] the United States complainant may be forced to promote an interpretive methodology which legitimizes use of the record of negotiations.[113] Once the court considers the negotiations documents, interpretation will lead to the conclusion that a United States corporation, even one not recognized and admitted in Taiwan, has the right to initiate a private criminal prosecution.[114]

The Vienna Convention on the Law of Treaties (Vienna Convention)[115] provides a methodology likely to assist a litigant in Apple Computer's position. Articles 31–33 represent a compromise between the teleological approach[116] and the textual approach to treaty interpretation[117] that should be acceptable to the Taiwan courts.

The Convention's approach to interpretation is a two-stage process. The text comes first.[118] Once the decisionmaker has made a preliminary interpretation based on the text, secondary materials may be consulted for confirmation.[119] At this second stage, the minutes of the negotiations

111. *See supra* notes 81–88 and accompanying text.

112. *See supra* text accompanying notes 89–99.

113. The minutes are apparently unpublished in the United States, but copies can be obtained from the National Archives. It is likely that the documents are not available at all in Taiwan. The litigant who foresees relying on these minutes to support a favorable interpretation must be ready to bring them to court in Taiwan.

114. *See supra* text accompanying notes 60–99.

115. Vienna Convention, *supra* note 107.

116. The teleological approach to treaty interpretation is characteristic of United States theory and practice. Schaffer, *Current Trends in Treaty Interpretation and the South African Approach*, [1976–1977] 7 AUSTL. Y.B. INT'L L. 129, 133 (1981). Chief among its features are recourse to extrinsic materials and reliance on circumstances at the time of interpretation to determine the purposes of the treaty. *Id.*; *see also* M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967); Harvard Research in International Law, Draft Convention on the Law of Treaties, 29 AM. J. INT'L L., Supp. 653 (1935) (example of the teleological approach).

117. Schaffer, *supra* note 116, at 135–47.

118. Vienna Convention, *supra* note 107, art. 31, 8 I.L.M. at 691–92. The Convention defines "text" broadly. It includes the preamble, annexes, and any instrument contemporaneous with the treaty and accepted by the other party as relating to the treaty. *Id.*, art. 31(2), 8 I.L.M. at 692. The minutes of the negotiations of the FCN Treaty arguably fit within this language because both parties in the minutes themselves agreed to the use of the minutes as expressions of their intentions. Dep't of State, file no. 711.932, *supra* note 2, Memorandum of Conversation, Aug. 21 and 22, 1946, at 2.

119. Vienna Convention, *supra* note 107, art. 32, 8 I.L.M. at 692 ("recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31").

become pertinent.[120] Under the Vienna Convention, relying on the record of negotiations can thus confirm the reading of the treaty favorable to Apple Computer's position.

The problem thus becomes legitimizing the use of the Vienna Convention. Neither the United States nor the government of Taiwan have ratified the Convention, although both have signed it.[121] Nevertheless, the Convention has much to recommend its use. The Vienna Convention is politically neutral. It also represents prevailing world opinion concerning treaty law.[122] As a member of the international community, Taiwan can only enhance its position by clearly recognizing and adopting those rules as its own. In addition, the Convention's approach to interpretation starts with the text,[123] which is in accord with the expected practice in Taiwan.[124] Treaties by nature are effective only if uniformity of interpretation can be fostered. Preliminary agreement between nations on their general approach to treaty interpretation may perhaps lead to more uniform results. At the very least, mere use of the Vienna Convention promotes the standardization of treaty interpretation regardless of when or where a particular interpretation takes place.

The Convention, however, did not come into force until January 27, 1980.[125] It specifically states that it applies only to treaties concluded after the Convention enters into force.[126] Thus, the Vienna Convention technically does not apply to the FCN Treaty, which entered into force in 1948.[127] Regardless of that apparent limitation, however, the courts of Taiwan may still use the rules embodied in the Convention for interpreting the FCN Treaty. Most of the rules in the Convention are not novel; indeed, the Convention represents a codification of customary

120. *Id.*

121. *See* Secretary General of the United Nations, Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1982, U.N. Doc. St/Leg/Ser.E/2 at 651, 656 (1983). The Convention has been in committee in the United States Senate since November 22, 1971. S. EXEC. DOC. L, 92d Cong., 1st Sess. (1970) (transmittal from the President and referral to the Committee on Foreign Relations). On September 7, 1972, the Committee was prepared to report favorably, but subject to an understanding that the Convention would not affect the internal law of the United States concerning the necessity of the Senate's advice and consent. The Department of State objected and an alternative was proposed. *See* A. ROVINE, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 195–99 (1975). Apparently, nothing has happened on record since.

122. *See* A. ROVINE, 1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 307, 483 (1974) (Convention codifies customary international law); A. ROVINE, *supra* note 121, at 235 (Convention represents consensus of the world's treaty law).

123. Vienna Convention, *supra* note 107, art. 31, 8 I.L.M. at 691–92.

124. *See supra* note 15 and accompanying text.

125. Secretary General of the United Nations, *supra* note 121, at 651.

126. Vienna Convention, *supra* note 107, art. 4, 8 I.L.M. at 682.

127. FCN Treaty, *supra* note 2, art. XXX, 63 Stat. at 1322 & 1322 n.1, T.I.A.S. No. 1871 at 30 & 30 n.1.

international law.[128] Its rules reflect the law of treaty interpretation for treaties that predate its entry into force.[129] Thus, the non-retroactivity limitation on the application of the Vienna Convention should not preclude use of the rules of customary international law embodied in the Convention.[130]

VI. NON-LEGAL CONSIDERATIONS

Despite the history of discrimination against aliens in Taiwan,[131] non-legal economic considerations suggest that Taiwan's courts will allow litigants in Apple Computer's position to initiate private criminal prosecutions. Apple Computer is a member of the growing high-technology industry, and Taiwan hopes to attract this type of industry.[132] Intellectual

128. *See supra* note 122; *see also* S. EXEC. DOC L, 92d Cong., 1st Sess. 2 (1970) (letter of submittal to the President).

129. Despite the non-retroactivity provision in the Convention itself, courts have applied the rules and methodology it delineates to pre-Convention treaties. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 47 (applying the Vienna Convention, art. 60, on material breach, to a League of Nations Mandate giving South Africa mandatory powers over Namibia); Beagle Channel (Argen.-Chile), 17 I.L.M. 632, 645, 646, 648 (1978) (both parties to the international arbitration by the Queen of England agreed to apply the Vienna Convention to their boundary treaty of 1881; the arbitrator followed their wishes without objection).

130. Two papers from Taiwan generally applaud the Vienna Convention. *See* Keum, *supra* note 110, at 95 (Vienna Convention a "long step forward" in the law of treaties); Wang, *On the Interpretation of Treaties*, 1981 ANNALS OF THE CHINESE SOC'Y OF INT'L L. 98, 104 (similar laudatory language).

Moreover, lack of ratification by either the United States or Taiwan does not foreclose use of the Vienna Convention. The courts of the United States have been using the Convention as an authoritative source for rules of treaty interpretation. United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978) (citing art. 36 on rights of third party states as additional authority for conclusion that the 1958 Convention on the High Seas did not confer rights on nationals of non-ratifying countries); Day v. Trans World Airlines, Inc., 528 F.2d 31, 33, 36 (2d Cir. 1975) (citing Vienna Convention, art. 31, as authority for rules of interpretation in the process of interpreting a 1929 convention on international air transportation as modified by a 1970 agreement), *cert. denied*, 429 U.S. 890 (1976); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972) (citing art. 31(3)(6) as authority for interpreting treaties by reference to subsequent conduct of the parties when the treaty is silent on the particular problem), *aff'd*, 485 F.2d 1240 (2d Cir. 1973). The United States Supreme Court has also implicitly adopted the two-stage approach of the Convention in its most recent case of treaty interpretation. *See* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982). Although the Court did not cite the Vienna Convention in the process of interpreting the United States-Japan Treaty of Friendship, Commerce and Navigation, the Court's approach to treaty interpretation follows the approach of the Vienna Convention. The Court began with the text of the treaty. *Id.* at 180. Once the court interpreted the particular provision, it found support in extrinsic materials from the governments of both the United States and Japan. *Id.* at 183. Thus, the Court's approach is precisely what the Vienna Convention prescribes: interpretation based on the text and confirmed by secondary materials. Vienna Convention, *supra* note 107, arts. 31, 32, 8 I.L.M. at 691–92. There is no reason why the courts of Taiwan cannot be persuaded to follow suit.

131. *See* Liu, *The Treatment of Aliens as Viewed from Chinese Legal Thought, Treaties and Legislation*, 22 SHE-HUI K'E-HSUEH LUN-TS'UNG 1971 198–204 (1973).

132. Taiwan presently offers major incentives for foreign investment in high-technology indus-

property rights are of major concern to this industry. Protection is sought both at home and abroad. Lack of protection for intellectal property can only slow the influx of foreign capital. Taiwan has a stake in keeping enterprises like Apple Computer satisfied with the treatment they receive in the courts.

Moreover, although intellectual property rights have generally been a source of friction in United States-Taiwan relations,[133] much of the source of that friction may be of little more than historical note.[134] As Taiwan's economy develops, attitudes are changing. Taiwan does not seek privileged access to copyrighted and patented materials from the developed nations.[135] The economic barriers to such materials are diminishing rapidly in Taiwan. Domestic development policy, which actively encourages foreign investment in high-technology industries, and improving economic conditions in Taiwan both augur well for increased protection of United States intellectual property rights.

The High Court decision vacating the judgment of dismissal in *Apple Computer Company v. Li*[136] is indicative of these changing conditions in Taiwan. The decision was remarkably non-committal on the treaty issues.[137] This fence-straddling may continue for a while. But with an adequate presentation, litigants in Apple Computer's shoes can succeed in

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tries. *See, e.g.*, K'e-hsüeh Kung-yeh Yüan-ch'ü She-chih Kuan-li T'iao-li (Statute for the Establishment and Management of a Science-Based Industrial Park), 31 CMHFH 19,347–54 (1981 & Supp. 1983). This statute is the basis for the Hsinchu Science-Based Industrial Park now operating in Taiwan. The statute interacts with other legislation to provide for generous tax benefits, privileges for repatriation of profits, guarantees against expropriation and simplification of administrative procedures for foreign enterprises operating in the park. *See* M. LIN & M. HICKMAN, *supra* note 75, at 52, 93–94 (general background on the park and its purposes). By mid-1983, foreign and domestic investment in the Hsinchu Science-Based Industrial Park had reached US$74 million. *Id.* at 65.

133. *See supra* note 1.

134. The *Apple Computer* case has stirred much controversy in Taiwan. Currently, copyright legislation is pending that would remove any barriers for the non-registered corporation that seeks to protect its copyright through a private criminal prosecution. The draft bill amends only the copyright law, expressly authorizing the private criminal prosecution remedy for foreign corporations that have not been recognized and admitted in Taiwan. *See Chu-tsuo-ch'üan Fa Hsiu-cheng Tsao-an Shuoming* (Explanation of Draft Revision of the Copyright Law) (1983) (copy on file with the *Washington Law Review*). The same economic considerations that increase the likelihood that the courts of Taiwan will recognize the full scope of access to courts also increases the likelihood that this copyright legislation will pass. *See supra* text accompanying notes 135–36. Nevertheless, this proposed copyright legislation, even if passed, would still leave open the issue of whether a United States corporation has a treaty right to initiate a private criminal prosecution in the case of patent or trademark infringement.

135. *See* Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 J. COPYRIGHT SOC'Y 402, 406–10 (1982).

136. Criminal Judgment of Mar. 14, 1983, Taiwan High Court (copy on file with the *Washington Law Review*).

137. *Id; see also supra* text accompanying notes 33 and 37.

getting the Court off its fence and squarely on the side of maximum protection for intellectual property rights.

VII. CONCLUSION

The FCN Treaty, properly interpreted, gives complete freedom of access to the courts of Taiwan. Under the FCN Treaty, access to courts should be provided to all United States corporations, including corporations that have not been recognized and admitted in Taiwan. Moreover, the scope of rights conferred by the access to courts provision includes the right to initiate a private criminal prosecution. Thus, the Taipei district court dismissal of Apple Computer's private prosecution for criminal copyright infringment was erroneous. The subsequent vacation of that judgment on appeal did not completely vindicate Apple Computer's treaty rights.

While Apple Computer prevailed on the merits after remand, the FCN Treaty right of access to courts for the non-recognized United States corporation is still uncertain in Taiwan. The future can be ensured by persuading the courts of Taiwan to address these issues, and to adopt the Vienna Convention on the Law of Treaties as the international law norm for treaty interpretation. Future United States complainants could thus rely on an accurate interpretation of the access to courts provision. This will follow because under Taiwan's municipal law, courts can directly apply treaties, and this self-executing provision does not directly conflict with any municipal legislation. Even if the courts perceive a conflict with municipal law, however, the treaty provision should still prevail. Once interpreted to confer the right to initiate a private criminal prosecution, the treaty will prevent dismissals such as the one Apple Computer faced in district court.

Both legal and non-legal incentives exist for the courts to provide full protection for United States intellectual property rights. From a legal and economic standpoint, United States corporations can expect to enjoy full access to the courts of Taiwan. That access should include an unquestioned right to the protection offered by a private criminal prosecution consistent with the goals of the FCN Treaty and international norms.

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