EU-CHINA 中国
IPR2 欧盟
知识产权项目二期

THIRD REVISION OF
CHINA'S PATENT LAW

Legal texts and documents on the drafting process 2006-2008

The content of this publication has been compiled by the EU-China Project on the Protection of Intellectual Property Rights (IPR2), as part of its work on supporting the revision of China's IP laws and providing stakeholders and practitioners with access to relevant documentation and information on IP law.

For further information visit
www.ipr2.org or contact info@ipr2.org.

IPR2 is a partnership project between the European Union and the People's Republic of China on the protection of intellectual property rights in China. This is done by providing technical support to, and building the capacity of the Chinese legislative, judicial and administrative authorities in administering and enforcing intellectual property rights; improving access to information for users and officials; as well as reinforcing support to right holders. IPR2 targets the reliability, efficiency and accessibility of the IP protection system, aiming at establishing a sustainable environment for effective IPR enforcement in China.

Europäisches Patentamt
European Patent Office
Office européen des brevets

The European Patent Office (EPO) is the European implementing organisation for IPR2, and draws on expertise from its Member States in specific fields and the Office for the Harmonisation of the Internal Market (OHIM) on trademark and design.

www.epo.org
www.oami.europa.eu

中华人民共和国商务部
MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

The Ministry of Commerce (MOFCOM) is the IPR2 Chinese implementing organisation.

www.mofcom.gov.cn

THIRD REVISION OF CHINA'S PATENT LAW
Legal texts and documents on the drafting process 2006-2008

China's National IP Strategy (NIPS), released in June 2008, sets mid term targets and overall objectives aimed at improving the creation, utilisation, protection and administration of intellectual property. One of the supporting pillars set in the NIPS is the revision of the framework of IP laws and regulations. The adoption in December 2008 of the new Patent Law by the Standing Committee of the National People's Congress - China's highest legislative authority - is the first result in the revision plan set in the NIPS.

The Patent Law will take effect on 1 October 2009, as the third amendment since it was passed in March 1984 and modified in September 1992 and August 2000. The law involves a number of substantial changes aimed at providing more effective protection of patent rights, in line with international developments and Chinese specificities, and at encouraging innovation and utilisation of patent protection.

The Third Revision of China's Patent Law: Legal texts and documents on the drafting process 2006-2008 has been published by the EU-China Project for the Protection of Intellectual Property Rights (IPR2), a co-operation initiative between the European Union and the People's Republic of China on the enforcement of IP rights. It forms part of IPR2's work on supporting revision of the major IP laws under the implementation of China's National IP Strategy.

This publication includes the most relevant documentation that came out of the revision, including the legal texts and the supporting documents. The explanatory notes issued by the authorities are complemented with comments submitted by institutional stakeholders and industry. In doing so, the publication offers a comparative overview - neither comprehensive nor exhaustive - of the changes made at the subsequent stages of the drafting process.

By documenting the legislative path, the IPR2 Project intends to present all parties who contributed to the drafting procedure with a token of gratitude, to give recognition to the transparency of the consultation process and to highlight the co-operation of the European Union with the Government of the People's Republic of China.

We hope this publication will prove to be a valuable source of information for all stakeholders, in particular officials, academics, students and legal professionals, regarding the purpose and objectives behind the third revision of the Patent Law.

Carlo Pandolfi
Technical Assistance Team Leader
EU-China IPR2 Project

CONTENTS

Introduction

The adoption of the amendments to the Chinese Patent Law by the Standing Committee of the National People's Congress (NPC) on 27 December 2008 (Patent Law 2008)[1] marked the first major legislative step in the field of IP law after the release of the National IP Strategy (NIPS) in June 2008. The announcement of NIPS noticeably accelerated the legislative procedure for the patent law revision as NIPS defines the revision of the Patent Law as a key requirement for the achievement of its working targets for 2013 as well as for the overall objective of fully improving the creation, utilization, protection and administration of IP by 2020.

This introductory article gives a brief overview of the legislative process for the revision of the law as well as the main new features of the revised law. It should be read in conjunction with the documents compiled in this publication for a valuable insight and a better understanding of the whole revision process.

I. Motivations behind the amendment

The Patent Law of the People's Republic of China was first enacted in 1985 and successively amended three times. The first amendment, that inaugurated China's membership in the Patent Cooperation Treaty (PCT), was endorsed in 1992. The second amendment in 2000 focused on the alignment of the Chinese Patent Law system with the provisions of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) prior China's accession to the WTO. These changes included the strengthening of the patent owner's rights against infringement and the provision of new means of protection such as injunctions. At a first glance, it is clear that the first two revisions of the Patent Law followed the country's bid to join the international system of protection for IPRs and the World Trade Organization (WTO) with the aim of fostering domestic industrial property development as well as attracting foreign investments by endorsing a system of law as familiar as possible to that of foreign investors.

However, problems connected with the enforcement of the law and with the special social cultural environment in China hindered, to a certain extent, the realization of the legislative goal, the effective protection of patent rights. Insofar, one must always consider that the country's IP law system is remarkably new compared to the respective systems in European countries. Many of the currently existing problems in the Chinese IP system are typical features of the transition from a centrally planned economy to a market economy.

1 See Section I for the full text of the Patent Law 2008.

In recent years, the protection of Intellectual Property rights has increased its significance on the political agenda with the consequent need of developing a strategy that balances IPRs, public interests and international obligations. Particularly the promotion of technological innovation is stated as being directly related with the economic development. Based on the comprehensive understanding of the importance of self-innovation the need for greater efforts to improve China's capacity for independent innovation and the respective perfection of the IPR protection system was made absolutely clear at 17th Congress of China's Communist Party in November 2007 and let to the adoption of NIPS in June 2008.

Giving this background, the drafters for the third revision of the patent law focussed on two areas. Firstly, the strengthening of the protection of the legitimate rights and interests of right holders, the encouragement of innovation and the promotion of timely implementation und utilization of patented technology. Secondly, the harmonization of the Chinese Patent Law with international patent treaties by taking into due accounts the specific national conditions and the actual needs of the country.

II. Legislative process for revision

The actual process for the third revision of the Patent Law started as early as 2005. In accordance with the provisions of the Chinese Legislation Law, the State Intellectual Property Office (SIPO) commissioned research in more than 10 fields related to patent legislation considered to be in urgent need of an update and revision. The different teams, composed of experts, scholars, scientific research institutions, governmental authorities, judicial authorities and social agencies collected an impressive amount of material which lead to the compilation of 40 exhaustive research reports on as many specific topics. Based on these researches, SIPO started from March 2006 to organize several expert symposia and meetings for soliciting opinions on the different issues identified.

The first draft of the amendments to the Patent Law was released for public comments by SIPO in December 2006[2] and was accompanied by explanatory notes[3]. Following this round of public consultation[4] the draft law was once more revised and then submitted to the Legislative Affairs Office of the State Council (LAO). The following two years were spent on researches, request for suggestions, opinion and discussion. LAO, supported by SIPO, requested opinions from 72 central departments and units, 35 local people's governments, 14 local courts, more than 20 enterprises and public institutions as well as experts and scholars. On the basis of the received input, a refined draft was released by LAO for public comments in March 2008[5]. Following a new round of consultations with domestic and international agencies and organizations[6] a new draft law was then submitted by the State Council to the Standing Committee of NPC for the first reading and review at the end of August 2008[7].

The delicate final phase of the drafting proceeding conducted by the Legislative Affairs Commission of the Standing Committee of NPC included again researches and a number of consultations with domestic and foreign experts[8] before the Standing Committee of NPC adopted the revision after the second reading of the law in December 2008. The revision will only enter into force on 1 October 2009 in order to provide sufficient time for consequent amendments to the Implementing Regulations of the Patent Law.

III. Major changes

The third amendment revised a substantial number of provisions in the Patent Law and also added completely new articles to the law. Important changes include the following:

2 See Section II 1 a for the full text of December 2006 Draft Patent Law.

3 See Section II 1 b for the full text of SIPO Explanatory Notes on December 2006 Draft Patent Law.

4 See Section II 1 c for the full text of EUCCC and EPO comments on December 2006 Draft Patent Law.

5 See Section II 2 a for the full text of March 2008 Draft Patent Law.

6 These consultations included an EU-China Expert Roundtable organized by LAO in cooperation with IPR2 in Beijing in May 2008. See Section II 2 e for the full text of Experts Conclusion Report on the roundtable as well Sections II 2 b, c and d for the full texts of comments from EUCCC, EC/EPO and OHIM on the March 2008 Draft Patent Law.

7 See Section II 3 a for the full text of August 2008 Draft Patent Law.

8 This included an EU-China Workshop organized by LAC in cooperation with IPR2 in Harbin in September 2008. See Section II 3 e for the full text of the Experts Conclusion Report on the workshop as well as Sections II 3 c and d for the full texts of comments from the EUCCC and EC on the August 2008 Draft Patent Law.

1. Patent Granting Procedure

a. Foreign Filing Requirements

The requirement that inventions completed in China must be first filed in China has been deleted. The new Patent Law replaces such filing requirement with a mandatory advance confidentiality examination. Article 20 Patent Law 2008 requires an advance application for confidentiality examination with SIPO before any patent filing abroad for inventions completed in China. Failure to comply with this requirement will result in the non-patentability of the respective invention in China. It has to be noted that the earlier drafts of revised law contained a much more detailed mechanism to implement this foreign filing license which cannot be found in the final text of the law. Insofar, it is expected that these rules will be incorporated in the Implementing Regulations of the Patent Law.

b. Domestic filing by foreigners

The old Patent Law established that all foreign applicants who applied for patents in China shall delegate patent agencies that are designated by the SIPO. This requirement to appoint only designated patent agencies has been abolished in the new law due to the growth of the Chinese patent agency industry and competences. Article 19 Patent Law 2008 allows foreign companies to appoint any patent agency established in accordance with the law to act as his or its agent.

c. Absolute novelty standard

One of the most important changes in the new law is the adoption of the absolute novelty

requirement that will raise the standard for patentability compared to the requirement of relative novelty that was laid down in the old legislation. Insofar, the mere use abroad did not destroy the novelty of an invention under the old law. Articles 23 and 24 Patent Law 2008 endorse now the absolute novelty requirement which offers no territorial restrictions on the prior art and the prior design. Prior art and prior design are defined as any technology/design known to the public before the date of filing by way of public disclosure in publications, public use or any other means in China or abroad. It must be pointed out that the standard of absolute novelty is still restricted by the provision of Article 25 Patent Law 2008 that expounds the terms of the so called grace period of 6 months when an invention creation was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government or it was made public for the first time at a 'prescribed academic or technical conference'.

2. Ownership and Management of Patent Rights

a. Co-owned rights

The previous law did not contain any article on the exercise of jointly owned rights. To overcome the problems related with the absence of a regulatory framework for such significant subject matter, Article 15 Patent Law 2008 establishes that the parameters for the exploitation of co-owned rights shall be, in first instance, enclosed in an agreement between the parties. However, if such agreement has not been signed, each co-owner is free to independently utilize and license the patent through common license. Any royalties obtained through the licensing shall be distributed amongst all the co-owners.

b. Coexistence of patents for invention-creations and patents for utility models

The new first paragraph of Article 9 Patent Law 2008 stipulates that for one identical invention-creation, only one patent right shall be granted. However, if the same applicant applies for both a utility model patent and an invention patent for the identical invention-creation on the same day, the invention patent can only be granted if the applicant declares to abandon the obtained utility model patent.

3. Balancing patent rights and public interest

a. Protection of genetic resources

Due to the complexity and importance of the matter, which relates to one of the tactical resources for the sustained development of one of the countries with the richest genetic resources in the world, the changes related to the protection of genetic resources were quite controversial. The new law provides that no patent shall be granted for an invention based on genetic resources, if the latter are obtained or utilized illegitimately (Article 5 Paragraph 2 Patent Law 2008). Where such resources are used, their initial/direct origin must be disclosed in the patent application; and reasons must be given if the disclosure cannot be provided (Article 26 Paragraph 6 Patent Law 2008). SIPO explained insofar that it is in the interest of China to follow the same practice of developing countries in an area where international treaties have always focused on the interest of developed countries.[9] The impact of this provision will depend on how the terms will be defined and what will constitute illegal acquisition and use.

b. Compulsory licensing

Issues related with compulsory licensing have always been object of heated debates because of their ability to strike at the core of the scope of intellectual property rights or, in other words, government-granted temporary monopolies. However, the granting of compulsory licenses is a common practice, although barely used, nearly everywhere in the world. Insofar, the revised Patent Law introduces a number of additional grounds for granting of compulsory licenses.

According to Article 48 (1) Patent Law 2008 SIPO may, upon the request of the entity or the individual which is qualified for exploitation, grant a compulsory license to exploit a patent for an invention or utility model, when the patentee has not or not sufficiently exploited the same, without any justified reason, within three years from the grant of the patent right or four years from the date of filing such patent. A compulsory license can also be granted in order to avoid or eliminate the adverse effects caused to competition in cases where it has been legally determined that the enforcement of the patent right by the patentee constitutes a monopolistic act (Article 48 (2) Patent Law 2008).

A compulsory license may under the new law also be granted in favour of a least developed country or a WTO Member which has no or insufficient means to manufacture such indispensable drug (Article 50 Patent Law 2008).

c. International exhaustion of rights and Bolar exemption

Article 69 Patent Law 2008 provides a series of exemption for acts that shall not be considered as infringing upon a patent right. According to Article 69 (1) Patent Law 2008 parallel importation will not constitute patent infringement if the product first entered the international market with authorization or consent by the patent owner. Such international exhaustion will reduce the scope of the patent law protection in China as inventors' rights will be exhausted once the product is sold in another country.

The so called Bolar Exemption is introduced in Article 69 (5) Patent Law 2008. Manufacture, import or use of a patented drug or patented medical apparatus by any person in order to acquire information necessary for regulatory approval as well as manufacture or import of the drug/apparatus by any person solely for others to acquire such information will be deemed as an exception to patent infringement. Consequently, a pharmaceutical firm will be able to start the procedure for obtaining the requested authorization for the generic chemical compose of the patented drug without seeking to acquire the right owner's consent. It is interest-

9 See SIPO Explanatory Notes on December 2006 Draft Patent Law (Section II 1 b).

ing to note that the Bolar Exemption in the new law is not combined with the possibility of extending the term for patent protection as it is usually provided for in the patent legislation of other countries in order to balance the different interests involved.

4. Patent Enforcement

a. Evidence preservation

The revised law introduces a new provision on pre-litigation preservation measures (Article 67 Patent Law 2008). Insofar, the existing Article 74 Civil Procedural Law which is dealing with the preservation of evidence does not explicitly permit to seize infringing goods prior to the litigation. However, the new provision in the patent law on pre-litigation evidence preservation will not have a significant impact on the patent litigation practice as the Supreme People's Court issued already in 2001 provisions which allowed the court, at request of the party, to preserve the evidence before the actual litigation on the merits by referring to the provision of Article 74 Civil Procedural Law.

b. Administrative enforcement of IP rights

Although it was questioned during the legislative process whether to change the Chinese enforcement system from the dual track system, involving both administrative organs and civil courts, into a solely judicial enforcement system, the Chinese legislators opted for preserving both channels. Furthermore, Article 64 Patent Law 2008 strengthens the power of discovery of the administrative bodies by clearly spelling out some additional functions and authorities to be conferred upon them when investigating passing off cases.

The new Patent Law also increases the amount of the administrative penalty that can be imposed in passing off cases. The infringer's illegal earnings will be confiscated and, in addition, a fine may be imposed of up to four times the illegal earnings or, if there are no illegal earnings, a fine of up to RMB 200,000 (Article 63 Patent Law 2008). Under the old law, administrative fines could only amount to three times the illegal earnings or, if there were no illegal earnings, to a fine of up to RMB 50,000.

c. Prior art defence

The new law codifies the current practice that if the alleged infringer in a patent infringement dispute has evidence proving its or his technology or design belongs to the prior art or design, it will not constitute patent infringement (Article 62 Patent Law 2008).

d. Damage compensation

Article 65 Paragraph 2 Patent Law 2008 also codifies the possibility of statutory compensation into the patent law. Courts will under the new law be able to grant statutory damage compensation of up to a maximum of RMB 1,000,000 in cases where the losses of the patentee, the profit of the infringer or the appropriate exploitation fee are difficult to determine. Respective existing provisions issued by SPC provided for compensation of up to RMB 500,000 only.

5. Design patents

The new law extends the exclusive right of the patentee to exploit a design patent to also include offering to sell the patented product for production or business purposes (Article 11 Paragraph 2 Patent Law 2008). Previously, an offer to sell did not constitute an infringement of a registered design. However, patent protection will no longer be available for two-dimensional designs of images, colours or combinations of the two that mainly serve as identifiers (Article 25 (6) Patent Law 2008). The Chinese legislator deemed such exclusion from patentability of designs necessary in order to avoid the registration of copied trademarks as designs.

Although the new law allows multiple applications for similar or related designs of products belonging to a single category and sold or used in sets, the standard rule is that each patent application for design has to be limited to a single design (Article 31 Paragraph 2 Patent Law 2008). A clarification on how to determine the extent of similarity required for a design to constitute a related design is expected in the Implementing Regulations of the Patent Law.

The discretion of the court to ask the patentee to provide a search report issued by SIPO has been extended to design patents. Article 61 Paragraph 2 Patent Law 2008 stipulates that the court may require the patentee in utility model or design patent infringement cases to submit an evaluation report made by SIPO which may be used as evidence to settle the dispute. This system provides an effective mean to avoid malicious litigation and to speed up the invalidation procedure.

The new features of the Chinese patent system introduced in the Patent Law 2008 will be further defined and explained in the respective amendments to the Implementing Regulations of the Patent Law which are currently being drafted and are expected to be passed by the State Council in due time before the revised law takes effect in October 2009. The changes will, once implemented, surely have a significant impact on the patent system and practice. Insofar, it has to be seen whether the revised legal framework will ultimately also increase the effectiveness of patent enforcement in China.

Patent Law of the People's Republic of China (2008)

Amended Patent Law (passed on 27 December 2008)

Chapter I General Provisions

Article 1

This law is enacted in order to protect the legitimate rights of patentees, encourage invention-creations, promote the application of invention-creation, enhance innovative capacity, and promote scientific progress and economic social development.

Article 2

In the present Law "invention-creation" means inventions, utility models and designs.

The term "invention" refers to a new technical solution put forward for a product, method or the improvement thereof.

The term "utility model" refers to a new practical technical solution for a product's form, structure, or the combination thereof.

The term "design" means a new design of a product's shape, pattern or the combination thereof, or the combination of its colour and shape and/or pattern, that is aesthetically pleasing and industrial applicable.

Article 3

The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law.

The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.

Article 4

If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.

Article 5

No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to the public interest.

No patent right shall be granted for any invention-creation which is completed on the basis of genetic resources of which the acquisition or use breaches the stipulations of related laws and regulations.

Article 6

An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee.

For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee.

In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.

Article 7

No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.

Article 8

For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.

Article 9

For any identical invention-creation, only one patent right shall be granted. However, with respect to the application of a utility model patent and invention patent for the identical invention-creation filed by the same applicant on the same day, the invention patent may be granted if this utility model patent right obtained first is still in force, and the applicant declares to abandon the obtained utility model patent that has been granted.

If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.

Article 10

The right to apply for a patent and the patent right itself may be assigned.

Any assignment of the right to apply for a patent or of the patent right from a Chinese entity or individual to a foreigner, foreign enterprise or other foreign organizations, shall be done in accordance with procedures in the related laws and administrative regulations.

Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department

under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.

Article 11

After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, namely make, offer to sell, sell, or import the design patented product for production or business purposes

Article 12

Any entity or individual exploiting the patent of another shall conclude with the patentee a license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

Article 13

After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14

Where any patent for invention, belonging to any State-owned enterprise or institution, is of great significance to the interest of the State or to the public interest, the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval by the State Council, decide that the patented invention be spread and applied within the approved limits, and allow designated entities to exploit that invention. The exploiting entity shall, according to the regulations of the State, pay a fee for exploitation to the patentee.

Article 15 (Newly added)

If the co-owners of a patent application right or patent right have an agreement on the exercise of those rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through ordinary licenses; Any royalties obtained through licensing others to exploit the patent shall be distributed amongst all the co-owners.

Except for the situation provided in the above paragraph, the exercise of a jointly-owned patent application right or patent right shall be consented by all co-owners.

Article 16

The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the

inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.

Article 17 (Combination of Original Article 15 and 17)

The inventor or designer has the right to be named as such in the patent document.

The patentee is entitled to put patent notice on the patented product or the package thereof.

Article 18

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 19

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent or has other patent matters to handle in China, he or it shall entrust a patent agency legally established to act on its or his behalf.

Any Chinese entity or individual who intends to file a patent application in China or engage in any other patent related affairs could entrust any legally established patent agency to act on its or his behalf.

The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.

Article 20

Any entity or individual intending to file a patent application in a foreign country for an invention-creation made in China, shall apply in advance for a confidentiality examination conducted by the patent administrative department under the State Council. The procedures and duration regarding the confidentiality examination shall be enforced in accordance with the State Council regulatios.

Any Chinese entity or individual may file an international application for a patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for a patent shall comply with the provisions of the preceding paragraph.

The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.

Any foreign patent application that violates the provision of the first paragraph of this Article

will not be granted a patent right if the patent is applied for in China.

Article 21

The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely.

The patent administrative department under the State Council shall completely, correctly and timely publish patent information in the the patent gazette on a regular basis.

Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.

Chapter II Conditions for the Grant of Patent Rights

Article 22

Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness.

"Novelty" means that the invention or utility model shall neither belong to the prior art, nor has any entity or individual previously filed before the date of filing with the patent administrative department under the State Council an application on an identical invention or utility model which was recorded in patent application documents or other gazetted patent documents published after the said date of filing.

"Inventiveness" means that, compared with the prior art the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement.

"Usefulness" means that the invention or utility model can be made or used and can create positive results.

The "prior art" referred to in this Law refers to any technology known to the public before the filing date of the patent application in China or abroad.

Article 23

Any design for which a patent right may be granted must not belong to an prior design; nor has any entity or individual previously filed before the date of filing with the patent administration department under the State Council an application on an identical design which was published in patent documents published after the said date of filing.

The design for which a patent right may be granted must be substantially different from prior designs or a combination of the features of prior designs.

Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person.

The prior design referred to in this Law means any design known to the public before the fil-

ing date of the patent application in China or abroad.

Article 24

Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred:

(1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government;

(2) it was made public for the first time at a prescribed academic or technical conference; or

(3) it was disclosed by any person without the consent of the applicant.

Article 25

For any of the following, no patent right shall be granted:

(1) scientific discoveries;

(2) rules and methods for mental activities;

(3) methods for the diagnosis or for the treatment of diseases;

(4) animal and plant varieties;

(5) substances obtained by means of nuclear transformation.

(6) two dimensional designs of images, colours or combinations of the two that mainly serve as indicators.

For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III
Application for Patents

Article 26

Where a patent application for invention or utility model is filed, a request, a specification and its abstract, and claims shall be submitted.

The written request shall state the title of the invention or utility model, the name of the inventor, the name and address of the applicant and other related matters.

The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model.

The patent claim shall, on the basis of the specification, clearly and briefly specify the scope of the patent protection claimed.

An applicant who files a patent application for an invention-creation completed on the basis of genetic resources shall in the patent application document indicate the direct and indirect source of the genetic resources; the applicant unable to indicate the original source of the genetic resource must provide an explanation.

Article 27

When a patent application is filed for a design, documents including a request, drawings or photographs of the design as well as a brief explanation of the design and should be submitted.

The drawings or photographs submitted by the applicant should clearly indicate the design sought to be protected by the patent.

Article 28

The date on which the patent administrative department under the State Council receives the patent application documents shall be the date of filing. If the application documents are sent by mail, the postmark date shall be the filing date of the application.

Article 29

Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.

Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.

Article 30

Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.

Article 31

Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application.

Each patent application for design shall be limited to a single design. Two or more similar designs used on the same product, or two or more designs used on the products belonging to a single category and sold or used in sets may be submitted together in one application.

Article 32

An applicant may withdraw the patent application at any time before the patent right is granted.

Article 33

An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV
Examination and Approval of Patent Applications

Article 34

Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council may publish the application earlier.

Article 35

Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administrative department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn.

The Patent administrative department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.

Article 36

When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application.

For an patent application for an invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.

Article 37

Where the Patent Administrative Department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit,

his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.

Article 38

If after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.

Article 39

Where it is found after examination as to substance that there is no cause for rejecting the patent application for a invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.

Article 40

Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 41

The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant is not satisfied with the decision to reject his or its application for patent issued by the patent administrative department under the State Council, such applicant may, within three months from the date of receiving the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant of the decision.

Where the patent applicant who is not satisfied with the decision of the Patent Reexamination Board, the applicant could, within three months from the date of receiving the notification, bring suit before the people's court.

Chapter V
Term, Termination and Invalidation of Patent Rights

Article 42

The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.

Article 43

The patentee shall pay an annual fee beginning with the year in which the patent right is granted.

Article 44

In either of the following cases, the patent right shall be terminated prior to the expiration of its term:

(1) if the annual fee is not paid as prescribed; or

(2) if the patentee renounces his or its patent right by a written declaration.

The termination of a patent right shall be registered and publicly announced by the patent administrative department under the State Council.

Article 45

Where, starting from the date of the announcement of the grant of a patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.

Article 46

For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administrative department under the State Council.

Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.

Article 47

Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

The decision declaring the patent right invalid shall have no retroactive effect on any judgment or mediation decision concerning patent infringement which has been issued and enforced by the people's court, as well as on any decision concerning disputes of patent infringement which has been enforced or compulsorily executed, or on any contract of patent license or assignment of patent right which has been performed prior to the declaration of the patent right being invalid. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.

If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right does not refund the damages for patent infringement, royalty fee forpatent exploitation or patent assignment, which is obviously contrary to the principle of equity, the whole or part of above-mentioned fees should be refunded.

Chapter VI
Compulsory Licence for Patent Exploitation

Article 48

In any of the following cases, the patent administrative department under the State Council may, upon the application of that entity or individual, grant a compulsory license to exploit the patent for the invention or utility model.

(1) where the patentee after the expiration of three years from the date of granting the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not sufficiently exploited the patent without any justified reasons;

(2) where it has been legally determined that the enforcement of the patent right by the patentee is an act of monopoly, to avoid or to eliminate the adverse effects caused to competition.

Article 49

Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.

Article 50 (Newly added)

For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted a patent right in China and to export it to the countries or regions specified in related international conventions in which China is a contracting member.

Article 51

Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 52 (Newly added)

Where the invention-creation covered by the compulsory license relates to semi-conductor technology, the exploitation under the compulsory license is limited to the use for the purpose of public interest and the conditions specified in Article 48(2).

Article 53 (Newly added)

Except as otherwise provided for in Article 48(2) and 50 of this Law, the compulsory

license is used mainly for the supply of the domestic market.

Article 54 (Original Article 51)

Any entity or individual applying a compulsory license in accordance with the provisions of Article 48(1) or Article 51 of this Law, shall provide proof that it or he has made requests for a license to the patentee to exploit the patent on reasonable conditions but was not licensed within a reasonable period of time.

Article 55

The decision made by the patent administrative department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced.

In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.

Article 56

Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.

Article 57 (Original Article 54)

Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable royalty fee for patent exploitation or handle the exploitation fee issue in accordance to the relevant provisions of international conventions in which China participates. The amount of the fee shall be decided by both parties upon consultation. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall make a ruling.

Article 58

Where the patentee is not satisfied with the decision issued by patent administrative department under the State Council on granting a compulsory license for patent exploitation, or where the patentee or the entity or individual that is granted the compulsory license for patent exploitation is not satisfied with the ruling made by the patent administrative department under the State Council regarding the royalty fee for exploitation, he or it may, within three months from the date upon receiving the notification, file suit to the people's court.

Chapter VII
Protection of Patent rights

Article 59 (Original Article 56)

The scope of protection for an invention patent or a utility model patent shall be determined on the basis of the patent claim which may be explained by use of the specification and appended drawings.

The scope of protection for a design patent shall be determined by the product's design shown in the drawings or photographs. The brief statement of the patent could be used to interpret the design of the product shown in the drawings or photographs.

Article 60

Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 61 (Original para 57(2)

Where any infringement dispute involves a invention patent for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the course of producing its or his product is different from the patented process.

Where the infringement relates to a utility model patent or design patent, the people's court or the patent administrative authority may require the patentee to furnish a patent evaluation report issued by the patent administrative department under the State Council after searching, analyzing and evaluating the patent which may be used as evidence to determine or settle patent disputes.

Article 62 (Newly added)

During a patent infringement dispute, if the alleged infringer has evidence proving its or his technology or design belongs to the prior art or is a prior design, it will not constitute patent infringement.

Article 63

Where any person passes off others' patent, the infringer shall, in addition to bearing the civil liability according to law, amend his act ordered publicly by the patented related administrative authority. The illegal earnings shall be confiscated and a fine will be imposed of not more

than four times of the illegal earnings; if there are no illegal earnings, the fine will not be more than RMB 200,000 yuan; where the infringement constitutes a crime, the infringer shall be liable for criminal liability.

Article 64 (Newly added)

The relevant patent administrative authority may, based on the evidence it obtains, query the related parties and conduct investigations concerning infringing activities when investigating the suspected passing-off matters; and may examine the place where the suspected infringement took place; view, reproduce any contracts, invoices, books and other materials related to the suspected infringement; examine the products related to suspected infringement, and may seal up or seize the products which has been proved to pass off patent rights.

The parties should neither reject nor interfere the legal performance of duty by the patent related administrative authority, and should to assist and cooperate.

Article 65

The amount of compensation for the damage caused by patent infringement shall be assessed on the basis of the loss actually suffered by the patentee, or the profits which the infringer has earned through the infringement if it is difficult to specify the above loss. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the royalty fee for patent exploitation. The amount of damage shall include the reasonable costs incurred for stopping the patent infringement.

If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the loyalty fee for patent exploitation, the people's court may award damages no less than 10,000 yuan and no more than 1,000,000 yuan depending on the type of patent right, the nature and gravity of the infringing act etc.

Article 66 (Original Article 61)

Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before filing a suit, apply to the people's court for an order to stop the relevant acts.

The applicant shall provide a guarantee for the above-mentioned motions; if the applicant does not provide a bond, the application shall be rejected.

Upon receiving the request, the people's court shall make a ruling within 48 hours where there are special circumstances that require extenstion, the court may extend the 48 hours. If a ruling is made to stop the related acts, this ruling should be enforced immediately. If the parties are not satisfied with the ruling, they could apply for a one-time review; the enforcement of the ruling will not be suspended during the course of review.

If the applicant does not file a lawsuit within 15 days after the people's court issued an order to stop related acts, the people's court shall withdraw the prior ruling.

If the application is in error, the applicant shall compensate to the opposite party for losses caused by stopping the relevant acts.

Article 67 (Newly added)

In order to prevent infringing activities, under the circumstance that the evidence might be destoryed or later be difficult to obtain, the patentee or a related injured party may before filing a law suit apply to the people's court for evidence preservation.

The people's court may order the applicant to provide a guarantee for the application of evidence preservation, and if no guarantee is provided by the applicant, reject the application.

Upon accepting the request, the people's court shall make a ruling within 48 hours; If the court rules to preserve evidence, this ruling should be enforced immediately.

If the applicant does not file a lawsuit within 15 days after the people's court issued an order to preserve evidence, the people's court shall withdraw the prior ruling.

Article 68

The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement.

Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 69

None of the following shall be deemed an infringement of the patent right:

(l) Where, after the sale of a patented product or products directly obtained by using the patented process, which was made by the patentee or an entity/individual authorized by the patentee, any other person uses, offers to sell, sells or imports that product;

(2) Before the date of filing the patent application, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;

(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;

(4) Where any person uses the patent concerned solely for the purposes of scientific research and experiments.

(5) For the purpose of providing the information needed for the administrative approval, manufacture, use, import of a drug or a medical apparatus, and exclusively for such manufacture any import of a patented drug or a patented medical apparatus.

Article 70 (Original last para of Art 63)

Any person, who, for business purposes, uses, offers to sell or sells a patented product without knowing that it was made and sold without the authorization of the patentee, shall not be liable for any damages if he can prove that he obtained the product from a legitimate source.

Article 71

Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.

Article 72

Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.

Article 73

The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities.

Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.

Article 74

Where any State functionary working for patent administration or any other State functionary

working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 75

Rules for the implementation of this Law shall be formulated by the patent administrative department under the State Council and submitted to the State Council for approval before they are put into effect.

Article 76

This Law shall go into effect on April 1, 1985.

Draft laws and supporting documents

1. December 2006 Draft Patent Law
2. March 2008 Draft Patent Law
3. August 2008 Draft Patent Law

December 2006 Draft Patent Law

Chapter I General Provisions

Article 1

This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation, to foster the spreading and application of inventions-creations, and to promote the development of science and technology and of economics and society, for meeting the needs of the socialist modernization and construction of an innovative country.

Article 2

In this Law, "inventions-creations" mean inventions, utility models and designs.

"Invention" means any new technical solution relating to a product, a process or improvement thereof.

"Utility model" means any new technical solution relating to the shape, structure, or their combination, of a product, which is fit for practical use.

"Design" means any new design of the shape, pattern, or their combination and the combination of color and shape or pattern, of a product, which creates an aesthetic feeling and is fit for industrial application.

Article 3

People's governments at all levels shall take effective measures to promote the creation, management, protection and application of patent rights.

The patent administrative department under the State Council is responsible for the patent work throughout the country. It receives and examines patent applications and grants patent rights for inventions-creations in accordance with law.

The patent administrative departments of local people's governments are responsible for the administrative work concerning patents in their respective administrative areas. They promote the spreading and application of patented technology and the propagation of patent information, guide enterprises and institutions to conduct patent work, handle and mediate in patent disputes in accordance with law, and investigate and prosecute patent violations.

Article 4

Where an invention-creation for which a patent is applied for relates to the security or other vital interests of the State and is required to be kept secret, the application shall be treated in accordance with the Law of the

Protection of State Secrets Law of the People's Republic of China and other relevant prescriptions of the State.

Where any entity or individual intends to file an application in a foreign country for a patent for invention-creation made in China, it or he must be approved by the Patent Administrative department Under the State Council.

Article 5

No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest. However, it is not allowed that no patent right is granted for an invention-creation only the exploitation of which is prohibited under the laws of the State.

Article 6

An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee.

For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee.

In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.

Article 7

No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.

Article 8

For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise provided for, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applied for it shall be the patentee.

Article 9

For an invention-creation which is completed under a scientific research project funded mainly with government investment, except that the invention-creation is of great significance to the security or interest of the State, the right to apply for a patent belongs to the entity undertaking the project. After approval of the application, the entity is the patentee.

According to the provisions of the preceding paragraph, the right to apply for a patent belongs to the entity undertaking the scientific

research project. The competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval of the application, decide that the patented invention-application be spread and applied within the approved limits, and allow designated entities to exploit that invention.

Concrete measures implementing the provisions of the present article are provided by the State Council.

Article 10

Except for the circumstances provided in the present article, paragraph two, any identical invention-creation, only one patent right shall be granted.

Where the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if the applicant declares to abandon the obtained patent right for utility model upon grant of the patent right for invention, then the grant of the patent right for utility model does not affect the grant of the patent right for invention.

Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.

Article 11

For assignments of the right to apply for a patent, the patent application and the patent right, the parties concerned shall conclude a written contract.

For any assignment of the right to apply for a patent, the patent application or the patent right by a Chinese entity or individual to a foreigner, a foreign enterprise or another foreign organization, relevant procedures must be followed in accordance with provisions of the laws and administrative regulations.

Where a patent application or patent right is assigned, the parties shall register it with the Patent Administrative department Under the State Council. The Patent Administrative department Under the State Council shall announce the registration. The assignment of the patent application or the patent right shall take effect as of the date of registration.

Article 12

After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent right for a design, unless otherwise provided in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorpo-

rating its or his patented design, for production or business purposes.

Article 13

Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14

Where the right to apply for a patent, patent application or patent right is shared by two or more entities or individuals, the following acts shall be consented by all co-owners, unless agreed upon otherwise:

(1) Assigning the right to apply for a patent;

(2) Assigning or withdrawing the patent application;

(3) Assigning, abandoning or pledging the patent right; and

(4) Licensing others to exploit the patent.

Where the patent right is shared by two or more entities or individuals, any co-owner may exploit the patent alone unless agreed upon otherwise.

Article 15

The patentee has the right to affix a patent marking and to indicate the number of the patent on the patented product or on the packing of that product.

Article 16

The entity that is granted a patent right shall award to the inventor or creator of a service invention-creation a reward and, upon exploitation of the patented invention-creation, shall pay the inventor or creator a reasonable remuneration based on the extent of spreading and application and the economic benefits yielded.

Article 18

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 19

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, it or he shall appoint a patent agency established in accordance with law to act as his or its agent.

Where any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may appoint a patent agency established in accordance with law to act as its or his agent.

The patent agency and its employed patent attorney shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency and its employed patent attorney shall be formulated by the State Council.

Article 20

Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of Article 4 of this Law.

The Patent Administrative department Under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.

Article 21

The Patent Administrative department Under the State Council and its Patent Reexamination Board shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely.

The Patent Administrative department Under the State Council shall periodically publish Patent Gazette, and propagate the patent information in a complete, correct and timely manner.

Until the publication or announcement of the application for a patent, staff members of the Patent Administrative department Under the State Council and other persons involved have the duty to keep its contents secret.

Chapter II Requirements for Grant of Patent Right

Article 22

Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.

Novelty means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the Patent Administrative department Under the State Council an application which described the identical invention or utility model and was published in patent application documents or announced in patent documents after the said date of filing.

Inventiveness means that, as compared with the prior art, the invention has prominent substantive features and represents a notable

progress for a person skilled in the relevant field of technology and that the utility model has substantive features and represents progress for a person skilled in the relevant field of technology.

Practical applicability means that the invention or utility model can be made or used and can produce effective results.

The prior art referred to in this Law means any technology known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.

Article 23

Any design for which patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the Patent Administrative department Under the State Council an application which described the identical design and was published after the said date of filing, and for a designer in the relevant field, the design is substantively different from the prior design or a combination of the feature of the prior design.

Any design for which patent right may be granted must not be in conflict with any prior right of any other person.

The prior design referred to in this Law refers to any design known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.

Article 24

Where an invention-creation for which a patent is applied for became known to the public in one of the following manners, within six months before the date of filing, it is not deemed to constitute a prior art or a prior design referred to in this Law for the said patent application:

(1) Where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;

(2) Where it was first made public at a prescribed academic or technological meeting;

(3) Where it was disclosed by any person without the consent of the applicant.

Article 25

For any of the following, no patent right shall be granted:

(1) Scientific discoveries;

(2) Rules and methods for mental activities;

(3) Diagnostic, therapeutic and surgical method for the treatment of humans or animals;

(4) Animal and plant varieties;

(5) Substances obtained by means of nuclear transformation;

(6) Designs mainly serving as a sign and made of the pattern, colour or its combination of two-dimensional printed matter.

For processes used in producing products referred to in items (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

For an invention-creation, the completion of which depends on genetic resources, but the acquisition and exploitation of said genetic resources are contrary to relevant laws and regulations of the State, no patent right shall be granted.

Chapter III Application for Patent

Article 26

Where an application for a patent for invention or utility model is filed, application documents such as a request, a description and its abstract, and claims shall be submitted.

The request shall state the title of the invention or utility model, the name of the inventor or creator, the name and the address of the applicant and other related matters.

The description shall set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant filed of technology to carry it out; where necessary, drawings are required.

For an invention-creation, the completion of which depends on genetic resources, the applicant shall indicate the source of said genetic resources in the description.

The abstract of the description shall state briefly the main technical points of the invention or utility model.

The claims shall be supported by the description and shall define the extent of the patent protection asked for in a clear and concise manner.

Article 27

Where an application for a patent for design is filed, application documents such as a request, drawings or photographs of the design as well as a brief explanation of the design shall be submitted.

Article 28

The date on which the Patent Administrative department Under the State Council receives the application shall be the date of filing. If the application is sent by mail, the date of mailing indicated by the postmark shall be the date of filing.

Article 29

Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on

the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.

Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the Patent Administrative department Under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.

Article 30

Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to meet the time limit for submitting the patent application document, the claim to the right of priority shall be deemed not to have been made.

Article 31

An application for a patent for invention or utility model shall be limited to one invention or utility model. Two or more inventions or utility models belonging to a single general inventive concept may be filed as one application.

An application for a patent for design shall be limited to one design incorporated in one product. Two or more similar designs for the same product, or two or more designs which are incorporated in products belonging to the same class and are sold or used in sets may be filed as one application.

Article 32

An applicant may withdraw his or its application for a patent at any time before the patent right is granted.

Article 33

An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV Examination and Approval of Application for Patent

Article 34

Where, after receiving an application for a patent for invention, the Patent Administrative department Under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the Patent Administrative department Under the State Council publishes the application earlier.

Article 35

Upon the request of the applicant for a patent for invention, made at any time within

three years from the date of filing, the Patent Administrative department Under the State Council will proceed to examine the application as to its substance. If, without any justified reason, the applicant fails to meet the time limit for requesting examination as to substance, the application shall be deemed to have been withdrawn.

The Patent Administrative department Under the State Council may, on its own initiative, proceed to examine any application for a patent for invention as to its substance when it deems it necessary.

Article 36

When the applicant for a patent for invention requests examination as to substance, he or it shall furnish pre-filing date reference materials concerning the invention.

For an application for a patent for invention that has been already filed in a foreign country, the Patent Administrative department Under the State Council may ask the applicant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application shall be deemed to have been withdrawn.

Article 37

Where the Patent Administrative department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.

Article 38

Where, after the applicant has made the observations or amendments, the Patent Administrative Department Under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.

Article 39

Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the Patent Administrative department Under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of the date of the announcement.

Article 40

Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the Patent Administrative department Under the State Council shall make a decision to grant

the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 41

The Patent Administrative department Under the State Council shall set up a Patent Re-examination Board. Where an applicant for patent is not satisfied with the decision of the said department rejecting the application, the applicant may, within three months from the date of receipt of the notification, request the Patent Re-examination Board to make a re-examination. The Patent Re-examination Board shall, after re-examination, make a decision and notify the applicant for patent.

Where the applicant for patent is not satisfied with the decision of the Patent Reexamination Board, it or he may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic of China.

Chapter V
Duration, Cessation and Invalidation of Patent Right

Article 42

The duration of patent right for inventions shall be twenty years, the duration of patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.

Article 43

The patentee shall pay an annual fee beginning with the year in which the patent right was granted.

Article 44

In any of the following cases, the patent right shall cease before the expiration of its duration:

(1) Where an annual fee is not paid as prescribed;

(2) Where the patentee abandons his or its patent right by a written declaration. Any cessation of the patent right shall be registered and announced by the Patent Administrative department Under the State Council.

Article 45

Where, starting from the date of the announcement of the grant of the patent right by the Patent Administrative department Under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.

Article 46

The Patent Re-examination Board shall examine the request for invalidation of the patent right promptly, make a decision on it and notify the person who made the request and the patentee. The decision declaring the patent right invalid shall be registered and announced by the Patent Administrative department Under the State Council.

Where the patentee or the person who made the request for invalidation is not satisfied with the decision of the Patent Re-examinations Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic Of China. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.

Article 47

Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

The decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed prior to the declaration of the patent right invalid; however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.

If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.

Chapter VI
Compulsory License for Exploitation of Patent

Article 48

In any of the following cases, the Patent Administrative department Under the State Council may, upon the request of the entity which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model:

(1) Where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason;

(2) Where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act intended to eliminate or restrict competition.

Article 49

Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the Patent Administration Department Under the State Council may, as suggested by a competent department under the State Council, grant the entity designated by the department a compulsory license to exploit the patent for invention or utility model.

In order to prevent, treat and control an epidemic disease, the Patent Administration Department Under the State Council may grant a compulsory license to exploit the patent for invention or utility model according to the provisions of the preceding paragraph.

Article 50

Where a drug for treating an epidemic disease has been granted a patent in China, and a developing country or a least developed country who have no or insufficient capability to manufacture the said drug, hopes to import the drug from China, the Patent Administrative department Under the State Council may grant an entity which is qualified for exploitation, a compulsory license to manufacture the said drug and to export it to the said country.

Where the Patent Administrative department Under the State Council grants a compulsory license in accordance with the provisions of the preceding paragraph, the said department shall clearly set forth relevant requirements in the decision on compulsory license.

Article 51

Where the invention or utility model for which the patent right has been granted involves important technical advance of considerable economic significance in relation to another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the Patent Administrative department Under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the Patent Administrative department Under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 52

The exploitation of a compulsory license shall be predominately for the supply of the domestic market, except as otherwise provided for in Article 50, paragraph one of this Law.

Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the public interest or to the use in remedy of an action of eliminating and restricting competition as determined by the judicial or administrative procedure.

Article 53

The entity or individual requesting, in accordance with the provisions of Article 48 or Article 50 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.

Article 54

The decision made by the Patent Administrative department Under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced.

In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the Patent Administrative department Under the State Council may, after review upon the request of the patentee, terminate the compulsory license.

Article 55

Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others.

Article 56

The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the Patent Administrative department Under the State Council shall adjudicate.

Article 57

Where the patentee is not satisfied with the decision of the Patent Administrative department Under the State Council granting a compulsory license for exploitation, or the entity or individual requesting a compulsory license for exploitation is not satisfied with the decision made by the Patent Administrative department Under the State Council rejecting its or his application, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.

Where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the Patent Administrative department Under the State Council regarding the exploitation fee, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Chapter VII
Protection of Patent Right

Article 58

The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims.

The extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs. The brief explanation may be used to interpret the drawings or photographs.

Article 59

Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the patent administrative department to handle the matter.

Article 60

When the patent administrative department handling the patent infringement dispute considers that the infringement is established, it shall order the infringer to stop the infringing act immediately.

If a party is not satisfied with the order made by the patent administrative department, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China; if, within the said time limit, such proceedings are not instituted and the order is not complied with, the patent administrative department may approach the people's court for compulsory execution.

The patent administrative department handling the patent infringement dispute may, upon the request of the parties, mediate in the amount of compensation for the damage caused by the infringement of the patent right; if the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 61

Where any patent infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process.

Where a patent infringement dispute relates to a patent for utility model or a patent for design, the patentee or the interested party shall furnish to the people's court or the patent administrative department a search report made by the Patent Administrative department Under the State Council.

Article 62

Where the people's court or the patent administrative department trying or handling the patent infringement dispute decides that the technology or design exploited by the accused infringer belongs to prior art or prior design based on the evidences provided by the parties, the said exploiting act shall not be considered as constituting an infringing act.

Article 63

Where the patentee, knowing that the technology or design for which a patent right has been granted belongs to prior art or prior design, accuses other persons for infringing its or his patent right and institutes legal proceedings in the people's court or request the patent administrative department to handle the matter, the accused infringer may request the people's court to order the patentee to compensate for the damage thus caused to the accused infringer.

Article 64

Where the patent administrative department handling the patent infringement dispute decides that the infringement is established and the infringer committed the infringement on purpose, the said department may, in addition to ordering the infringer to stop the infringing act immediately, impose the infringer on a fine of not more than RMB 100,000 yuan.

Article 65

Where any person passes off the patent of another person as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the patent administrative department to amend his act, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan; where the infringement constitutes a crime, he shall be prosecuted for his criminal liability

Article 66

Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the patent administrative department to amend his act, and the order shall be announced, with confiscation of illegal earnings and, in addition, he may be imposed a fine of up to three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan.

Article 67

When handling patent infringement disputes, investigating and prosecuting the act of passing off the patent of another person or passing off a patent, the patent administrative department may exercise the following functions and authorities:

(1) to inquire the parties involved, and to investigate the facts relevant to the alleged illegal act;

(2) to inspect and duplicate the contracts, invoices, account books and other relevant

materials related to the party's alleged illegal act;

(3) to carry out an on-the-spot inspection of the site where the party's alleged illegal act took place;

(4) to examine the products related to the illegal act and seal up or seize the products that are proved by evidences to infringe the patent right, pass off the patent of other person or pass off a patent.

The parties shall assist and cooperate with the patent administrative departments in exercising the functions and authorities prescribed in the preceding paragraph in accordance with law, and may not refuse or impede them.

Article 68

The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the losses suffered by the patentee. If it is difficult to determine the losses which the patentee has suffered, the amount may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine both the losses which the patentee has suffered and the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license.

The amount of compensation for the damage caused by the infringement of the patent right shall further include a reasonable expense the patentee has incurred in order to stop the infringing act.

Where it is difficult to determine the losses suffered by the patentee, the profits which the infringer has earned through the infringement and the patent exploitation fee under contractual license, the people's court may set an amount of compensation of not less than RMB 5,000 yuan and not more than RMB 1,000,000 yuan in light of factors such as the type of the patent right, the nature of the infringing act and the circumstances.

Article 69

Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and the preservation of property.

The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China.

Article 70

In order to stop a patent infringing act, under the circumstance that an evidence might become extinct or hard to obtain hereafter, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings.

After acceptance of the request, the people's court shall make a ruling within 48 hours; if the court rules to grant preservation measures, the execution thereof shall be started immediately.

The people's court may order the requester to provide guarantee; if the requester fails to do so, the request shall be rejected.

If the requester does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.

Article 71

Prescription for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act.

Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, is paid during the period from the publication of the application to the grant of patent right, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 72

Where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter beyond the prescription for instituting legal proceedings, it or he may be granted a compensation for damages caused by an infringement act occurring 2 years before the date of instituting the legal proceedings or requesting the handling;

Where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter 3 years after the expiration of the prescription for instituting legal proceedings, it or he shall not be entitled to a compensation for damages caused by an infringement act occurred before the date of instituting the legal proceedings or requesting the handling; in the above situation, where the infringing act still continues at the time of the institution of the legal proceedings or the request for handling, it or he may request the people's court or the patent administrative department to order the infringer to stop the infringing act immediately.

Article 73

Where the relevant act, indication of intention or silence of the patentee or any interested party makes the entity or the individual exploiting the patent thereof have reasons to believe that the patentee or the interested party will

not claim its or his right over the exploitation, whereas it or he subsequently institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter, its or his claiming of right is obviously contrary to the principle of good faith, and it or he shall not be entitled to a compensation for damages caused by an act exploited before the date of instituting the legal proceedings or requesting the handling, nor shall it or he be entitled to request the people's court or the patent administrative department to order the entity or the individual to stop the exploitation of the act.

Article 74

None of the following shall be deemed as infringement of the patent right:

(1) Where, after the sale of a patented product that was made by the patentee or with the authorization of the patentee, or of a product that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product;

(2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;

(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;

(4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation;

(5) Where any person manufactures, uses or imports a patented drug or a patented medical apparatus solely for the purposes of obtaining and providing the information needed for the administrative approval of the drug or medical equipment, and any person manufactures, imports or sells a patented drug or a patented medical apparatus to the said person.

Article 75

Any person who, for production and business purpose, uses, offers to sell or sells a patented product or a product that was directly obtained by using a patented process, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.

Article 76

Where any entity or individual, without the approval of the Patent Administrative department under the State Council, files in a foreign country an application for a patent for invention-creation that is completed in China, no patent right shall be granted for the patent application for said invention-creation filed in China by it or him; where the secret of the State is divulged, the person concerned shall be prosecuted for his legal liability.

Article 77

Where any person usurps the right of an inventor or creator to apply for a patent for a non-service invention-creation, or usurps any other right or interest of an inventor or creator, prescribed by this Law, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority at the higher level.

Article 78

The patent administrative department may not take part in recommending any patented product for sale to the public or any such commercial activities.

Where the patent administrative department violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.

Article 79

Where any State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be prosecuted for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 80

Any application for a patent filed with, and any other proceedings before, the Patent Administrative department Under the State Council shall be subject to the payment of a fee as prescribed.

Article 81

This Law shall enter into force on April 1, 1985.

Explanatory notes from SIPO

(I) Legislative objective of the Patent Law

Premier Wen Jiabao pointed out that "self-innovation is the soul of the development of science and technology, the inexhaustible motive force of the development of a nation, and the backbone to prop up the rising of a country. Without self-innovation, we can hardly win an equal status in the world or have a due national dignity."

Based on the comprehensive understanding of the importance of self-innovation, the 11th Five-year Planning of the People's Republic of China on Civil Economic and Social Development pointed out that "the scientific and technological improvement and innovation should be regarded as the important impetus for the economic and social development"; and "great efforts should be invested to construct an innovative country and a country with strength in human resources". A grand aim was further clearly set in the National Mid-and Long-term Planning on Scientific and Technological Development to drive China into the society of innovative countries within 15 years.

As one of important mechanisms for enhancing China's self-innovation capacity and boosting China's economic and social development, patent system should play a significant role in enhancing the national economic and technological strength and the national competitiveness and maintaining the national interest and the economic safety and thus to provide great support for China's access into the society of innovative countries. Therefore, it is proposed to incorporate "to promote the economic and social development, for meeting the needs of the construction of an innovative country" into Article 1 of the Patent Law as one of the legislative objective of the Patent Law.

(II) Measures Taken to Deepen the Reform of Administrative Examination and Approval and Construct a Service-oriented Government

1. Invalidate the designation of foreign-related patent agencies

At the preliminary stage of the implementation of the Patent Law in China, the patent agency industry was also of premature phase and lack of practical experience, therefore there were not many patent agencies that are competent to deputize a foreign applicant to apply for a patent in China or a domestic applicant to apply for a patent in a foreign country. In order to ensure the rights and benefits of the applicants inside and outside China, it is provided in the Patent Law formulated in 1984 that all foreign applicants that apply for patent in China or all domestic applicants that apply for patent outside China shall entrust patent agencies that are designated by the State Council (namely the "foreign-related patent agencies"). During the amendment to the Patent Law in 2000, the foreign-related patent agencies designated by the State Council are amended to those designated by the State Intellectual Property Office.

Along with the increasingly development of China's patent system in 20 years, China's patent agency industry is gradually matured, and more and more patent agencies are of capacities to deal with foreign-related patent matters. In order to further promote the development of the patent agency industry and establish a fair competition environment, it is proposed to invalidate the designation of foreign-related patent agencies and to allow all the patent agencies of which the establishment is granted to undertake the relevant business of application for patent in China entrusted by a foreign entity or individual (Article 19).

2. Revoke the provisions that require a Chinese entity or individual to entrust a foreign-related patent agency to file an application for a patent in a foreign country

Along with the increasing enhancement of China's strength in economy and technologies, a lot of Chinese entities start to launch in the international market and participate into international competitions and thus more and more patent applications to foreign countries will be imperative under such situation. Article 20, paragraph 1 of the current Patent Law that where any Chinese entity or individual intends to file an application in a foreign country, it or he shall appoint a designated patent agency to act as its or his agent. Likewise as in China, many countries prescribe provisions that foreigners shall entrust domestic agencies or agents for applications for patent. Therefore, if Chinese enterprises that desire to apply for foreign application patents have to entrust not only Chinese foreign-related patent agencies but also foreign patent agencies. In reality, some enterprises and institutions in China, small and middle-sized enterprises that are not familiar with international matters in particular, may also need to entrust domestic patent agencies to provide necessary services in addition to the entrustment of foreign patent agencies; situations will be different for large companies that are familiar with international business and own special calibers. Therefore, the SIPO is of the view that whether it requires to entrust a Chinese patent agency for filing of an application for a patent in a foreign country shall be decided by Chinese applicants according to the factual situations and it is no longer necessary to compulsorily provide that Chinese patent agencies shall be entrusted. Therefore, the Draft for Comments suggests revoking the provisions of Article 20, paragraph 1 that require a Chinese entity or individual to entrust a foreign-related patent agency to file an application for a patent in a foreign country, in order to facilitate the application of Chinese applicant for patents outside China.

3. Increase the responsibility of patent administrative departments for the distribution of patent information

The timely distribution of patent information is one of the basic functions of the patent system, which is of great importance to elevate the starting point of innovation, prevent the public from repeated research and development and incautious infringement of patent right and to promote the technological improvement and innovation. Although Articles 34, 39 and 40 of the current Patent Law each prescribe the

publication of a patent application and the announcement of a patent grant, these articles and paragraphs thereof merely determine the publication or announcement as one of essential procedures for examination or grant, and the Patent Law still lacks an overall position of the distribution of patent information. Along with the gradual improvement of China's socialist market economic system as well as the overall in-depth development of China's technologies and economy, the patent system is more and more stressed by the market players and the creators, and the enterprises and institutions are of more and more demands for patent information. To date, visits to the patent search window of the official websites of the State Intellectual Property Office amount to 10,000 and the patent documents downloaded amount to 2,000,000 pages each day. At the same time, the public imposes an increasingly high requirement on the comprehensiveness, accuracy and timeliness of patent information. Nonetheless, the distribution of patent information in China nowadays still has problems such as disorder of distribution of channels, lag of information technologies and excessive high cost for public research of patent information. Patent Laws such as those of the United States, French and Switzerland all prescribe very comprehensive and detailed provisions on the functions of distribution of patent information of the patent and trademark authority or industrial property authority, which is necessary to be referenced by us. Therefore, the Draft for Comments suggests it be explicitly prescribed that the Patent Administrative department under the State Council and local patent administrative departments are responsible for the comprehensive, accurate and timely distribution of patent information (Articles 3 and 21).

(III) Ownership and Management of Rights

1. Ownership of the right of an invention-creation which is completed under a scientific research project with government investment

The undertaking of scientific research projects with government investment is an important channel for China to achieve self-innovation achievements. In the management of the achievements of projects of this kind, China once overemphasized that the achievements should be owned by the state, it resulted in the ambiguity of responsibilities, rights and interests of the entity that undertook such projects, which impaired not only the enthusiasm of the undertaking entity but also the initiative of the undertaking entity to form self-owned intellectual property and to provide effective protections for the same. In order to solve the issue, the General Office of the State Council in April 2002 forwarded the Certain Provisions concerning the Management of Intellectual Property of the Achievements of the Projects under National Scientific Research Plans that was formulated by the Ministry of Science and Technology and the Ministry of Finance, which adjusted the intellectual property policies for the projects under national scientific research plans. It is provided in the said circular that the entity which undertakes a project under national scientific research plans is allowed to own the intellectual property right in its research achievements and may legally decide the implementation, license, transfer and invest via the intellectual property of its research achievements at its discretion and be entitled to the profits therefrom, except for the achievements of the projects under scientific research plans that involve national security, national interest and the material interests of the public.

In order to reinforce the legal effect of the above provisions, the Draft for Comments suggests incorporating the core content of the said provisions into the Patent Law and combining it with the provisions on the spreading and application of invention-creations as stipulated in Article 14, paragraph 1 of the current Patent Law so as to utilize the patent system to propel the creation and application of self-owned intellectual property rights in scientific research projects with state investment (Article 9).

This amendment suggestion is similar to the noted US "Bayh-Dole Act." In view of specific problems which will occur in the implementation of the said provisions, it is suggested that the State Council formulate other administrative regulations to make further provisions on relevant details.

2. Exercise of jointly owned rights

The right to apply for a patent, the patent application and the patent right are of the nature of property right, and therefore can be jointly owned by two or more entities or individuals. The PRC General Principles of Civil Law provides the general rules that should be observed in the exercise of joint rights. However, the patent right, being an intangible property right, is of different characteristics from those of general tangible properties, and therefore the exercise of the joint rights of patent needs certain special rules. However, there are no provisions regarding the exercise of jointly owned rights under the General Principles of Civil Law, the current Patent Law and its Implementing Regulations. As a result, the practice witnesses many disputes caused by the ambiguity of definition between rights and obligations of joint owners. To solve this issue, the Draft for Comments proposes to add the provisions on the exercise of jointly owned right to the Patent Law (Article 14).

3. Examination and approval of an application for a patent in a foreign country for an invention-creation completed in China

It is provided in Article 20 of the current Patent Law that any Chinese entity or individual which intends to file an application in a foreign country for a patent for invention-creation made at home, shall file first an application for patent with the Patent Administration Department Under the State Council. Any wholly foreign-owned company, joint venture company or research and development institution etc., which is set up by a foreign company in China according to law, is a "Chinese entity", and the foregoing provisions shall be observed in its application for an invention-creation finished in China to a foreign country. However, in practice, some foreign parent companies, in consideration of its interest, prescribe that the rights in such invention-creations should belong to the parent company via agreement in the name of entrustment or cooperation according to Article 8 of the current Patent Law, and therefore applied for a foreign patent in the name of the parent company firstly in a foreign country, so as to circumvent the approval requirement as provided in Article 10 and the provision for an initiative patent application in China in Article 20 under the current Patent Law. This phenomenon might result in that patent applications

for invention-creations that must be kept secret as relating to the national security or significant interests of China are directly filed outside China without examination and approval. To solve this problem, the Draft for Comments proposes that with reference to the practice of the United States, Britain, Germany and other countries for reference and in order to delete the unpreciseness in Article 20, paragraph 1 of the current Patent Law, it is necessary to provide that Where any entity or individual intends to file an application in a foreign country for a patent for invention-creation made in China, it or he must be approved by the Patent Administrative department under the State Council (Article 4, paragraph 2), and to explicitly set forth the legal liabilities for the violation of the said provisions, i.e. where any entity or individual, without the approval of the Patent Administrative department under the State Council, files in a foreign country an application for a patent for invention-creation that is completed in China, no patent right shall be granted for the patent application for said invention-creation filed in China by it or him (Article 76).

Regarding the examination and approval procedures, the SIPO proposes to use the practice of the United States for reference. That is, the applicant who does not file an application for a patent in China may file a separate request for a patent application in a foreign country; the applicant who has filed an application for a patent in China is deemed to simultaneously file a request for a patent application in a foreign country. In all cases, the SIPO must make a decision on the request for a patent application in a foreign country within 6 months. These detailed proposals leave to be provided in the Implementing Regulations of the Patent Law.

(IV) Requirements on Grant of Patent Right

1. Abolish the territorial restrictions on the prior art and the prior design

The provisions of Articles 22 and 23 of the current Patent Law prescribe different territorial scopes of the prior art and the prior design of different categories: the prior art and the prior design that are published in the form of publications is worldwide; the prior art and the prior design that are published via public use or any other means is merely domestic. Along with the trend of the increasing economic globalization and the dramatic development of science and technologies, the border between publication disclosure and non-publication disclosure is more and more vague; it is therefore of less and less practical significance and maneuverability to restrict the prior art and the prior design disclosed via non-publication means within the territory of China. More importantly, to allow the technologies publicly known in a foreign country via public use, public sale or other means to be granted the patent right in China does not help encourage real invention-creations. Within the international harmonization of the patent system, patent laws of majority countries nowadays are of no territorial restrictions on the prior art and the prior design. Therefore, the Draft for Comments proposes to abolish the territorial restrictions on the prior art and the prior design, adopt the general absolute novelty requirement in the world, and add definitions of the prior art and the prior design to the Patent Law, so as to facilitate the expression of relevant articles and paragraphs of the Patent Law and make it consistent (Article 22 and 23).

2. Protection of genetic resource and disclosure of source of genetic resource

With the dramatic development of biological and genetic technologies, genetic resource has become one of the strategic resources for the sustained development of a country. China is one of countries with richest genetic resources in the world, and thus to protect genetic resource effectively is of great importance to China.

The Convention on Biological Diversifications (the "CBD") established three important principles and explicitly provided that "the contracting parties acknowledge that patent and other intellectual property right may impact the implementation of the Convention, therefore cooperation should be carried out in terms of national legislations and international legislations for the purpose to ensure such power is helpful to rather than against the objectives of the Convention."

Measures taken to protect China's genetic resource at least include the following two aspects: one is to establish a management mechanism for genetic resource through special legislation to prevent any person from obtaining China's genetic resource without the approval of the relevant department and impose an administrative fine or even criminal punishment to the violator; and the other is to add relevant provisions to the Patent Law so as to stop the act of illegal obtaining or use of the genetic resource based on which the creations are completed.

In recent years, developing countries have repeatedly advocated the perfection of IP-related international treaties and the formation of international regulations for the protection of genetic resource in the World Trade Organization, the World Intellectual Property Organization and other international organizations. However, these efforts have made little headway due to the obstruction of developed countries. Confronted with such a situation, it is of necessity for China to use the practice of relevant developing countries for reference and carry out the protection of genetic resource through legislation in the country.

To this end, the Draft for Comments proposes to provide in the Patent Law that for an invention-creation, the completion of which depends on acquisition and exploitation of genetic resources, but the acquisition and exploitation of said genetic resources are contrary to relevant laws and regulations of the State, no patent right shall be granted (Article 25). To ensure the implementation of the preceding provisions, the Draft for Comments further proposes to provide in the Patent Law that for an invention-creation, the completion of which depends on acquisition and exploitation of genetic resources, the applicant shall indicate the source of said genetic resources in the description (Article 26).

(V) Patent System for Designs

1. Properly restrict the scope of the object for which a patent for design shall be granted

The number of applications for designs received in China ranks the first in the world each year, whereas a considerable number of received applications for designs and grants for designs relates to pattern designs mainly serving as a sign and made for two-dimensional packaging

bags. On the one hand, this does not help propel innovation activities of designs of products per se, promote the formation of China's name brands or enhance the international competitiveness of the Chinese products. On the other hand, this will increase the intercross and superposition between the patent rights for designs and the exclusive rights for trademarks. In order to encourage designers to focus on the innovation of the design of a product per se, the Draft for Comments proposes to exclude "designs mainly serving as a sign and made for the pattern, color or combination of two-dimensional printed matter" from the object for which a patent right for design may be granted (Article 25, paragraph 1, item (6)).

2. Enhance the substantive requirements for grant of the patent right for design

Among received applications for design and grants of patent for design in China, some are designs formed by copying the prior designs or piecing features of the prior designs. This does not help give a full play to the incentive function of the patent system in innovation activities of product designs. In order to raise the innovation level of the Chinese product designs and to form a varied product mode with higher market competitiveness and add provisions on conflicting applications for designs and requirements for patent grants that are similar to "inventiveness" in patents for inventions and utility models, i.e. the design is substantively different from the prior design or a combination of the feature of the prior design.

3. Allow the consolidated application for patent for design for associated designs

On the basis of a new basic design formed for the design of one identical product, the same designer usually proposes many design solutions (namely "associated design") similar to the basic design in practice. Applicants of design patents generally wish to obtain the patent protection for both their basis design solutions and similar design solutions so as to avoid the fact that the slight difference between the design for the accused infringing product and that for the patented design leads to the determination of no establishment of infringement of the patent right for design during the infringement litigation. However, this wish will not come true in light of the provisions of the current Patent Law and its Implementing Regulations for the following reasons: if one application for a patent for design seeks to protect a plurality of similar designs, the application will be rejected as not complying with the requirement on unity of Article 31, paragraph two of the current Patent Law; if the applicant files and seeks to protect a plurality of applications for patents for design respectively, the applications will also be rejected for not complying with the provisions that require "only one patent right shall be granted the identical invention-creation." To solve this issue, the Draft for Comments proposes to allow the filing of a consolidated application for a patent for design for associated designs so as to provide ample protection for the legitimate rights and interests of the design patent applicant (Article 31).

4. Establish the search and report system of patents for designs

As provided in the current Patent Law in China, merely preliminary examination is required for an application for utility model or design and no substantive examination will be carried out. Therefore, the legal definiteness and right stability of the patent right for design is relatively poor. In this case, if the patentee of design exercises its or his right indiscreetly, then harmful consequence of harming the legitimate rights and interests of the public will be produced. Along with the dramatic increase of the patent application volume in Chin in recent years, the foregoing issues become more outstanding, to which the whole society is of strong response. Considering that it is still impossible for the SIPO to conduct substantive examination on all applications for patents for design, the Draft for Comments proposes to expand the application of the search report system of patents for utility model established during the amendment to the Patent Law in 2000 to patents for design and to specify the explicit provisions on the furnishing of a search report to be the prerequisite for the patentee of design to institute legal proceedings before the people's court against the infringement act or request the patent administrative department to hand the matter, so as to prevent the patentee or interested party of design from harming the interests of the public due to the improper exercise of right (Article 61).

5. Perfect provisions on the protection scope of the patent right for design

It is provided in Article 56, paragraph 2 under the current Patent Law that the extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs. In practice, it is more difficult to determine the protection scope of the patent right for design than for invention or utility model. The reasons are as follows: pictures or photographs usually reflect various details of product design. It is undoubtedly too rigid if no infringement of design patent shall be held unless the claimed infringing product completely represents all the details of the patented design product, which is not of advantage for protection of the creations in designs. On the contrary, however, if certain details are allowed to be ignored, necessary rules shall be established in terms of what details may be ignored and to what extent the ignorance is allowed; otherwise decisions will be overly subjective, which is of disadvantage to ensure the public's predictability in law. In this regard, China has not established the relatively consummated rules to date.

In order to facilitate the determination of the protection scope of the patent right for design, the draft comments proposes to make necessary adjustment to Article 56 and Article 27 of the current Patent Law by providing that "the extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs, and the brief explanation may be used to interpret the drawings or photographs" (Article 58) and that the application documents for a design patent submitted by an applicant shall include the brief explanations (Article 27).

(VI) Protection for Patent Right

1. Provide that no entity or individual may, without the authorization of the patentee, offer to sell the product incorporating its or his patented design

The amendment to the Patent Law in 2000 added the provisions that no entity or individual may, without the authorization of the patentee, offer to sell the product incorporating its or his patented invention or utility model in line with the provisions of Article 28 of the TRIPS Agreement, but did not incorporate the provisions that no entity or individual may, without the authorization of the patentee, offer to sell the product incorporating its or his patented design, because there is no corresponding requirement in the TRIPS Agreement.

In practice, upon acquisition of the infringing product manufactured without the license of the design patentee, some entities or individuals conduct sales promotion through advertising on various mass media or exhibition on expositions or exhibition fairs. Under the current Patent Law, the design patentee has no right to request the people's court or the patent administrative department to stop these activities even if it or he discovers them, and only when the actor sells the infringing product, can the design patentee claim its or his right. It is obviously not advantageous to stop the infringement of the patent right for design as soon as possible and safeguard the patentee's legitimate rights and interests. Therefore, the Draft for Comments proposes to provide that no entity or individual may, without the authorization of the patentee, offer to sell the product incorporating its or his patented design (Article 12).

2. Perfect the patent administrative law enforcement

The Patent Law established in 1984 provided the administrative enforcement measures for patent protection, which was maintained during the amendments to the Patent Law in 1992 and 2000. This is one of the outstanding differences between China's patent system and the patent systems in many countries throughout the world. As proved by the practice over 20 years in implementing the Patent Law, the administrative enforcement for patent is in line with the conditions of the country and of important functions for China to pressingly carry out the protections of the legitimate rights of the patentees, to stop patent infringement and to maintain regular economic and social orders.

Vice-Chairman Lu Yongxiang clearly pointed out in the Report on the Inspections on the Implementations of the Patent Law by the Law Enforcement Inspection Team of the Standing Committee of the National People's Congress on the 22nd conference of the 10th Standing Committee of the National People's Congress that "patent infringements, passing off a non-patent as a patent and passing off the patent of another person happen frequently, the legitimate rights and interests of the patentees are not protected effectively, and the engagement in a lawsuit is both time and energy consuming, 'high right safeguarding cost but low infringement cost,' some people 'win the case while suffer great economic losses.' In order to solve these problems, it is necessary to reinforce the administrative protection for patents and give full play to the convenient, immediate and efficient advantages of the administrative enforcement for patent."

Compared with the relevant provisions under China's Trademark Law and Copyright Law, the provisions under the Patent Law in China regarding the legal enforcement measures and power of investigations of administrative authorities for patent affairs for dealing with patent infringement are relatively weak, which goes against the normal performance of the administrative enforcement for patent. In view of this, the Draft for Comments puts forward the following proposals:

First, the intentional patent infringement is not only a civil infringement against the legitimate rights and interests of the patentee but also an administrative violation against the regular market and economic orders and the interests of the public, and thus it is proposed to impose both civil infringement liabilities but also an administrative punishment such as a fine on the intentional infringer (Article 64).

Second, Articles 58 and 59 of the current Patent Law provide the administrative punishments for passing off the patent of another person and for passing off a non-patent as a patent respectively, whereas there is a distinct difference between the administrative punishments for these two illegal acts. Considering that both of these acts are of considerable harm to the interests of the public, it is proposed to stipulate the same administrative punishments (Article 66).

Third, it remains a grave problem in China's patent system that patent administrative departments lack essential means for evidence collection when dealing with patent infringement disputes and investigating patent violations, and this problem goes against the normal performance of the administrative enforcement for patent. It is therefore proposed to refer to the provisions of Article 55 of the Trademark Law so as to provide essential means for evidence collection for patent administrative departments when dealing with patent infringement disputes and investigating patent violations (Article 67).

3. Further clarify provisions on the amount of compensations for infringement

The calculation method for amount of compensations for infringement is provided relatively clearly during the second amendment to the Patent Law in 2002, which is the reasonable time of the losses of the patentee, the illegal earnings of the infringer and the loyalties.

In judicial practice, what often takes place is that the court can decide neither the losses of the owner nor the illegal earnings of the infringer, and there is also none of loyalties for reference or the loyalties for reference are obviously unreasonable. To resolve this issue, Article 21 of the Several Provisions concerning the Application of Laws in the Hearing of Patent Disputes that was issued by the Supreme People's Court in June 2001 that, "where there is no patent exploitation fee under contractual license for reference or the patent exploitation fee under contractual license is obviously

unreasonable, the people's court may set an amount of compensation of not less than RMB 5,000 yuan and not more than RMB 300,000 yuan, and not exceeding RMB 500,000 yuan in light of factors such as the type of the patent right, the nature of the infringing act and the circumstances". This is the so-called "statutory compensation" or "fixed-amount compensation" in practice. The provisions on statutory compensation were imported into the Copyright Law and the Trademark Law amended in 2001. In addition, Article 45 of the TRIPS of the WTO also provides that "the judicial authority ……may order it (infringer) to pay statutory compensations".

Therefore, it is proposed in the Draft for Comments to add statutory compensation to the Patent Law and include into the scope of amount of compensation the reasonable expense the patentee has incurred in order to stop the infringement (Article 69).

4. Add the provisions on pre-litigation preservation of evidence

For interim remedy measures for patent infringement, Article 61 of the current Patent Law provides measures for ceasing an infringing act and preservation of properties before litigation but does not touch upon measures for pre-litigation preservation of evidence. Article 74 of the Civil Procedural Law merely provides the measures for preservation of evidence after the initiation of a lawsuit without any clear provisions on the measures for preservation of evidence prior to the litigation. However, during the hearing of patent infringement disputes, what often happens is that if the evidence is not preserved before the litigation, such evidence will possibly lose or be hard to be collected. In order to resolve the issue, the Several Provisions concerning the Application of Law in terms of Pre-litigation Cease of Infringement issued by the Supreme People's Court in 2001 provides that the people's court may, as per the request of the party, preserve the evidence with reference to the provisions of Article 74 of the civil procedural law when implementing the measures to cease patent infringement before the litigation.

During the amendments to the Trademark Law and Copyright Law after the completion of the second amendment to the Patent Law 2000, both provisions concerning the cease of infringing acts and preservation of properties before litigation and the provisions on preservation of evidence before litigation were added.

In view of the above situations, it is proposed in the Draft for Comments to add provisions on preservation of evidence before litigation to the Patent Law so as to protect the legitimate interests of the patentees more effectively (Article 70).

(VII) Safeguard Legitimate Rights and Interests of the Public and Stop the Abuse of Patent Rights

1. Perfect provisions on compulsory license

Compulsory license is of importation position in the patent system of each country, which is of active realistic significance in preventing the patentee from exercising its exclusive right unreasonably, maintaining the interests of the country and the public and promoting public benefits.

In order to adapt the provisions on patent compulsory license in China's Patent Law to the developing situations at home and abroad and further perfect the existing provisions, the Draft for Comments puts forward the following amendment proposals:

First, to amend the reasons for grant of compulsory license as set forth in Article 48 of the current Patent Law. On the one hand, as per the relevant provisions under Paris Convention for The Protection of Industrial Property, it is proposed to clearly provide that compulsory license may be granted where the patentee, without any justified reason, does not implement or sufficiently implement its or his patent within three years since the grant of the patent right; on the other hand, it is provided that compulsory license may be granted where the exercise of the patent right by the patentee is determined through judicial or administrative procedure as the conduct of excluding and restricting competition (Article 48).

Second, it is clearly specified in the Declaration regarding the TRIPS Agreement and Public Health formulated by the WTO that public health crisis, including the crisis of AIDS, tuberculosis, malaria or any other epidemic, shall constitute national emergency or extraordinary state of affairs. China is the country in the world that has the largest population, and the issues of public health occur relatively frequently, so the country should make full use the flexibility furnished by the aforesaid declaration. Therefore, it is proposed in order to prevent, treat and control an epidemic disease, the SIPO may grant compulsory license for the sake of the interest of the public during national emergency or extraordinary state of affairs as per the relevant provisions, so as to resolve the public health problem which might occur in China (Article 49).

Third, the general council of the WTO approved the Resolution regarding the Implementation of the TRIPS and Paragraph 6 of the Public Health Declaration on August 30, 2003, which allows the members to grant compulsory license to other members who have no or insufficient capability to manufacture the said drug when facing public health issues and to manufacture the relevant drug and export the same to these members, which therefore breaks through the restrictive provisions of Article 31 of the current TRIPS that the compulsory license should mainly be used to supply the domestic market demands. In December 2005, the general council of the WTO approved the Protocol on the Amendment to the TRIPS Agreement, which proposed to include the substantial contents of the foregoing resolution into the TRIPS agreement. The competent department of China has launched the procedure for the approval of the said protocol. In order to help a developing country or a least developed country who have no or insufficient capability to manufacture the said drug to resolve the public health issues faced by the same, it is necessary for China to allow the grant of compulsory license under the conditions that prescribed qualifications are met so as to license the drug manufacturers to produce relevant patented drug and export the same to these countries. (Article 50).

Fourth, regarding the procedure conditions for the grant of compulsory license, under Article 31 of the TRIPS, it is proposed to provide that for any request for the grant of compulsory license as per the provisions of Article 48 and

Article 51 of the Patent Law to be amended, proof should be provided to prove that a license contract on the exploitation of the patent has been signed with the patentee on reasonable conditions whereas license cannot be granted within a reasonable length of time; for any request for the grant of compulsory license as per the provisions of Article 49 and Article 50 of the Patent Law to be amended, the foregoing proof does not need to be provided.

2. Add provisions on defense to prior art and stopping of accusation in bad faith

In China's practice of hearing or disposing patent infringement dispute, situations like this often happen: the patentee claims that the accused infringer infringes the patent; the accused infringer however produces evidence to establish that the technologies or designs implemented by the same are the prior art or prior design known by the public before the application date and therefore claims that its activities should not be held as infringement of patent. Under such circumstance, if the accused infringer is not allowed to use the defense of prior art, the accused infringer will have to launch the patent invalidation process to invalidate the involved patent for the purpose to eliminate its liabilities in infringement of patent. However, as the China's proceeding for hearing of patent infringement dispute and the proceeding for invalidation of patent are separate from each other and in the charge of different authorities, this requires the accused infringer to apply for the suspension of the patent infringement proceeding and launch the invalidation proceeding; and the patent infringement proceeding will be restored after the invalidation examination by the Patent Reexamination Board and the invalidation proceeding at the people's court and the issue of the patent validity is settled, of which the whole process might need several years. Even if the accused infringer finally wins the case, it will suffer great losses in terms of time, money, market and reputation, which is unfair to the accused infringer that implements the prior art or prior design. If the provisions on defense of prior art are added in the Patent Law, when the accused infringer that implements prior art or prior design puts forward the defense of prior art during the hearing of patent infringement dispute, it only needs the people's court or the administration to decide whether that the accused infringer implements is prior art or prior design and the infringement charge can be directly judged without any consideration of the validities of the patent, which will greatly simplify the procedures of the infringement proceeding, shorten the litigation term and effectively protect the legal rights and interest of the public. To date, the defense of prior art has been generally adopted in the patent judicial practice in the United States, Japan, Germany and other countries, and there is certain practice of some people's courts and administrative authorities allowing the defense of prior art in hearing or disposing of patent infringement dispute but there are no grounds from the perspective of Patent Law. Therefore, it is proposed in the Draft for Comments to add the provisions allowing the defense of prior art and the prior design (Article 62).

The normal operations of the patent system needs the respect of the whole society to other's patent and the intensification of the effective protection for the patent right, and on the other hand, needs to prevent the patentee from maliciously interfering the normal production and operation of another person by using its or his right and safeguard the regular market and economic order. No applications for patent should be made with knowing that the technology or design for which a patent right has been granted belongs to prior art or prior design, some people not only intentionally violate the provisions of the Patent Law, especially manipulating the system that no substantive examination is required for utility model and design, and obtain the patent for such creations but also maliciously charge others for infringing of their patent, which severely interfere with the other's normal business activities. It should be pointed out that such a phenomenon might exist even in the patent right for invention granted through substantive examination. Therefore, it is necessary to enhance the law-abiding consciousness of the patentee. Article 48 of the TRIPS provides that if measures are taken upon the request of one party and the party abused the law enforcement procedure, the judicial authority shall has the right to order the said party to pay the other party which is wrongly prohibited or restricted a sufficient compensation for the suffered losses due to the abuse. It is proposed to provide the compensation system for accusation in bad faith so as to enhance the legal determent against accusation in bad faith. That is, where the patentee, knowing that the technology or design for which a patent right has been granted belongs to prior art or prior design, accuses other persons for infringing its or his patent right, the accused infringer may request the people's court to order the patentee to compensate for the damage thus caused to the accused infringer (Article 63).

3. Add supplementary provisions on prescription for instituting legal proceedings and provisions on expiration of right

Article 62 of the current Patent Law provides the prescription for instituting legal proceedings for patent infringement. However, the current Patent Law does not set forth any clear provisions on the circumstance where, for successive patent infringement, the patentee claims its or his right beyond the prescription for instituting legal proceedings from the date when the patentee knows or ought to know how the amount of compensation is calculated and whether the patentee has the right to demand the infringer to stop the infringement. In order to resolve these problems in practice, the Several Provisions concerning the Application of Laws in the Hearing of Patent Disputes issued by the Supreme People's Court provides that "if the right owner brings a lawsuit after two years but the infringement continues as of the initiation of the lawsuit and the patent is within the valid term, the people's court shall order the defendant to cease infringement in the judgment, of which the compensation amount for the infringement damage shall be calculated from two years before the patentee brings the lawsuit to the people's court." The said provisions mean that where the patentee brings a lawsuit before the court two years after it or he ought to know, the claims of the patentee shall be subject to the prescription for instituting legal proceedings, and the patentee shall not be compensated for the infringement two years before the date of the initiation of the lawsuit, but the patentee may be compensated for the infringement within two years from the date of the initiation of the lawsuit; if the infringement

continues as of the initiation of the lawsuit, the claims of the patentee shall not be subject to the prescription for instituting legal proceedings, and the patentee may demand the infringer to stop the infringement. The Draft for Comments proposes to include the essence of the foregoing judicial interpretation of the Supreme People's Court into the Patent Law.

However, for the successive patent infringement, it seems unreasonable if the patentee may be compensated for the infringement committed within two years before the date of the initiation of the lawsuit, no matter how long has passed since the patentee knew or ought to know the infringement. This also goes against the original intention of the prescription for instituting legal proceedings as set forth in Article 62 of the current Patent Law. In order to impel the patentee to exercise right in an active and timely manner and stabilize social relations, the Draft for Comments proposes to refer to the practice of the United States and other countries in imposing necessary restrictions on the patentee that "slacks in the exercise right" and provide that where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter after 3 years of the expiration of the prescription for instituting legal proceedings (i.e. 5 years after the patentee knew or ought to know the infringement), it or he shall not request a compensation for damages caused by the infringement omitted before the date of instituting the legal proceedings or requesting the handling (Article 72).

On the other hand, it is also unreasonable to provide that in whichever cases, the patentee may have the right to request another person implementing its or his patent to bear the civil liabilities to cease infringement without considering whether or not there is indication of intention by the patentee before litigation of not looking into the implementer's responsibility. In reality, some patentees adopt the strategy of "leave the infringer at large in order to apprehend him afterwards" after knowing the infringement. That is, the patentee does not claim its or his rights in the first place and makes the implementer to believe that the patentee will not claim right over the implementation and then the implementer will continue the implementation and even increase investment and production scale based on such reliance; however, years later, the patentee brings a lawsuit before the people's court or requests the patent administrative department to handle the matter. Under such circumstances, the implementer will suffer numerous losses in terms of fund, equipment, raw materials and labors if the patentee is still of the right to request the infringer to cease infringement, which will result in the waste of social resources and is not of the advantage to form the stable economic order. Such conducts contravene the principle of good faith and the principle of fairness as set forth in the General Principles of the Civil Law, and the patentees' claims shall be restricted. The Draft for Comments proposes to refer to the relevant foreign systems, such as "equitable estoppel" under the Anglo-American Law System and "invalidation of rights" under the Continental Law System, and provide that in such situations, the patentee has no right to demand the implementer to cease the implementation or obtain a compensation (Article 73).

4. Acts not deemed as patent infringements

It is a widely adopted practice among respective countries to provide in the Patent Law acts which shall not be deemed as patent infringements, to further restrict the right of the patentee and balance the interests between the patentee and the public. Article 63 of the current Patent Law enumerates four types of acts which shall not be deemed as patent infringements. Through practice, we are of the view that it is necessary to further perfect the said provisions. And the main amendment proposals include the following:

First, it is proposed to perfect the provisions on the principle of exhaustion of patent right and to allow parallel import. Article 6 of the TRIPS provides that "any provisions herein shall not be applicable to the exhaustion of intellectual property." Thus, each country is allowed to adopt a flexible position towards the exhaustion of right. The Declaration concerning the TRIPS Agreement and Public Health that was approved by the WTO in 2001 reiterated that each member had the right to decide at its discretion its position in terms of the issue of exhaustion of intellectual property right. In consideration that there is still big difference between China's strength in economy and scientific research and those of the developed countries, patent rights in the hi-tech field are mostly owned by foreign patentees; the industrial development in China still depends on the import of foreign technologies to a great extent, it is therefore proposed in the Draft for Comments to fully use the flexibility given by the TRIPS to each country and allow the parallel import in the patent field. In addition, the allowance of parallel import will enable China to import from foreign countries the patented drug which China is unable or insufficient to manufacture so as to resolve the issues of public health in China.

Second, the Draft for Comments proposes to introduce the exception of drug and medical equipment experimentation (hereinafter referred to as the "Bolar exception") as set forth in the patent systems of many countries. The Bolar exception, a legal system which was first created in the United Sates, aims to overcome the lag behind the launch of copying drug and medical equipment into market after the expiration of the patent term caused by the system for approval and examination of the launch of drug and medical equipment into market. This is because that: after the patent term expires, even if other company copies products that are completely identical with the patent drug or patented medical equipment, under each country's system for approval and examination of the launch of drug and medical equipment into market, the copier still must provide various experiment material and data of the drug or medical equipment in order to prove the product conforms to relevant provisions. Therefore, if other companies are allowed to start relevant experimentation only after the patent term expires, the launch of copying drug and medical equipment into market will be greatly lagged, which results in that the public can hardly obtain cheap drug and medical equipment after the expiration of the patent term. This performs the function of extending the patent term objectively. Therefore, the Bolar exception is clearly provided in the patent laws of the United States, Canada, Japan, Australia and other countries, and this system is determined to conform to the TRIPS by relevant

rulings of the WTO's Dispute Settlement Body. As a country having a large population and relatively grave problems of public heath, China ought to add provisions on the Bolar exception so that the public can obtain cheap drug and medical equipment after the expiration of the patent term for drug and medical equipment (Article 74).

V. Acceptance of Opinions Voiced by the Public

(I) Accepted Opinions

1. Definitions of service invention-creations and non-service invention-creations

During the amendment to the Patent Law in 2000, for an invention-creation made by a person using the material and technical means of an entity to which he belongs, the entity and the inventor were allowed to define the ownership of such invention-creation in the form of a contact. The SIPO once proposed in the Draft for Soliciting Opinions to further provide that for an invention-creation made by using the material and technical means other than technical secrets of an entity, the invention-creation is a service invention-creation unless otherwise agreed, and the right to apply for a patent belongs to the invention or the designer, and the entity has the right to exploit the invention-creation in a non-exclusive and non-assignable manner.

During the process for soliciting opinions, the said amendment proposal, though approved by part of people, met with relatively strong objections. The main reasons are as follows: first, the said amendment proposal will result in that the inadvertent management of an enterprise or institution will lead to the privatization of service invention-creations and thereby harm the legitimate interests of the entity; second, the meaning of "technical secrets" is vague, and it is very difficult to define whether an invention-creation made by a staff member has used technical secrets of the entity, which will spark off considerable controversy and dispute.

There are always different opinions among Chinese enterprises, institutions and individuals towards whether to increase or reduce the ratio of service invention-creations. Thus, the making of any decision must take various factors into account. For the purpose of prudence, the Draft for Comments has cancelled the amendment proposal to Article 6 as put forward in the Draft for Soliciting Opinions and maintains the provisions of Article 6 of the current Patent Law unchanged.

2. Approval of and examination on application for a patent in a foreign country for an invention-creation completed in China

In order to prevent any invention-creation that relates to the national security or material interests from being disclosed through application for a patent in a foreign country without the permission of the competent authority and to ensure that the provisions of Article 4 of the Patent Law are observed, the Draft for Soliciting Opinions proposed to amend the provisions of Article 20, paragraph 1 to read as "where any entity or individual intends to files an application in a foreign country for a patent for invention-creation made in China, it or he shall file first an application for patent with the Patent Administration Department under the State Council and comply with the provisions of Article 4 of this Law."

During the process for soliciting opinions, some multinationals raised objections for the following main reasons: first, as per the said amendment proposal, a multinational can file an application in a foreign country for a patent merely one day after it filed an application for a patent in China, so that the object of making the provisions will not be achieved, i.e. the requirement on keeping secret as set forth in Article of the Patent Law will not be met; second, the amendment proposal will affect the global patent strategy of the multinationals and impair their enthusiasm towards the setup of research and development center in China; and third, in reality, especially in the situation of transnational cooperation and development in the manner of Internet and the like, it is very difficult to define whether an invention-creation is "completed in China", which will lead to a conflict in the application of laws of different countries. Thus, some companies indicate that a system may be adopted which is similar to the practice in the United States that a patent application to a foreign country shall be approved by the Patent Office of the United States.

The Draft for Comments has accepted the above opinions and with reference to the system of the United States, amended the amendment proposal put forward in the Draft for Soliciting Opinions concerning first filing of an application in China as the proposal that the filing of any application in a foreign country shall be approved by the SIPO.

3. Expression of "patent application right"

The Draft for Soliciting Opinions proposed to amend Article 10 of the current Patent Law to specify the right to apply for a patent is assignable, and at the same time, the Draft for Soliciting Opinions proposed to specify that where any Chinese entity or individual assigns the right to apply for a patent to a foreigner, the relevant procedures under laws and regulations must be followed just like the assignment of the patent application right and the patent right. During the process for soliciting opinions, many people are of the view that the "right to apply for a patent" and the "patent application right" are quite confusing from the literal perspective.

As a matter of fact, Articles 6 and 8 of the Patent Law enacted in 1984 adopted the expression "right to apply for a patent," and Article 10 of the same Law adopted "patent application right." These two expressions remained unchanged during the amendments to the Patent Law in 1992 and 2000. Nevertheless, in order to free people from doubt, the Draft for Comments proposes to amend "patent application right" as "patent application."

4. Ownership of right over invention-creation completed under a scientific research project with government investment

For the ownership of intellectual property right for a scientific research project with government investment, the Draft for Soliciting Opinions proposed to provide that "for an invention-creation which is completed under a scientific

research project with government investment, the right to apply for a patent belongs to the entity undertaking the project."

During the process for soliciting opinions, each side opines that it is necessary to make provisions on the ownership of achievements of scientific research projects with government investment and also expresses some opinions: first, for a scientific research project co-invested by the state and other investor (e.g. enterprise), if the intellectual property right of the scientific research achievement belongs to the entity undertaking the project, then the interests of the co-investor cannot be ensured, which does not help to arouse the enthusiasm of the society and enterprises to invest in scientific activities; second, the Draft for Comments conflicts with Article 37 of the Law on National Defense, because Article 37 of the Law of National Defense provides that funds which the state directly invests into the construction of military force, the production of national defense scientific research and other construction of the national defense, resources such as land appropriated for the use thereof, and technical achievements formed as such for the purposes of the national defense belong to the national defense capital which is owned by the state.

According to the foregoing opinions, the Draft for Comments has made corresponding adjustment to the Draft for Soliciting Opinions.

5. Rules concerning the establishment of patent infringement

For more than twenty years, based on the reference to the experience and practice of developed countries, China's judicial and administrative authorities have gained certain experience in how to establish patent infringement during the hearing and dealing with patent infringement cases and formed certain relatively matured rules, such as the principle of equivalence and the principle of estoppel. These rules have played an active role in the normal operation of China's patent system. The Draft for Soliciting Opinions proposed to add the principle of equivalence, the principle of estoppel and other infringement establishment rules that are widely adopted by respective countries to the Patent Law.

During the processing for soliciting opinions, may foreign companies, patent agencies and some domestic enterprises agreed to add the principle of equivalence and the principle of estoppel to the Patent Law. However, some experts, scholars and representatives of judicial authorities were opposed to the addition of the principle of equivalence. The main reasons are as follows: first, the principle of equivalence is to expand the protection scope as literarily defined by the claims and thus is advantageous to the patentee. However, where a large number of patent rights for high-tech technologies are owned by foreign enterprises, the addition of the said principle to the Patent Law is of disadvantage to the innovation and development of Chinese enterprises; second, the principle of equivalence is an infringement establishment rule which is applied by the judicial authority at its discretion during the hearing of patent infringement dispute, and the said principle is an exception other than a universal rule; third, the application of the principle of equivalence is relatively complex.

Based on the above objections and in consideration of the fact that the Several Provisions concerning the Application of Laws in the Hearing of Patent Disputes that was issued by the Supreme People's Court in 2001 has made judicial interpretations on the principle of equivalence which is applied in the judicial practice of China, the Draft for Comments cancels provisions on the principle of equivalence. The principle of estoppel is a reverse regulation of the principle of equivalence. Where the principle of equivalence has been cancelled, it is not necessary to separately set forth the principle of estoppel.

6. Administrative enforcement for patent

In order to enhance the administrative enforcement for patent, the Draft for Soliciting Opinions proposed to prove that for an infringing act with grave seriousness, the patent administrative department may confiscate the infringing product and special equipment used for the exploitation of the infringing act.

During the process for soliciting opinions, objections were raised to the foregoing proposal, which mainly include: first, "infringing act with grave seriousness" is relatively blurry and is difficult to define; second, the measures taken for the patent infringing act, i.e. to confiscate the infringing product and special equipment, are too severe; third, it is difficult to make further provisions on the matters of interest to many foreign companies, i.e. how to dispose the confiscated infringing product and special equipment.

In view of the foregoing objections, the Draft for Comments has cancelled this proposal.

(II) Unaccepted Opinions

1. Examination and approval requirement on assignment of right to apply for a patent, patent application and patent right to a foreign country

During the process for soliciting opinions, many foreign enterprises, foreign chambers of commerce and foreign associations were opposed to the amendment proposal to Article 10 of the Patent Law, i.e. "for any assignment of the right to apply for a patent, the patent application or the patent right by a Chinese entity or individual to a foreigner, a foreign enterprise or a other foreign organization, relevant procedures must be followed in accordance with provisions of the laws and administrative regulations." The main reasons are as follows: first, the import and export of technologies under the Administrative Regulations on Import and Export of Technologies merely includes the assignment of the patent application right and the patent right, but does not include the assignment of the right to apply for a patent; second, the current control of the import and export of technologies is complex in procedure and tedious in formality, and if relevant management departments demand in a mandatory manner the party, which does not have the right over the import and export managerial authority, to entrust a foreign trade agency, then an unreasonable burden will be placed on research and development institutions set up in China by foreign enterprises, Chinese institu-

tions, small and medium-sized enterprises and enterprises that do not have the right over the import and export managerial authority.

The SIPO is of the opinion that the "right to apply for a patent" is a concept adopted in Articles 6 and 8 of the Patent Law other than a concept newly added to the amendment to the Patent Law this time, which means the right to obtain patent protection for the application for the invention-creation that has been completed or that is to be completed before any entity or individual files an application for a patent with the SIPO. Like the "patent application" and the "patent right," the "right to apply for a patent" is also assignable. Article 10 of the current Patent Law provides that "any assignment, by a Chinese entity or individual, of the patent application right, or of the patent right, to a foreigner must be approved by the competent department concerned of the State Council," whereas the said Article does not clarity whether or not the assignment of the right to apply for a patent to a foreign shall be approved. As a result, the pitfall of circumventing the said provisions is put behind.

Although the Administrative Regulations on Import and Export of Technologies does not clarify that the assignment of the right to apply for a patent also belongs to the import and export of technologies, under Article 2 of the said Regulations, the assignment of technical secrets falls into the scope of the import and export of technologies. Thus, as a form of the assignment of technical secrets, the assignment of the right to apply for a patent by any Chinese entity or individual to a foreigner also belongs to the scope of the export of technologies under the said Regulations.

Problems of simplifying the procedures for the management of the export of technologies and reducing the burden on parties ought be resolved by amending the Administrative Regulations on Import and Export of Technologies or perfecting the specific implementation methods of the said Regulations and shall not be involved in the Patent Law.

2. Protection for genetic resource and disclosure of origin of genetic resource

For the provisions on the protection for China's genetic resource and the disclosure of the origin of genetic resource as proposed in the Draft for Soliciting Opinions, relevant government institutions and enterprises of the United States, Japan and other countries raised opposing opinions for the following main reasons: first, the key to the protection of genetic resource lies in the establishment of a particular supervision system for genetic resource, the act of "Bio-pirate" should be regulated through particular laws and regulations, and the protection for genetic resource should not rely on the patent system; second, the Draft for Soliciting Opinions did not clarify the wording "genetic resource," "acquisition and exploitation," "depend on," "origin" and "laws and regulations", which will bring about difficulty in the implementation; third, the implementation of the said provisions calls for the support of relevant laws and regulations, and before these laws and regulations are put forward, the said Regulations are inexecutable; fourth, if the applicant fails to disclose the origin of genetic resource, the consequence is not explicit.

The SIPO is of the view that the effective protection for genetic resource needs the comprehensive regulation of various laws and regulations and the coordinated enforcement of multiple government departments. The relevant regulation under the patent system is an indispensable link of the effective protection for China's genetic resource. If merely the act of illegally acquiring China's genetic resource is subjected to legal sanctions, whereas the invention-creation which is completed with the exploitation of the illegally-acquired genetic resource can be granted the patent protection in China without any obstruction, this is tantamount to allow the law-breaker to make a profit with illegal acts and to indulge the act of illegally acquiring China's genetic resource to some extent, the consequence of which does not help stop the act "Bio-pirate" and safeguard China's sovereignty over the genetic resource.

Competent departments under the State Council, such as the Ministry of Agriculture, the Ministry of Health and the Ministry of Science and Technology, have enacted some particular regulations concerning the management of genetic resource so far. And the concerned competent department under the State Council speeds up drafting of the Administrative Regulations on Genetic Resource with a view to establish a comprehensive system for the management of genetic resource. Therefore, the provisions on the protection for genetic resource under the Patent Law will see the fruits.

For problems, such as the concrete meaning of "the completion of an invention-creation depends on genetic resource" and "the origin of genetic resource," the form in which the applicant discloses the origin of genetic resource, and the legal consequence which the applicant will bear if failing to disclose the origin of genetic resource, they will be clarified in the Implementing Regulations of the Patent Law or in the Examination Guidelines for Patent Examination. And for problems, for example, which acts of acquiring genetic resource are illegal acts and the acquisition of genetic resource should be subject to the examination and approval of which level of government department, they will be provided in the law and regulation on the management of genetic resource.

3. Drug patent linkage and extension of drug patent term

There is currently no evident objection to the provisions on the "Bolar exception" as proposed in the Draft for Soliciting Opinions. However, the relevant government institutions and pharmaceutical companies of the United States are of the opinion that in addition to the provisions on the "Bolar exception," the provisions on the drug patent linkage and the extension of drug patent term should be added to China's Patent Law. The main reasons are as follows: in the United States, the "Bolar exception" was created following the system of drug patent linkage and extension of drug patent term, which serves the object of balancing the interests between the drug patentee and the copying drug manufacturer and the interests between the patentee and the public, and to provide the "Bolar exception" only will create an unbalance of the interests. Also, relevant government institutions and some pharmaceutical companies of the EU and Japan opine that besides the provisions on the "Bolar exception," the provisions on the extension of drug patent term should be added to China's Patent Law for similar reasons.

Drug patent linkage is a special practice adopted in the patent system of the United States. Article 271, (e) (2) of the Patent Law of the United States provides that where another person submits to the drug supervisory authority an application for approval of the launch of a patented drug into the market, it or he constitutes an act of patent infringement. According to the said provisions, when other pharmaceutical company submits the US drug supervisory authority an application for approval of the launch of a patented drug into the market, the patentee may bring a lawsuit before the court against the application act to demand the drug examination and approval authority to stop the examination and approval procedures. However, there are no similar provisions in the Patent Laws of the EU countries and Japan.

The extension of drug patent term means that it takes a relatively long time for an application for approval of the launch of a drug into market to be approved by the drug supervisory authority, which might shorten the actual patent term the drug patentee has, and it is thus provided that the drug patentee may request the extension of the patent term for its or his drug based on the time duration before the application for approval of the launch of the drug into market is approved. The system for the extension of drug patent term has been established in the United States, Japan and the EU, in which the term will be extended for 5 years at most.

For the problem of drug patent linkage, the SIPO is of the view that Article 11 of the current Patent Law clearly provides that no individual may, without the authorization of the patentee, make, sell, offer to sell, use or import the patented product for production or business purposes. According to the said provisions, even if another person submits to the drug supervisory authority an application for approval of the launch of a patented product into market, when he conducts any act prohibited under Article 11 of the Patent Law within the patent term, the patentee has the right to request the people's court or the patent administrative department to order the infringer to stop the infringement and obtain a compensation for the losses suffered. Additionally, under Article 61 of China's current Patent Law, upon occurrence of an infringement, the patentee may further request the people's court to take interim remedies before litigation. Therefore, the right of the drug patentee will not be impaired by the examination and approval of the launch of a drug into market. It is an extremely special practice in the world that the US Patent Law provides that the submission of an application for approval of the launch of a drug into market is an act of patent infringement. Therefore, to add similar provisions to China's Patent Law lacks sufficient reasons.

For the problem of the extension of drug patent term, the SIPO is of the view that the following points must be taken into consideration: first, Article 33 of the TRIPS provides that the patent term is 20 years at least. Except for the said provisions, the TRIPS does not impose on the WTO members any obligations of extending the drug patent term, and Brazil, India and other developing countries also do not provide that the drug patent term may be extended; second, relevant statistics indicates that almost all patented products will undergo a sharp decrease in the price upon expiration of the patent term, and thus the drug patent term has a direct bearing on the cost and opportunity for the 1.3-billion population to get drugs and is of vital significance to maintain health of the masses of the people. In view of this, the SIPO opines that the time is not yet ripe for China to extend the patent term.

4. Indirect infringement

During the process for soliciting opinions, many foreign enterprises, some domestic enterprises and part of experts and scholars maintain that provisions on indirect infringement should be added to the Patent Law.

Indirect infringement means that the actor, knowing another person intends to implement an act of patent infringement, provides it or him with special components or equipment needed for the implementation of the infringement (the components or equipment per se are not granted the patent right).

The essence of adding provisions on stopping of an act of indirect patent infringement to the Patent Law is to expand the protection for patent right to the product which is associated with the patented technology and itself is not granted the patent right. Therefore, the problem of indirect patent infringement has fallen into the highly sensitive grey area of the interests between the patentee and the public, and relevant rules, if established and applied in an improper manner, will harm the right of the public to freely use the prior art. In consideration of the above factors, the SIPO is of the view that the time is not yet ripe to provide indirect patent infringement in the Patent Law, since the patentee may claim right over the direct infringer and look into joint liabilities of the relevant person based on the provisions on contributory infringement under the General Principles of Civil Law.

Comments from EUCCC and EPO on December 2006 Draft Patent Law

Chapter I General Provisions

Article 1

The reference to economics and society and to the construction of an innovative country, are a very strong, and of course welcome, addition to the current law. Innovation being directly related to protection of Intellectual Property, this modification announces that in order to encourage innovation, every modification of the law shall aim at strengthening the protection of patent rights, and discouraging infringement.

Article 3

The more detailed role of the Patent Administrative Department is welcome, it being understood, that spreading and propagating patent information relates to offering full and transparent access, for the public, to the data base of the Chinese Patent Office, in the same way as the European Patent Office makes its data base available to the public. This is to prevent the public from repeated research, as rightly indicated in the explanations (hereafter 'the Explanations") kindly provided by SIPO about the December 06 draft.

Article 4

The reference to "security or other vital interests of the State" is obviously missing in the second paragraph. In the Explanations, it is clear that the modification aims at avoiding that "invention-creations that must be kept secret as relating to the national security or significant interests of China are directly filed outside of China without examination and approval". If the second paragraph or article 4 is not modified, any application for any patent made by any entity or individual, even not Chinese, would be placed under the entire discretion of SIPO. Filing strategies and investment strategies for IP portfolios in China would be seriously impacted and lead to a decrease of hi-level research in China, including Chinese companies cooperating with US and EU companies. High-level research would possibly no longer be completed in China in order to avoid that an invention would be qualified as "invention-creation made in China" (see Art. 76 Draft).

Article 9

Article 9 introduces a very significant modification in Article 14 of the July Draft, and raises a serious concern for foreign companies who have been encouraged by China to invest financial and human resources in order to innovate in China, rather than in their own countries. The compulsory license referred to here not only applies to invention-creations that are of great significance to the security or interest of the State, but apply to all inventions, including inventions made with the contribution of foreign entities. The consequence is that any invention-creation made by an R&D center created by a foreign entity in cooperation with national research institutes would be exposed to the risk of being spread without their approval. This would be a strong signal to all foreign entities to refrain from further investing and cooperation with national research institutions (which are usually funded by the government, such as under the 863 or 973 program), or even to withdraw from their pending projects. This article however, may remain unchanged, but only if it applies to national scientific plans (as mentioned in the Explanations) without foreign involvement, and not to foreign funded research projects. Should such modification not be made, the article would be in conflict with Article 31 of TRIPS. Finally, it would not be clear whether contractual regulations such as according to Art. 6 and Art. 8 Patent Law could supersede this article.

Article 11

The Explanations (article III3) construe the existing contractual frameworks between a patent company and its Chinese subsidiary whereby an invention shall belong to the parent company as "a way to circumvent the approval requirement as provided in Article 10…"

Since the new Article 11 refers also to the right to apply for a patent, and not only to a pending patent application of a registered patent, and is not restricted to national security or significant State interests, this would mean that, even where such a contractual framework exists, all invention-creations made by a Chinese subsidiary need to be approved, both by SIPO (article 4 of the new draft) and by MOFCOM/MOST before a patent application may be filed in a foreign country. Such situation would retroactively invalidate all contracts signed between subsidiaries and their parent companies, and cause serious negative impact in practice. [It is difficult to predict a "an unwarranted curtailment of period of protection" if the stipulated time frame for approval according to TIER is 40 working days.] It would especially increase the administrative burden also for Chinese companies doing international research themselves. Additionally, where a company decides to keep an invention as know-how, it would still have to disclose it to the Chinese authorities for approval according to TIER before being able to acquire the right abroad in case of restricted technology. Fears for unwanted transfer of technology could be easily averted by following the recommended alternative wording. In addition, it is strongly recommended to re-draft the TIER for more practical application.

Article 12

The insertion of offer to sell is a welcome modification.

Article 13

It should be clear that the right of the patent applicant to receive a fee is be contingent to the patent eventually being granted.

Article 14

Often Chinese or foreign companies, e.g. in the steel sector, have subsidiaries which are especially dedicated to R&D. These subsidiaries often cooperate with universities. This cooperation is beneficial for both sides as well as for educating the society in general. According to the proposed Article 14, the subsidiaries would

have to obtain the agreement of the universities prior to granting a license to their parent company. Such an obligation could teach industry to shy away from cooperating with third parties including universities. Moreover the need for consensus before licensing co-owned rights would restrict the diffusion and availability of technology within China in total. Furthermore, the act of granting a license to use is one of the means of exploitation of the patent, and should be treated in the same way as in the last paragraph of the article. "Exploitation" should include the right to take enforcement measures whenever necessary.

Article 16

Article 16 was introduced in the Patent Law at a time when research was mainly performed by State owned entities. Foreign entities had not yet invested in China into R&D centers. This article is now obsolete, as it does not correspond to the private sector who need to remain free to decide whether, and how, to provide incentives to its employees. The article and could be removed. Or, alternatively, it should made clear that it only applies to State owned enterprises and to inventions made in China.

Article 19

According to article II(1) of the Explanations, the intention of the modification is to allow all patent agencies without restriction to represent a foreign patent applicant. Although such modification is welcome, it must be said that, in practice, it is not significant and does not address the concerns that had been expressed in previous comments. The concern was expressed by large foreign invested companies who employ highly qualified staff, including Chinese qualified patent agents, and do not wish to duplicate work and expenses by having to instruct a patent agency in addition to employing qualified Chinese patent attorneys. It is, therefore, suggested to add in the text that patent attorneys, qualified according to law, may be employed by the applicant and may deal with patent matters directly with SIPO.

Chapter II Requirements for Grant of Patent Right

Article 22

As the term "technology" is not well defined in patent literature, it is recommendable to use the term "information" instead, in order to avoid dispute on the content of this term.

Article 23

We would propose a different translation for article 23, which does not change the substance: "Any design for which a patent right may be granted shall neither belong to the prior design nor be identical to another design filed with SIPO by another person prior to the publication of the design concerned, even if such other design is published afterwards, and shall be, for a designer in the relevant field, substantially different from the prior design or from a combination of features of the prior design."

Article 24

The term "design" seems to be missing in article 24. It should be made clear that this article only applies to the determination of novelty and not, in the case of invention-creations, to the evaluation of inventive steps, which should be made at the date of filing the patent application, and not at the time where it may have been disclosed.

Article 25

As for patent eligibility, it would be useful to clearly exclude business methods. There is a strong disagreement against the stipulation on an invention-creation depending on genetic resources, which creates a link between the patentability of an invention and the compliance of the genetic resources with the national laws and regulations. It seems incompatible with Article 29 (2) TRIPS which provides that Members may exclude from patentability inventions (where their exploitation would affect public order, morality, human, animal or plant life or health, or environment) provided that such exclusion is not made merely because the exploitation is prohibited by their law. Such an undefined and overly broad rule, that could be the basis for invalidating a patent right would adversely impact the goals set in the Convention on Biodiversity (CBD), WIPO and WTO.

Chapter III Application for Patent

Article 26

The amended law still requires a disclosure of the origin of biological material used in the invention. The exact origin of the genetic resources is not always known to the inventor and compliance with such disclosure requirement may be difficult, or even impossible. It is considered to be contra-productive to link validity / patentability of a patent to compliance with the CBD regulations. It is strongly suggested to clarify the wording of the disclosure and to make clear that only a disclosure of the material source (but not the origin) is required whenever it is available.

Article 27

Article 27 does not determine the scope of protection of a design. Therefore, the filing of a description should only be optional. The article shall then be in line with article 58 of the Draft. The revision of this article is, also, an opportunity to introduce a provision against what is commonly called junk patents that are filed in bad faith by applicants o the basis of existing products. The principle of their liability should be established in the law

Article 28

As for mailing application, it is suggested to add another precision on proof of mailing.

Article 31

Article 31 could be the right place to introduce the possibility to obtain protection for partial designs, still missing in the Patent Law.

Chapter IV Examination and Approval of Application for Patent

Article 34

It should be added that the application is published promptly after the expiration of eighteen months from the date of filing or, if priority has been claimed, as from the date of priority. This would ensure that the public at large is never

informed later than 18 months from the filing of a priority application of the latest technical developments and the potential protection rights. The requirements of the law, only related to the form of the application and not the substance. With regard to the rights conferred by an application after publication it should be possible to provisionally confer upon the applicant the right to prevent others from using the invention without the applicant's consent. This would be compatible with the proposed Article 13 Draft where, after the patent is granted, the patentee may request a fee covering the period between publication and grant, if the applicant has chosen not to prevent the exploitation by others, or has failed in its attempt to stop it.

Article 36

When the applicant for a patent for invention requests examination as to substance, it should be clear that pre-filing date reference materials are only those that are known to the applicant.

Article 37

It is expected that the Implementing Rules should provide for the possibility to obtain extension of the time limit in article 37.

Chapter V Duration, Cessation and Invalidation of Patent Right

Article 42

In line with the practice of many countries which strive to strike a balance between patent term protection, fair use exemption and support for costly but innovative research, especially in the area of pharmaceuticals, it is strongly suggested to introduce a Supplementary Protection Certificate or patent term extension. Lengthy market approval authorizations in addition to exemptions of protection in case of clinical trials in this draft undermine China's efforts to develop a strong and competitive pharmaceutical industry which can act as originator for new medicines.

Chapter VI Compulsory License for Exploitation of Patent

Article 48

The possibility to grant a compulsory license of a patent is an exception to the fundamental principle of the monopoly contained in the patent right, and is therefore strictly defined in article 31 TRIPS. [See Art. 5A(4) Paris Convention, almost identical wording.] Art. 31k) TRIPS allows a compulsory license under the following circumstances: "Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive …" The current wording "…the act of exercising the patent right … intended to eliminate of restrict competition" is not equivalent to a "practice determined …to be anti-competitive ". The practice is further illustrated in Article 40 TRIPS, as licensing practices or conditions such as grant back conditions, conditions preventing challenges to validity and coercive package licensing…" The current wording insinuates that the mere fact of exercising the patent right could be deemed as an attempt to eliminate or restrict competition. This is a negation of the very essence of the patent right, which by definition is a monopoly: inevitably, when a patent owner takes action to exercise his right and requests an infringement to be stopped, he does eliminate or restrict competition. Such practices are addressed in the Anti-Unfair competition law and/or in the Anti-Monopoly law, in accordance with Article 40 of TRIPS. The current draft which gives power to a Court or a local Administrative Bureau to decide that the exercise of a patent is deemed to eliminate and restrict competition, and then order a compulsory license, is highly prone to be misinterpreted and sometimes even abused, which would in turn mean an infringement of the TRIPS requirements under article 31. It is therefore recommended to modify this article.

Article 50

The term "hope" in article 50 is too vague and is inadequate to trigger the granting of a compulsory license. We suggest using the expression makes a request.

Article 51

Art. 31 l) ii) TRIPS requires that the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent. This can be achieved in the draft by replacing the word may by shall in the second paragraph.

Article 53

Art. 31 b) TRIPS requires that compulsory license to use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Other exceptions are not mentioned in Art.31 TRIPS. Therefore, the requirements under Art. 53 draft should also apply to Art. 51 draft.

Article 54

The conditions surrounding the decision to grant, or to withdraw a compulsory license must be fair and transparent, so as to protect the interests of all parties concerned. We suggest adding to the current text of Article 54, new provisions relating to (1) the patentees reply to the request for a compulsory license, (2) possible restrictions to the compulsory license and (3) the possible termination of the license in case of violation of its terms by the licensee.

Article 56

Pursuant to Article 31(h) TRIPS, the remuneration should be adequate, which is more objective than "reasonable", and should be assessed in consideration of the economic value of the authorization".

Article 57

We suggest adjusting article 57 with the suggested change in article 54.

The determination of the exploitation fee being an adjudication made by SIPO, pursuant to article 56 of the Draft (54 of the current Patent Law), the only recourse against such and administrative decision would be, for the party who is not satisfied, to file an administrative

litigation seeking for a review of such adjudication. Civil courts have no power over SIPO and, in the absence of infringement act, the mere disagreement on a license fee is not a cause for civil action.

The above comment leads to a further suggestion, which is to make clear that until the permissible scope and all the conditions of the compulsory license are finally determined, by agreement or an administrative decision, the compulsory license may not be exploited.

Chapter VII
Protection of Patent Right

Article 60

The substitution of the word "shall "to the word "may" that was used in the previous draft of July, 2006 is most welcome. However, the new draft had deleted the possibility to confiscate the products and equipment, which is contrary to the spirit of the law (as defined in Article 1), since is diminished the power of the administration to enforce effectively a patent. It should be underlined that such confiscation is only an option that may be used at the discretion of the authority in charge of enforcing the patent right.

Article 62

Article 62 does not define whether decisions by the courts are binding for the administration and vice versa.

Article 64

The modification consisting in replacing the concept of repeat infringement by the intentional infringement is most welcome. However, this improvement is counterbalanced by the deletion of the confiscation of the illegal earnings and the possibility to impose a fine up to three times the illegal earnings. This, again, is in contradiction with the spirit of the law as defined in article 1. Deterrence requires the possibility to impose substantial fines where appropriate. In patent matters, the proposed maximum of 100,000 Yuan is too low and does not create an incentive to abstain from infringement. At minimum, the maximum amount should be significantly increased (e.g. 1 Mio Yuan).

Article 65

As for article 65, the minimum fine should be significantly increased to give the patent administrative department the possibility to effectively deal with patent infringement cases. In cases of passing-off the intent of the infringer is obvious, making the need for serious deterrence even more important.

Article 66

As for article 66, the minimum fine should be significantly increased to give the patent administrative department the possibility to effectively deal with patent infringement cases. In cases of passing-off the intent of the infringer is obvious, making the need for serious deterrence even more important.

Article 67

The strengthening of the Administration's power is welcome as a principle. It has been required in previous position papers by the

EUCCC, for the enforcement of designs, because designs are shown in products and it is immediately possible to assess whether two products are identical. However, Invention Patents and Utility Models are a much more technical and complex subject matter, and it seems impractical to request the patent administrative department to conduct such investigations in case of alleged infringement of an invention. This might, in fact, lead to bad faith action whereby an enterprise would seek to obtain technical secrets against a competitor. Art. 42 TRIPS requires, however, that the procedure provides means to identify and protect confidential information. It is, therefore, recommended to limit the application of this article to designs.

Article 68

The reference to reasonable expenses incurred by the patentee is welcome. The reference to losses, illegal profits and to the appropriate multiple of exploitation fee is in accordance with international practice. The reservation about this article concern the order in which the three criteria should be taken into account: first the loss, then the profits and finally the exploitation fee. There is no justification for this and the decision as to which criterion is best adapted to ensure adequate compensation should be left to the Patent owner. The maximum amount of 1,000,000 RMB is too low.

Article 69

The rule imposing to the Court to decide within 48 hours should also apply in article 69. This is particularly obvious for actions taken during an exhibition where time is of the essence.

Article 72

We understand the concern expressed in the Explanations under article VII(3), which addresses the delicate objective to strike a fair balance between the interests of the patent owner and those of an infringer who invests time and efforts to produce infringing products under the belief that the owner does not object. However, it does not seem that the proposed draft achieves this goal. This issue should also be analyzed from the point of view of the patent owner: the two year prescription is already a clear incentive not to let an infringement proceed too long, because the prejudice grows faster and the possibility of obtaining a corresponding compensation diminishes with time. This rule is also in favor of the infringer, as it is meant to discourage a patent owner to wait on purpose in order to obtain more compensation. On the other hand, starting litigation is not always an easy decision to make, and patent owners may prefer to act in a less aggressive manner, by sending warning letters, and even attempting amicable negotiations. The main issue should, therefore, to make sure that the infringer is warned by the patent that the patent is being infringed and that the patent owner does not agree. Once this is achieved, if the infringer still continues to infringe, he does so at his own risks. It is strongly recommended to abolish the second paragraph. If it is to be maintained, the proposed wording is recommended.

Article 73

The comments made under article 72 re TRIPS apply here. The so-called estoppel of laches in fact only applies in very narrow circumstances. It

also requires positive knowledge of the concrete circumstances by the right holder and is not solely dependant on "reasons to believe that the patentee will not claim his right" from the perspective of an infringer. It is not stipulated how to treat cases of limited use before the expiration of the five year time limit which after claiming a license are then transformed into a large scale operation. Business decisions by the right holder (e.g. small size of the infringer or lack of a sufficiently mature market) not to pursue legal proceedings in court are not respected. This provision is strongly recommended to be completely abolished in order to avoid serious conflicts and uncertainties.

Article 74

There is a strong opposition to the principle of international exhaustion of patents implied by the addition of the words or imports. This would jeopardize the recent improvements to the Chinese patent law and would affect the interests of domestic companies. Under US 271(e) (1), the unlicensed manufacture, use, sale, offer for sale or importation of a patented invention is permitted as long as the otherwise infringing activity is only for development and submission of data for submission "under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products". Article 74 (5) uses the general language "administrative approval" while the US statute is explicit about "Federal law", which the US courts have construed to exclude non-US regulatory authorities or local provincial protectionism. We suggest to restrict administrative approval to SFDA and CNCA approval. Moreover, the introduction of a Supplementary Protection Certificates (SPC) is strongly recommended in order to strike a fair balance between fair use exemptions and patent term. See comments to Art 42 of the present draft.

Article 76

The comments made under Art.4 Draft apply. If at all, sanctions such as refusal of the patent right should only apply in cases concerning secrets of the State. It is recommended to abolish this regulation.

March 2008 Patent Law Draft Amendments

Chapter I General Provisions

Article 1

This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation, to foster the spreading and application of inventions-creations, and to promote the development of science and technology and of economics and society, for meeting the needs of the socialist modernization and construction of an innovative country.

Article 2

In this Law, inventions-creations mean inventions, utility models and designs.

"Invention" means any new technical solution relating to a product, a process or improvement thereof.

"Utility model" means any new technical solution relating to the shape, structure, or their combination, of a product, which is fit for practical use.

"Design" means any new design of the shape, pattern, or their combination and the combination of color and shape or pattern, of a product, which creates an aesthetic feeling and is fit for industrial application.

Article 3

The country adopts effective measures to promote patent creativity, management, protection and utilization.

Article 4

The patent administrative department under the State Council is responsible for the patent work throughout the country. It receives and examines patent applications and grants patent rights for inventions-creations in accordance with law.

The patent administrative departments of the Provincial, Autonomous Region and Municipal local people's governments are responsible for the administrative work concerning patents in their respective administrative areas.

Article 5

Where an invention-creation for which a patent is applied for relates to National security or other significant interests of the State and is required to be kept secret, the application shall be treated in accordance with the Protection of State Secrets Law of the People's Republic of China on and other related regulations.

Article 6

No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest. However, it is not allowed that no patent right is granted for an invention-creation only the exploitation of which is prohibited under the laws of the State.

No patent right shall be granted for an invention-creation the completion of which relys on genetic resources or traditional knowledge the acquisition or use of the genetic resources of traditional knowledge which breaches the stipulations in related laws and regulations.

Article 7

An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee.

For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee.

In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.

Article 8

No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.

Article 9

For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise provided for, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applied for it shall be the patentee.

Article 10

For any identical invention-creation, only one patent right shall be granted, except for the circumstances provided for in paragraph 3.

Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.

Where the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if the applicant declares to abandon the obtained patent right for utility model upon grant of the patent right for invention, then the grant of the patent right for utility model does not affect the grant of the patent right for invention.

Article 11

For assignments of the right to apply for a patent, the patent application and the patent right, the parties concerned shall conclude a written contract.

For any assignment of the right to apply for a patent, the patent application or the patent right by a Chinese entity or individual to a foreigner, a foreign enterprise or another foreign organization, relevant technology import-export approval procedures must be followed in accordance with the related technology import-export management laws and administrative regulations.

Where a patent application or patent right is assigned, the parties shall register it with the patent administrative department under the State Council. The patent administrative department under the State Council shall announce the registration. The assignment of the patent application or the patent right shall take effect as of the date of registration.

Article 12

After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent right for a design, unless otherwise provided in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorporating its or his patented design, for production or business purposes.

Article 13

After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14

Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and "in accordance with the license contract" pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

Article 15

Where the right to apply for a patent, patent application or patent right is shared by two or more entities or individuals, the following acts shall be consented by all co-owners, unless agreed upon otherwise:

(1). Assigning the right to apply for a patent;

(2). Assigning or withdrawing the patent application;

(3). Assigning, abandoning or pledging the patent right; and

(4). Licensing others to exploit the patent.

Where the patent right is shared by two or more entities or individuals, any co-owner may exploit the patent alone unless agreed upon otherwise.

Article 16

The patent rights holder has the right to affix a patent marking and to indicate the number of the patent on the patented product or on the packing of that product.

The patent rights holder must according to the previous clause regulating patent marking and patent number conduct this according to the patent administrative department under the State Council.

Article 17

The entity that is granted a patent right shall award to the inventor or creator of a service invention-creation a reward and, upon exploitation of the patented invention-creation, shall pay the inventor or creator a reasonable remuneration based on the extent of spreading and application and the economic benefits yielded.

Regarding the method and amount of the reward and remuneration paid to the inventor or creator of the invention creation, it is agreed between the unit obtaining the patent rights and the inventor or creator of the service invention creation [no "yingdang"]. If there is no agreement then this will be determined according to the related national legislation.

Article 18

The inventor or creator has the right have their name written in the patent document as the inventor or creator.

Article 19

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 20

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, it or he shall appoint a patent agency established in accordance with law to act as his or its agent.

Where any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may appoint a patent agency established in accordance with law to act as its or his agent.

Patent agencies shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing patent agencies shall be formulated by the State Council.

Article 21

Any unit or individual who applies for a patent overseas for an invention-creation completed in China must be approved by the patent administrative department under the State Council. Besides those involving national security or significant public interest that are required to be kept confidential, the patent administrative department under the State Council must grant approval .

An invention-creation completed in China that is applied for as a patent in China, will be regarded as providing a foreign patent application request from the patent administrative department under the State Council. Within 6 months of the patent administrative department under the State Council receiving the application if they have not issued a ruling regarding the foreign patent application, it will be regarded as permitting the applicant to apply for a foreign patent.

Chinese units or individuals must file international patent applications according to the related international treaties the People's Republic of China is a party to. When filing an international patent application the applicant must abide by paragraph 1 of this article.

The patent administrative department under the State Council must handle international patent applications in accordance with the international treaties it is party to, this law and related regulations of the State Council.

Article 22

The Patent Administrative department Under the State Council and its Patent Reexamination Board shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely.

The Patent Administrative department Under the State Council shall periodically publish Patent Gazette, and propagate the patent information in a complete, correct and timely manner.

Until the publication or announcement of the application for a patent, staff members of the Patent Administrative department Under the State Council and other persons involved have the duty to keep its contents secret.

Chapter II Requirements for Grant of Patent Rights

Article 23

Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.

Novelty means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the patent administrative department Under the State Council an application which described the identical invention or utility model and was published in patent application documents or announced in patent documents after the said date of filing.

Inventiveness means that, as compared with the prior art, the invention has prominent substantive features and represents a notable progress for a person skilled in the relevant field of technology and that the utility model has substantive features and represents progress for a person skilled in the relevant field of technology.

Practical applicability means that the invention or utility model can be made or used and can produce effective results.

The prior art referred to in this Law means any technology known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.

Article 24

Any design for which a patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application which described the identical design and was published after the said date of filing, and for a designer in the relevant field, the design is substantively different from the prior design or a combination of the feature of the prior design.

Any design for which a patent right may be granted must not be a two-dimensional printed matter design, color or a combination of both to be mainly used as design with the function of an identifier.

Any design for which a patent right may be granted must not be in conflict with any prior right of any other person.

The prior design referred to in this Law refers to any design known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.

Article 25

Where an invention-creation for which a patent is applied for became known to the public in one of the following manners, within six months before the date of filing, it is not deemed to constitute a prior art or a prior design referred to in this Law for the said patent application:

(1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;

(2) where it was first made public at a prescribed academic or technological meeting;

(3) where it was disclosed by any person without the consent of the applicant.

Article 26

For any of the following, no patent right shall be granted:

(1) scientific discoveries;

(2) rules and methods for mental activities;

(3) diagnostic, therapeutic and surgical method for the treatment of humans or animals;

(4) animal and plant varieties;

(5) substances obtained by means of nuclear transformation.

For processes used in producing products referred to in items (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III Patent Applications

Article 27

Where an application for a patent for invention or utility model is filed, application documents such as a request, a description and its abstract, and claims shall be submitted.

The request shall state the title of the invention or utility model, the name of the inventor or creator, the name and the address of the applicant and other related matters.

The description shall set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant filed of technology to carry it out; where necessary, drawings are required.

The abstract in the description shall briefly explain the main technical points of the invention or utility model.

The claims shall be supported by the description and shall define the scope of the patent protection asked for in a clear and concise manner.

For an invention-creation, the completion of which relies on genetic resources or traditional knowledge, the applicant shall on the patent application document indicate that genetic resource direct source and original source or the source of that traditional knowledge. If the applicant is unable to indicate the original source of the genetic resource then they must explain the reason.

Article 28

Where applying for a design patent, application documents such as a request, drawings or photographs of the design as well as a brief explanation of the design shall be submitted.

Article 29

The date on which the patent administrative department under the State Council receives the application shall be the date of filing. If the application is sent by mail, the date of mailing indicated by the postmark shall be the date of filing.

Article 30

Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it

may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.

Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department Under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.

Article 31

Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to meet the time limit for submitting the patent application document, the claim to the right of priority shall be deemed not to have been made.

Article 32

An application for a patent for invention or utility model shall be limited to one invention or utility model. Two or more inventions or utility models belonging to a single general inventive concept may be filed as one application.

An application for a patent for design shall be limited to one design incorporated in one product. Two or more similar designs for the same product, or two or more designs which are incorporated in products belonging to the same class and are sold or used in sets may be filed as one application.

Article 33

An applicant may withdraw his or its application for a patent at any time before the patent right is granted.

Article 34

An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV
Examination and Approvals of Patent Applications

Article 35

Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council can publish the application earlier.

Article 36

Upon the request of the applicant for a patent for invention, made at any time within three years from the date of filing, the patent administrative department Under the State Council will proceed to examine the application as to its substance. If, without any justified reason, the applicant fails to meet the time limit for requesting examination as to substance, the application shall be deemed to have been withdrawn.

The patent administrative department under the State Council may, on its own initiative, proceed to examine any application for a patent for invention as to its substance when it deems it necessary.

Article 37

When the applicant for a patent for invention requests examination as to substance, he or it shall furnish pre-filing date reference materials concerning the invention.

For an application for a patent for invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the applicant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application shall be deemed to have been withdrawn.

Article 38

Where the patent administrative department under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.

Article 39

Where, after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.

Article 40

Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of the date of the announcement.

Article 41

Where it is found after preliminary examination that there is no cause for rejection of the appli-

cation for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 42

The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administrative department under the State Council rejecting the application, the applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant.

Where the applicant for patent is not satisfied with the decision of the Patent Reexamination Board, it or he may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic Of China.

Chapter V
Duration, Cessation and Invalidation of Patent Rights

Article 43

The duration of patent right for inventions shall be twenty years, the duration of patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.

Article 44

The patentee shall pay an annual fee beginning with the year in which the patent right was granted.

Article 45

In any of the following cases, the patent right shall cease before the expiration of its duration:

(1) where an annual fee is not paid as prescribed;

(2) where the patentee abandons his or its patent right by a written declaration. Any cessation of the patent right shall be registered and announced by the patent administrative department under the State Council.

Article 46

Where, starting from the date of the announcement of the grant of the patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.

Article 47

The Patent Reexamination Board shall examine the request for invalidation of the patent right promptly, make a decision on it and notify the person who made the request and the patentee.

Where the patentee or the person who made the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court under the Civil Procedure Law of the People's Republic Of China.

Article 48

Any decision to declare a patent right invalid must be registered and announced by the administrative department under the State Council.

Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

The decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed prior to the declaration of the patent right invalid; however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.

If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.

Chapter VI
Compulsory License for Patent Exploitation

Article 49

In any of the following cases, the patent administrative department under the State Council may, upon the request of the entity which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model:

(1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason;

(2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act eliminates or restricts competition.

Article 50

Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may, as

suggested by a competent department under the State Council, grant the entity designated by the department a compulsory license to exploit the patent for invention or utility model.

In order to protect the health of the public, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model according to the provisions of the preceding paragraph.

Article 51

Where a drug for treating an epidemic disease has been granted a patent in China, and a developing country or a least developed country who have no or insufficient capability to manufacture the said drug, hopes to import the drug from China, the patent administrative department under the State Council may grant an entity which is qualified for exploitation, a compulsory license to manufacture the said drug and to export it to the said country.

Where the patent administrative department under the State Council grants a compulsory license in accordance with the provisions of the preceding paragraph, the said department shall clearly set forth relevant requirements in the decision on compulsory license.

Article 52

Where the invention or utility model for which the patent right has been granted involves important technical advancements of considerable economic significance in relation to another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 53

The exploitation of a compulsory license shall be predominately for the supply of the domestic market, except as otherwise provided for in Article 49(2) and 51(1) of this Law.

Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the public interest or to the use in remedy of an action of eliminating and restricting competition as determined by the judicial or administrative procedure.

Article 54

The entity or individual requesting, in accordance with the provisions of Article 49 or Article 51 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.

Article 55

The decision made by the patent administrative department Under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced.

In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, after review upon the request of the patentee, terminate the compulsory license.

Article 56

Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others.

Article 57

The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall adjudicate.

Article 58

Where the patentee is not satisfied with the decision of the patent administrative department Under the State Council granting a compulsory license for exploitation, or the entity or individual requesting a compulsory license for exploitation is not satisfied with the decision made by the patent administrative department under the State Council rejecting its or his application, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.

Where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the Patent Administrative department Under the State Council regarding the exploitation fee, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.

Chapter VII
Patent Right Protection

Article 59

The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims.

The extent of protection of the patent right

for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs. The brief explanation may be used to interpret the drawings or photographs.

Article 60

Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the patent administrative department to handle the matter.

Article 61

When the patent administrative department handling the patent infringement dispute considers that the infringement is established, it shall order the infringer to stop the infringing act immediately.

If a party is not satisfied with the order made by the patent administrative department, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China; if, within the said time limit, such proceedings are not instituted and the order is not complied with, the patent administrative department may approach the people's court for compulsory execution.

The patent administrative department handling the patent infringement dispute may, upon the request of the parties, mediate in the amount of compensation for the damage caused by the infringement of the patent right; if the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 62

Where any patent infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process.

Article 63

Where a patent infringement dispute relates to a patent for utility model or a patent for design, the patentee or the interested party shall furnish to the people's court or the patent administrative department a search report made by the patent administrative department Under the State Council.

The patentee or an interested party can after the utility model or design patent is granted request a search report from the patent administrative department under the State Council. The patent administrative department under the State Council must according to the request conduct a search of the related utility models or design patents, and according to the search result conduct analysis and appraisal whether it

accords the requirements for grant of a patent, issue a search report and announce.

Where the search report confirms the legally prescribed requirements for grant of a patent right for a utility model or external design are not fulfilled but the patentee still claims his patent right is infringed by third parties , thereby causing losses to the other party, he must bear the liability for compensation.

Article 64

If during the patent infringement dispute, the infringer has evidence proving their technology or design belongs to presently existing prior art or a prior creation, this will not constitute patent infringement behaviour.

Article 65

Where the patentee or interested party for the purpose of harming another's interests, without facts or a fair reason accuses another of infringing their patent right and institutes legal proceedings in the people's court or requests the patent administrative department to handle the matter, the accused infringer may request the people's court to order the patentee to compensate for the damage thus caused to the accused infringer.

Article 66

Where any person passes off the patent of another person as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the patent administrative department to amend his act, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan; where the infringement constitutes a crime, he shall be prosecuted for his criminal liability

Article 67

Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the patent administrative department to amend his act, and the order shall be announced, with confiscation of illegal earnings and, in addition, he may be imposed a fine of up to three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan.

Article 68

The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the losses suffered by the patentee. If it is difficult to determine the losses which the patentee has suffered, the amount may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine both the losses which the patentee has suffered and the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license.

Article 69

Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe their patent right and that if such infringing act is not promptly prevented it will be difficult to avoid harm, they may before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and property preservation measures.

The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China. In relatively complicated cases the parties must be subpoenaed within 48 hours to conduct an inquiry, and a ruling issued within 5 days.

Article 70

In order to stop a act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings.

After acceptance of the request, the people's court shall make a ruling within 48 hours. In relatively complicated cases the parties must be subpoenaed within 48 hours to conduct a inquiry, and make a ruling within 5 days. If the ruling is to adopt property preservation measures it must be immediately implemented.

The people's court may order the applicant to provide a guarantee; if the requester fails to do so, the application shall be rejected.

If the applicant does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.

Article 71

The limitation for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act.

Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, is paid during the period from the publication of the application to the grant of patent right, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 72

For patent right infringements, where the patentee or interested party, without sound reason, does not file a case to the people's court or requests the patent administrative agencies to deal with it within 2 years after he knows or

should have known about the infringement, the infringer is not liable for compensation for infringements which happened before the date on which the lawsuit or request for action was filed. But, if the infringement continues after the patentee or interested party filed a lawsuit or requested administrative action, the infringing action must be terminated. Where the infringer pays reasonable license fee, he may continue exploiting the relevant patent.

Article 73

Where the relevant act, indication of intention or silence of the patentee or any interested party makes the entity or the individual exploiting the patent thereof have reasons to believe that the patentee or the interested party will not claim its or his right over the exploitation, whereas it or he subsequently institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter, its or his claiming of right is obviously contrary to the principle of good faith, and it or he shall not be entitled to a compensation for damages caused by an act exploited before the date of instituting the legal proceedings or requesting the handling, nor shall it or he be entitled to request the people's court or the patent administrative department to order the entity or the individual to stop the exploitation of the act.

Article 74

None of the following shall be deemed as infringement of the patent right:

(1) Where, after the sale of a patented product that was made by the patentee or with the authorization of the patentee, or of a product that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product;

(2) A patent rights holder who has obtained a patent in China or a licensed person in other country or area after that patented products is manufactured or products obtained directly from that patented method are sold, imports that product, as well as uses, promises to sell, or sells that product,

(3) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;

(4) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;

(5) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation;

(6) Where any person manufactures, uses or imports a patented drug or a patented

medical apparatus solely for the purposes of obtaining and providing the information needed for the administrative approval of the drug or medical equipment, and any person manufactures, imports or sells a patented drug or a patented medical apparatus to the said person.

Article 75

If the patent holder requests that the people's court or patent administrative department under the State Council for an order prohibiting infringement of their patent rights, if by stopping implementing the related patent the infringer cause harm to the public interest, the people court or patent administrative department can not order the infringer to cease carrying out these actions. The infringer can then continue to carry out these actions, but they must pay a reasonable fee.

Article 76

Any person who, for production and business purpose, uses, offers to sell or sells a patented product or a product that was directly obtained by using a patented process, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.

Article 77

Where any entity or individual, without the approval of the patent administrative department under the State Council, files in a foreign country an application for a patent for invention-creation that is completed in China, no patent right shall be granted for the patent application for said invention-creation filed in China by it or him; where the secret of the State is divulged, the person concerned shall be prosecuted for their legal liability.

Article 78

Where any person usurps the right of an inventor or creator to apply for a patent for a non-service invention-creation, or usurps any other right or interest of an inventor or creator, prescribed by this Law, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority at the higher level.

Article 79

The patent administrative department may not take part in recommending any patented product for sale to the public or any such commercial activities.

Where the patent administrative department violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.

Article 80

Where any State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be prosecuted for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 81

Any application for a patent filed with, and any other proceedings before, the patent administrative department under the State Council shall be subject to the payment of a fee as prescribed.

Article 82

This law shall enter force on 1 May 1985.

Comments from EUCCC on March 2008 Draft Patent Law

Specific Issues not addressed in this draft

(1) Doctrine of Equivalents

Although the judicial interpretation provides for the Doctrine of Equivalents, but its effect is not as stable as a law. Moreover, the relevant judicial interpretation is only applicable for judicial enforcement channel and not for administrative enforcement channel, whereas the latter is an important Chinese characteristic enforcement mechanism. Thus we suggest put this doctrine into Patent law, so that there is a stable and uniform effect for both enforcement channels.

(2) Contributory infringement

The revised Patent Law is silent about contributory infringement. While Chinese jurisdiction acknowledges joint infringement, it seems to be a controversially discussed, whether legal actions can only be taken against all joint infringers together and whether joint infringers shall only be liable if they infringe knowingly.

To avoid such discussions and define a clear and sufficient protection, patent laws of most industrialized countries sufficiently cover contributory infringement. Just to name a few: Belgium Article 27 (2) and (3) Patent Law, Denmark § 3 (2) Patent Law, France Article L 613-4 CPI, Germany § 10 Patent Law, Luxembourg Article 46 Patent Law, the Netherlands Article 73 ROW, Spain Article 51 Patent Law, Sweden § 3 (2) Patent Law, the Czech Republic § 13a Patent Law, Turkey Article 74 VO 551, UK Section 60 (2) and (3) Patent Acts, and US 35 U.S.C. 271 (c).

Suggestion: Define contributory infringement in an article of the Patent Law.

Chapter I General Provisions

Article 6

The addition of a provision disallowing patents relying on traditional knowledge without a definition of "traditional knowledge" creates a large amount of uncertainty. A clear definition of "traditional knowledge" should be included and not rely on "other regulations".

To what extent will reliance on traditional knowledge prevent patentability should also be defined.

We note that if something is traditional knowledge, it is part of the state of the art and thus not patentable. Therefore the provision is not necessary.

Article 10

We welcome the clarification in the law that an applicant who filed both a utility model patent application and an invention patent application has to abandon the former in order to get a patent for the latter. However, Art. 6.2.2 of the Examination Guideline of SIPO provides that the utility model patent has to be abandoned with retroactive effect to the filing date which is not necessary in order to prevent double protection.

We thus suggest that giving up the utility model right should not be retroactive (i.e. from the utility model application filing date) but only as from the invention patent grant date.

Article 11

Article 11 can be interpreted to require approval for transfer of unrestricted technology before a patent assignment can be registered. There is no approval procedure for unrestricted technology. There is a recordal procedure that does not affect the validity of the underlying contract. It should be made clear that this provision is only applying to restricted technology.

Article 17

Giving priority to the agreement between the employer and the inventor/creator concerning the rewards for an invention-creation is a positive step welcome by EUCCC members.

However, we would welcome clarification on the default rules that will apply in case there is no written agreement with regards to the inventor remuneration.

Article 20

In-house patent agents employed by companies in China who have passed the Chinese patent agent examination should be able to prosecute patents on behalf of any foreign company related to their employer.

Article 21

The clarification that the approval is restricted to invention-creations "completed" in China is highly welcome.

However, the expression "significant public interest" is vague and will create uncertainty and should be deleted, or defined clearly.

Chapter II Requirements for Grant of Patent Rights

Article 24

Article 24 is a welcome change and we understand it is directed towards preventing people applying for trademarks under the guise of design patents.

It is essential to make clear that a design cannot be registered if it is similar to a prior Trademark, whether registered or simply applied. A similar provision exists already in the Trademark law and we strongly recommend to introduce a similar provision in the Patent Law, so that that these two laws become consistent.

Article 25

We refer to the following comments submitted to SIPO on the December 2006 draft:

"Where an invention-creation or design for which a patent is applied is disclosed in one of the following manners, within six months

before the date of filing, said disclosure does not constitute prior art or prior design referred to in this Law for determination of the novelty of the said patent application:

(1) where it was first exhibited by the applicant or his predecessor/successor in title at an international exhibition sponsored or recognized by the Chinese Government;

(2) where it was first made public by the applicant or his predecessor/successor in title at a prescribed academic or technological meeting;

(3) where it was disclosed by any person obligated to the applicant not to disclose without the consent of the applicant or his predecessor/successor in title.

Chapter 3 Patent Applications

Article 27

For PCT national phase applications, the last paragraph is a violation of Art. 27 PCT as it is a requirement as to form and/or contents of an application that is different from or additional to those which are provided for in the PCT

We are also concerned about, which "reasons" will be accepted, like e. g. that the material has been acquired from a third party. However, it might be difficult in many cases for the applicant to explain, why the third party was the legal owner.

Article 32

It is common international practice to allow registration of partial designs. We recommend that partial designs be allowed.

Chapter V Duration, Cessation and Invalidation of Patent Rights

Article 47

It does not appear that the Civil Procedure Law has clear provisions dealing with appeals from a decision of an administrative body. (In fact, Article 111(1) seems to require the Administrative Procedure Law to be used). Consideration should be given to whether this change is appropriate.

We are also concerned by what seems to be an extension of the number of Courts having jurisdiction over patent matters. Experience, in Europe, leads to limit as much as possible the number of such "patent courts", so as to facilitate the recruitment of technically competent judges and ensure consistency in their decisions. It seems that China is moving in the opposite direction, and we are afraid that, regardless of the efforts that SIPO will make to provide training, local Courts will find it difficult to maintain quality and consistency.

Chapter VI Compulsory License for Patent Exploitation

Article 49

The paragraph (1) is not entirely in conformity with the Paris Convention. The period of three years is shorter than what is provided in Article 5A (4) of the Paris convention (4 years from filing or 3 years from grant, whichever expires last).

Paragraph (2) is not in conformity with Article 31 of TRIPS, which relates to anti competitive practices. Such anti-competitive practices are defined in the Anti-Monopoly Law, and the mere act of exercising a patent right cannot be considered as an anti-competitive practice. If this paragraph was to be maintained as drafted, without a clear reference to practices defined in the Anti-Monopoly Law,, it would give the authorities unlimited discretion to decide that a patent cannot be enforced and that a compulsory license should be granted.

Article 50

This paragraph appears not to comply with Article 31(b) of TRIPS which allows compulsory licensing in a national emergency or circumstances of extreme urgency. Protecting the health of the public is not an emergency situation.

There is also a need to first try to seek a voluntary license on reasonable conditions in view of Art.31(b); and the scope of the compulsory license should be limited to the purpose for which it was authorized (31(c))

Article 51

In article 51 "hopes" should be changed to "requests" in accordance with the Doha Declaration.

There is a need to first try to seek a voluntary license on reasonable conditions in view of Art. 31(b) TRIPs.

Article 52

It is recommended to bring the wording closer to TRIPS and re-phrase the sentence "[…] the patent administrative department under the State Council may, upon request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model" as follows: "[…] the patent administrative department under the State Council shall, upon request of the earlier patentee, grant a compulsory license to exploit the later invention or utility model".

Article 53

Article 49(2) applies to abuse of IP rights under the Anti Monopoly Law which is domestic legislation. There can be no reason why a compulsory license in these circumstances needs to allow non-domestic supply.

Chapter VII Patent Right Protection

Article 63

Taking into account the problem posed by the proliferation of utility models and design patents filed in China, which in fact are nothing but reproduction of other parties' patents or trademarks, Article 63 is very welcome.

Article 67

SIPO administrative action is a useful and cost effective means of enforcement for design patents and simple mechanical patents. We are concerned that powers of SIPO have been diluted.

Article 68

Article 68 remains silent about statutory dam-

ages, which are currently stipulated in a judicial interpretation of the Supreme People's Court.

An abolition of statutory damages would be highly welcome, but only if they were replaced by a workable methods to calculate and prove damages.

Indeed, the patentee needs to have a well defined right of information on the scale of the infringement. For infringements committed on a commercial scale it is important that the courts have the power to order, where appropriate, access to banking, financial or commercial documents under the control of the alleged infringer.

Alternatively, the burden of proof on the patentee to prove damages should be relaxed so that the Plaintiff only needs to provide prima facie proof of damages and the Defendant bears the burden to disprove this.

Article 69

Providing for a subpoena of the parties and an enquiry on complicated cases is welcome.

It should even be specified that an inter parties hearing must be organized by the Court with both parties present before the Court, within the five days.

Article 70

Under no circumstances whatsoever, should the defendant be informed of evidence preservation proceedings. The evidence will disappear. To this end it appears imperative to delete the sentence "In relatively complicated cases the parties must be subpoenaed within 48 hours to conduct a inquiry, and make a ruling within 5 days."

Article 72

Article 72 of the current law is consistent with the principle set out in the Code of Civil Procedure, i.e., that the time limit for claiming compensation against act that caused a prejudice is two years, and therefore, that when the act is permanent, no compensation can be claimed for a period exceeding two years, calculated backwards from the date of filing of the legal action.

Such rule guaranties both the right holder, who can obtain some compensation, and the infringer who cannot be sued for an excessive period. The new article 72, as drafted, cancels the right of the patentee to obtain any compensation whatsoever, and even introduces the right of the infringer to continue his infringing act, subject to paying a fee. This new version is an encouragement to the infringers and a threat to the right holders. We believe that such a provision would discourage any innovation. Moreover the last sentence of Art. 72 introduces a compulsory license concept that conflicts with Art. 31 TRIPS. We thus strongly suggest maintaining Art. 72 as it is in the current Patent Law.

Article 73

We agree on the principle that some limits, dictated by the general concept of good faith, may be opposed to the right of a patentee to sue an infringer. However, such limits can only be an exception and, as an exception, they should be strictly and clearly defined. In particular, some conditions should be met: (1) that the patentee has positive knowledge of the concrete circumstances of the infringement (2) that the burden of proof of such positive knowledge lies on the infringer, and (3) that the patentee expressed, in appositive manner and without ambiguity, that he would not take action against the infringer. In the present draft, the situation is reversed in favour of the infringer, who is invited to claim that he "had reasons to believe" that he would not be sued. Such a wording is also, as mentioned under article 72, an encouragement to the infringers and a threat to the right holders.

Furthermore, this article introduces the concept acquiescence or laches which is a common law concept. This works in common law jurisdiction because it is relatively easy to prove infringement because discovery is available.

Most civil law countries do not have this concept for patent infringement, because it is much harder for a patentee in civil law countries to prove infringement.

It is very common in China for a patentee to suspect infringement but not have sufficient evidence to satisfy the very high burden of proof in China and bring an action. This provision will create unfairness to patentees.

We are finally concerned that if Article 73 should become part of the Patent Law, e.g. any silence of an interested third party which makes the entity or the individual exploiting the patent thereof have reasons to believe that the patent or the interested party will not claim its or his right over the exploitation could be considered as "Use without Authorization of the Right Holder" as defined in Art. 31 TRIPS, which would deprive the patentee of his rights. This is far beyond the principles of good faith and not in line with Art. 31 TRIPS which requires that "Use without Authorization of the Right Holder" shall be considered on its individual merits.

Article 74

We maintain that Article 74(6) which provides for a clinical trial exemption should only be included in the law if patent term extensions are available to take into account delays in examination.

Paragraph 2 is about "parallel import" or "patent international exhaustion". We think that Patent rights are granted/secured on a territory basis.

Consequently, the sale (placement into commerce) of the product outside of China should not exhaust the patent owner's right within China. So we suggest removing this paragraph.

Article 75

Article 75 appears to be seeking to implement a similar concept as that decided by the US Supreme Court in Merck v Ebay. However, we believe that it is almost impossible to transfer into a law a precedent elaborated by a foreign court, pursuant to a Common Law procedure. Case laws are deeply linked to factual circumstances and interpretation nuances followed in the judge's reasoning. Therefore, any general reference to "public interest" as a cause for rejecting a claim made by a patentee will lead to a threat for patentees and a wide open argument in favor of infringers. We therefore strongly recommend deleting this article.

Comments from EC Delegation and EPO on March 2009 Draft Patent Law

Chapter I General Provisions

Article 2

EPO: In Europe patents are only granted for inventions that solve a technical problem. Therefore, patents are not granted for computer programs, business methods as such or computer implemented business methods that make no technical contribution to the state of the art. In this respect the granting practice in Europe differs significantly from that of the United States Patent & Trademark Office (USPTO). Under the proposed definition of invention, i.e. "technical solution relating to a product, a process or improvement thereof" it should be clear that a business method is not an invention, as it does not imply any technical character. Nevertheless, it could be helpful to add a clarification in this respect to the secondary law.

Article 3

It could be added that the state also ensures an effective "enforcement" of patent rights.

Article 6

Both, the term "genetic resource" (cf. for example Art. 2 Convention on Biological Diversity) and "traditional knowledge" (no agreement to date of the international legal community on a definition) are in dispute among experts.

With regard to "genetic resources" it is for example unclear whether it also includes inventions which are based on derivates of such resources and how such derivates are qualified.

It will consequently be important to have clear definitions for these terms.

Furthermore, the EPO is concerned that many practical problems will arise from the linkage between the invention and the genetic resource or traditional knowledge on which its completion must be based on.

With regard to "acquisition or use of the genetic resources or traditional knowledge which breaches the stipulations in related laws and regulations"

it is not clear whether this refers only to national law or whether it also refers to inventions which were patented in breach of the law regarding genetic resources and traditional knowledge of other countries and for which patent protection is also seeked in China. This should be clarified.

It is also not stipulated whether new regulations on genetic resources and traditional knowledge should have retroactive effect on patent rights granted prior to their effectiveness.

Del: It remains unclear how "the completion of which relies on genetic resources or traditional knowledge" can be defined, adding great uncertainty to sectors such as biotechnology who rely most on patents for protection.

If traditional knowledge poses a risk for patenting activities, their exploitation and divulgation via the patenting system will be prevented, thus cutting off benefits for those who usually need revenues most. It means less development of spreading use and benefit of TK.

Adding traditional knowledge increases unpredictability of this rule, as this term again is not clearly defined even in the international fora.

Making the grant of right dependant on "breach of rules" which is currently not even defined in China opens the door of the patent law to administrative regulations by other ministries and government bodies. Where these new rules are overly broad, this new article might come into conflict with Art. 27(1) TRIPS.

Article 11

EPO: It is open whether the relevant "import-export management laws" would in fact strongly limit the possibility of a foreign company to obtain the right to apply for a patent or the patent application from a Chinese entity in relation to high technology inventions. It should be noted, however, that Art. 62(1) TRIPs Agreement, requires WTO members to refrain from burdening patent applicants with unreasonable procedures and formalities as a condition of the acquisition and maintenance of intellectual property rights.

Del: This article acerbates further barriers for free and unencumbered trade in technology. The Technology Import and Export Administration Regulations of 2001 TIER are increasing formalities for technology transfer contracts. In case of "restricted" technology, transfers even only become legally valid after obtaining approval, which may take months. At the same time, lists of technology import and of technology export are differing, with the list for technology export items being more restrictive.

A further problem for trade in technology is that these lists are re-classified, which may increase burdens for right holders and users of technology.

The result of this rule is to connect administrative procedures with private patent rights, which discourages technology transfer. R&D Centers will be concerned about the broad applicability of the TIER and the related costs and insecurity about ownership these rules will bring; the Patent Law is not the right place to address concerns of administrative control over technology flows.

Article 14

Del: The added part clarifies that for many licensing agreements no fees are paid, but other conditions (such as cross-licensing etc.) may apply.

Article 15

Del: According to article 15, the actual filing for patent for a co-owned invention is not depending on the consent of the co-owner. This may have impact in instances where parties disagree whether to file an invention or keep it as know-how.

Article20

EPO: It is questionable whether a mandatory representation of foreign parties is necessary regarding all patent application related actions. The European Patent Convention for example does not require a mandatory representation regarding the filing of the patent application even if the applicant has no residence or place of business within the territory of one of the contracting states.

Article 21

Del: The additions in article 21 are positive developments following previous comments.

Concerns remain that approval must be separately sought for all inventions completed in China but not filed here. The six months deadline does not seem to apply here. The new rule does increase the administrative burden for R&D centres operating globally, and actually may discourage to "complete" inventions in China, which would be the strongest added value for the country.

The sanction in Article 77 of the draft is especially worrisome, as the definition of "completed in China" – something which may be subject to factual uncertainties - can decide the validity or availability of patent protection in China.

Chapter II
Requirements for Grant of Patent Rights

Article 24

Del: The new para.2 in article 24 serves to draw a distinction between trademarks and designs. It is understood that this approach is chosen to address the problem of design registrations as copies of trade marks in China, and to bring down the surging number of design applications in China using design patents as product identifier.

Article 25

Del: As for article 25, design patents should be included in the wording.

EPO: paragraph (1) should not only include international exhibitions sponsored or recognized by the Chinese Government but also include invention-creations which were displayed at an official, or officially recognized, international exhibition falling within the terms of the Convention on international exhibitions signed at Paris on 22 November 1928 and last revised on 30 November 1972 to which China is also a member (for example the 2010 Shanghai World Exhibition)

Chapter III
Patent Applications

Article 27

Del: The same concerns on the definitions of "relying upon", "traditional knowledge" as raised for Article 6 apply.

The current version puts a strong burden on applicants, as they have to indicate both direct source and initial source ("he"). Where the source is not easy to determine (e.g. for plant-related genetic material, which several countries claim to be the original source for), the sanction of Article 6 (no patent right may be granted) could apply for breach of relevant regulations. For TK, the permissibility to explain the reason for not knowing the source is not even granted at all, resulting again in a possible case of application of Article 6. Given the lack of a clear definition what TK actually is, this sanction seems inappropriate. It is also doubtful that this system will lead to a better benefit sharing and protection of TK in China,

EPO: With regard to the terminology "completion relying on genetic resources" it is not clear whether it refers to the development process of the invention or whether the invention for its execution must rely on the genetic resource or traditional knowledge. A clarification in this regard could be useful.

In addition, it is not clear why the applicant has to indicate the direct and original source with regard to inventions in relation to genetic resources whereas he has to indicate only the source with regard to inventions in relation to traditional knowledge. The latter is less clear and provides for greater legal uncertainty.

See also comments regarding Art. 6 draft Patent Law.

Article 32

Del: Partial designs are still not addressed in this draft, although they play an important part for further innovating products.

A change would be desirable to harmonize with problems on accepting priority applications for designs drafted in dotted lines for parts of products.

Chapter IV
Examination and Approvals of Patent Applications

Article 35

EPO: With a view to the strongly increasing prior art at all levels it could be interesting to introduce a new provision which would make it possible for third parties following the publication of the application to present observations concerning the patentability of the invention to which the application relates. The EPO made some good experience in this regard.

Article 36

EPO: It could also be considered to introduce a right for any third party to request the examination of the application as to substance before the expiration of the three year period. This would help to improve the legal certainty (prevention of abusive filings of patent applications) and would be in the interest of the public at large.

Chapter V
Duration, Cessation and Invalidation of Patent Rights

Article 47

Del: Rejection of grant according to the draft follows Administrative Procedure Law, invalidation Civil Procedure Law. It is understood that this distinction is introduced to avoid having the PRB as party to the legal proceedings in court when a private party files for invalidation. There remains a question whether this difference will lead to differing standards

how evidence is provided and treated under the two different routes, see for examples on evidence Articles 34 and 36 Administrative Procedure Law and comparable provisions in the Civil Procedure Law.

Chapter VI
Compulsory License for Patent Exploitation

Article 49

Del: Previous comments apply.

Not sufficiently exploiting may depend on a case by case basis and vary in different industries.

Article 5A Paris Convention is infringed by the current wording of Article 49 para.1.

In particular the wording of para.2 seems not in line with Article 31 lit. (k) TRIPS,

Further, this article needs to be aligned with the Anti-Monopoly Law and to the extent applicable the Anti-Unfair Competition Law.

Article 51

Del: The wording "hopes" in article 51 seems not compliant with the Doha Declaration which under No. 4 speaks of "on request".

Article 52

Del: The wording of Article 31 lit. (l) TRIPS is proposed, instead of grant of a compulsory license. Article 31 lit. (l) TRIPS speaks of a "cross-license on reasonable terms" which implies negotiations between the holders of both patents and may result in different terms and conditions than under a compulsory license.

Chapter VII
Patent Right Protection

Article 61

Del: Confiscation of infringing goods and seizures are necessary as additional powers for administrative enforcement if enforcement is meant to be effective. Else the only real advantage of administrative enforcement, being cheaper and faster, gets lost and actual use of this enforcement route will remain very low.

It is suggested to clarify whether 15 days means working days or calendar days.

Article 63

Del: The mandatory requirement to provide a search report prior to enforcing is welcome.

Article 64

Del: The prior art defense is a highly debatable concept which seems not clearly defined even in Chinese academic literature, let alone in Chinese courts. It creates in effect a second line of judgment of novelty and inventiveness of an invention by courts outside of the PRB, in particular if the prior art defense is applicable in non-literal infringement cases. As a result, the two-track system of separating invalidity issues from infringement determination is blurred and dissolved, leading to more pressure on local courts to decide highly technical issues.

It is recommended to abolish this article.

Article 65

Del: Article 65 aims at curbing abuse of patent rights by malicious lawsuits. It can be predicted that this new provision will lead to almost automatic counter-claims by accused infringers, increasing the number of lawsuits and conflicts between the parties. It is debatable how many abusive patent litigation lawsuits actually do occur in China each year. For utility models and designs, Article 63 already provides a more adequate alternative solution.

It is further very difficult to prove the amount of damages actually incurred by malicious actions. It would be more effective to deter abusive lawsuits by actually letting in practice the loosing party bear the full and real costs of the lawsuits incurred (including realistic lawyer fees and fees for investigation, both in reality substantial in the Chinese current legal IP system), thus increasing the financial risk of litigation, which may be much more deterrent against abuse than this new article.

Article 68

Del: It is recommended to let plaintiff's chose which damage calculation method they claim (own losses, infringers' profits, or reasonable license fee), rather than fixing a prescribed order.

It should be clearly stipulated that the full costs of a lawsuit shall be borne by the losing party, which should include the actually incurred costs for evidence investigation and lawyers' fees. This would also act as an incentive not to embark on malicious litigation.

The scrapping of a maximum statutory license fee is positive.

Article70

Del: For evidence preservation, a surprise element is important to efficiently secure the evidence needed. At the same time, evidence preservation as such rarely does greatly endanger the business of an alleged infringer, and creates much less actual damage than an interim injunction for cease and desist. As the current law does not stipulate deterrent sanctions for obstruction of providing evidence, an inter parties hearing with five days time for the alleged infringer effectively invalidates the value of the procedure of evidence preservation. It is likely that courts will automatically always assume a "relatively complicated case" in order to escape a possible liability. Therefore, the article should be amended and the standard for an obligatory inter parties hearing be made higher, such as in "exceptionally complicated cases".

Article 72

Article 72 continues to incorporate the highly debatable concept of estoppel of laches. This article forces patent litigation and is apt to substantially increase frictions between trading powers, especially in case of broad interpretation of the requirement "without sound reason".

The compulsory license approach proposed in Article 72 conflicts with Article 31, in particular lit. (a), (b) and (f) TRIPS.

The estoppel of laches hurts mainly small inventors who often do not have the financial resources to litigate, opposed to big patent holders. As such, the rule does hurt most domestic patent owners rather than foreign ones who are perceived to prey on Chinese industry.

It is strongly recommended to delete this article.

Article 73

The argument in favour of estoppel of laches is that patent holders "wait for the fish to grow fat before catching it". For tangible property, a cease-and-desist claim for the future can be executed even after two years knowing about the infringement for the future, A comparable rule to Article 73 draft does not exist in Chinese law for tangible property. This indicates that the Patent Law may be subject of industrial policy decisions which will have negative effects on the perceived value of the patent system as such and will weaken domestic inventors who do create valuable inventions.

The theory of a justified exemption must be measured against the principle of Article 30 TRIPS, meaning exceptions to rights conferred must be "limited", must not "unreasonably conflict with the normal exploitation" and "not unreasonably prejudice the legitimate interests of the patent owner". It is doubtful that the current article fulfils these requirements.

Article 31 TRIPS seems to conflict with the proposed article.

It could further be debated whether Article 73 violates Article 28, No. 1 lit. (a) TRIPS, Article 33 TRIPS, as it effectively terminates for the future the patent protection term for the right holder and limits the claims to almost nothing against a particular infringer before the end of the full protection period of 20 or 10 years.

It is strongly recommended to delete this article.

Article 74

EPO: The contents of the new paragraph in article 74 seem already covered by paragraph (1).

Article 75

Del: Article 75 conflicts with Article 31 TRIPS which limits the grant of compulsory licenses to more narrow circumstances. "Harm to the public interest" is not clearly defined and may serve as a catch-all clause to implement policy guidelines, rather than the written law. This is highly detrimental to the rule of law, increases the risk of local protectionism and decreases the attractiveness of the patent system as such.

Article 76

Del: Article 76 requires further clarification of the terms "without knowing" and "prove that … legitimate source".

Article 77

Del: In general it is proposed to abolish this regulation, or restrict it to national security cases.

If necessary at all, a more proportionate sanctions with different steps of escalation should apply, taking into account that there may be significant differences in the understanding of the term "completed in China", especially regarding factual circumstances which may be interpreted differently by Chinese agencies and right holders. A fine might be sufficient and more appropriate in most cases to enforce the law.

Comments from OHIM

The current draft, like the patent law in force, regulates designs within its scope of application.

The proposed definition can be technically improved and substantially modified in order to cover "designs" which, for example, have neither an aesthetic feeling nor an industrial application

The proposed definition of the "ius prohibendi" of the design holder ("patentee") could be further improved. Eventually, it could be also envisaged to expressly include the mention that the design right confers on its holder the exclusive right to use it. However, since such a right is not explicitly envisaged in the invention-side of the provision, no express recommendation is made.

Since no specific provision is made in the article on international application as regards "designs", it is understood that this provision would cover an scenario where the PRC would decide to join the International Registration system governed by the Hague Agreement, allowing PRC applicants to file design international application at WIPO.

The substantive requirements for design registration needs to better reflect the substantive requirements for protection, like Article 23 does for patents and utility models.

Secondly, the proposed article excludes designs of 2-D format such as graphical designs is contrary to the most modern legislative trend to cover, as design right, also graphic designs such as Graphic symbols and logos, surface patterns, ornamentation. This tendency has been lately confirmed by the fact that the Locarno classification on designs will have, as from January 2009, a class "32" on "Graphic symbols and logos, surface patterns, ornamentation"

The proposed Article 24 refers to a grace period of six months. It is recommended to simplify it, while at the same time, enlarging the period from 6 to 12 months. It is understood that the term "invention-creation" covers, pursuant to Article 2, also designs.

The requirement of a brief description for filing a design implies an extra burden on design filers, which is not justified. Under EU legislation, the description for designs is merely optional, which discharges the system from unnecessary translations both for filers and for the registration office.

The amended article opens the possibility to multiple applications, that is, an application for one or more designs. This is to be welcomed. However, the requirements for doing so are too severe and could be less rigid, thanks to the "unity of class" condition only.

This provision on grant of design right has not been amended. However, it is reasonable to commence the protection from the date of filing, not the date of grant, since any delay in the grant will be detrimental to the filer.

The period of protection is 10 years. 10 years as total period of protection may not suit the needs of industry. In light of the normal short-cycle life of designs, it is suggested to employ the formula "5 years, which can be extended up to 25 years".

In line with the suggestions related to Article 28, it is reasonable to explicitly mention that the scope of protection of the designs shall not be affected by the optional description.

The requirement of providing a search report by the design holder when requesting protection from infringement before a court of the administrative authority is burdensome and makes meaningless the registration of design. The fact that the design right is not examined as to its substance does not mean that the design is of poor certainty in itself. The experience in registrations systems without prior substantive examination shows that the rights are not deemed, by the economic operators, as "weak". Making a requirement of the infringement action to provide a search report weakens the position of the design right holder and, overall, of the registration system. In any case, the search report cannot guarantee the novelty of the design since the threshold of novelty is an absolute one, not just those prior designs disclosed within the PRC (see Article 24). Therefore, the search report will be incomplete in any case.

Conclusion report by IPR2 (May 2008)

The Chinese government is currently revising the Patent Law with the aim to strengthen and to promote patent protection in China. As part of this process, an expert roundtable has been hosted by the Legislative Affairs Office of the State Council (SCLAO). The roundtable provided an opportunity for Chinese and European experts to look at the issues related to the preparation and finalization of the draft patent law before its submission to the National People's Congress for final discussion and enactment.

Prior to the roundtable, the experts were provided with a list of topics which the drafting team considers of particular importance for its further drafting work. These topics and a number of additional questions with relevance for the drafting work were in the focus of the discussions among the participants during the course of the roundtable.

The roundtable was held in a highly cooperative atmosphere and the experts greatly benefited from the exchange with the members of the drafting team under the chairmanship of Mr Zhang Jianhua, Director General of Department of Education, Science, Culture and Public Health (SCLAO). From the very open discussions, it became clear that many of the topics are also under discussion in Europe.

This document provides a summary of the discussions taken place during the roundtable. The document is intended as a reference and information basis for all interested circles on the discussion and the comments presented at the roundtable. The comments are the sole responsibility of the European experts invited to the roundtable and the IPR2 TAT and can in no way be taken to reflect the views of the European Union or any other institution and organization.

I. Protection of patent rights

a. How to improve the search report system and provisional measures system for utility models and designs

The following comments refer only to designs, since no EU single utility model system exists and no valid reference can be therefore given.

It is understood that the requirement of providing a search report to be issued by SIPO by the design holder when filing an infringement action before a court or the administrative enforcement authority (as laid down in Art. 63 Draft Patent Law) is the proposed solution to address the need for improvement regarding the stability of registered designs in China, as expressed by the Chinese authorities.

The experience of the Office for Harmonization in the Internal Market (OHIM), the EU agency in charge of registration of Community designs, shows that lack of substantive examination does not necessarily entail "unstable rights" (only 0.17% of the Community designs are challenged before the OHIM Invalidity Division).

In the EU system adopted by the Community Designs Regulation (CDR), the "search report" mechanism is not a solution to address the sort of concern behind the draft amendment. In fact, OHIM conducts no official search of its database on demands for such purposes. Any user can search, however, its records via Internet, freely and rapidly, for purposes of any nature, including the existing of prior designs. Commercial services for search of designs do exist, but provided by private companies. Such reports can be used before the Invalidity Division of OHIM and before courts as evidence provided by the parties.

While the motivation of the envisaged amendment regarding the requirement of providing a search report can be understood, some potential negative side effects of such provision should be considered:

- requirement to provide a search report weakens the position of the design right holder and, overall, of the registration system;
- search report can never fully cover all prior disclosures: since the threshold of novelty will be an absolute one (a change which is welcomed), the question is how such report will deal with, for example, the prior disclosure by means of use, when such use is not documented by available databases (e.g. use by means of sale of a product in the EU). In other terms, the SIPO search report would not cover all possible disclosures in any case, despite of its expected high quality;
- SIPO itself will need to assure the service of issuing the report in a timely manner, this will be particularly important in order to avoid the infringement proceeding left pending too long;
- requirement represents a shift in the burden of proof for the validity of the design right: it is not the defendant that will need to establish the invalidity claim but the right holder to establish that his right is valid.

For solving the dilemma of "lack of substantive examination entails unstable design rights", a different approach may be looked at. The EU legislation provides for the following:

- registered design is presumed valid by courts (Art. 85 (1) CDR); courts cannot raise themselves a claim of invalidation;
- courts must hear the infringement claim, without requesting a search report;
- courts must hear the case which can only be stayed if the defendant files a counterclaim for invalidation of the design and only if the holder requests the court to invite the defendant to submit the matter before OHIM (Art. 86 (3) CDR); the court itself cannot stay the proceedings when a counterclaim is filed, unless the holder requests so; if the defendant is invited to do so and he does not remits the invalidation claim to OHIM, the counterclaim is deemed withdrawn and the infringement action proceeds;
- should the case be stayed, provisional measures, including protective measures, may be ordered during the duration of the stay due to the proceedings at OHIM.

In other terms, OHIM does not enter into play unless the parties decide so. And even if OHIM enters into play, its role will be as adjudicatory body for invalidation, not as a provider of a search report.

This solution imposes on OHIM to manage the invalidation proceedings at a great speed, with the due observance of the parties' rights. Such solution does not deprive the holder from preliminary protection granted by the court when the presumed infringer uses the invalidation route as a defence to stop the effectiveness of the design right. Efficient administrative adjudication of invalidation cases plus grant of court preliminary measures in favour of the plaintiff represent a fair solutions for both parties, without comprising their legitimate rights and expectations.

On the other side, if the defendant truly believes in the invalidity of the design right, he can rapidly put the issue before OHIM even before the infringement action was filed, in which case, the court may stay the infringement proceedings (Art. 91 (2) CDR).

These solutions are workable and could be considered as alternatives to the "search report" option.

b. Preliminary injunctions, availability and formalities

Preliminary injunctions are playing an extremely important role for the protection of patent rights in Europe. This is so because the only two real remedies a patentee can rely on under the European legal systems are preliminary injunctions and damages.

The rules set out in Art. 69 Draft Patent Law and Art. 93 to 96 and 99 Civil Procedure Law seem reasonable. However, to ask for prove of infringement (Art. 69 (1) Draft Patent Law) might in some cases be a too heavy burden for the patentee as he may not be in a position yet to prove the infringement at this time in the proceeding. Therefore, it is suggested to stipulate that a substantial probability of infringement (prima facie evidence) is sufficient.

Furthermore, Chinese experts proposed during the roundtable that the time from filing the request to the court order should be shorter than five days, in particular for preservation of evidence. Insofar, it is suggested to provide for the possibility of such court order also to be granted ex parte. The surprise element is important to secure the evidence needed for any subsequent action. Such evidence preservation would only very rarely endanger the business of the alleged infringer and creates significantly less damage than a suspension order. If an injunction for evidence preservation is issued ex parte, the defendant should be heard within three to five days in order to guarantee his right to be heard.

c. Determination of scope of right (equivalency, all elements rule, file history wrapper estoppels etc.) – principles in the law or in judicial practice?

The principals mentioned should be both in the law and in the judicial practice. In order to have the same basis for the judicial and for the administrative enforcement channel it would be preferable to have those provisions in the Patent Law.

Equivalency is most important in order to do justice to the patentee. But it seems to be very

difficult to define equivalency in the law (e.g. the Protocol on the interpretation of Article 69 European Patent Convention (EPC) mentions equivalency without defining it). Therefore, it is suggested to leave this to the interpretation by the Supreme People's Court.

File history wrapper estoppel seems to be justified where an applicant had to amend a claim during the granting procedure (Art. 38 Draft Patent Law) and now tries to extend the scope of protection in a way which contradicts the amendment. If the patentee narrowed his claim in order to have the patent granted good faith requires taking this into consideration when determining the scope of protection in order to curb unfair claims by patent owners.

d. Protection of design patents, differences to invention and utility models patents

The experience of the EU shows that specific legislation on designs outside the patent legal framework is a good option for dealing with the differences between designs and inventions/utility models. The EU has a specific body of law (the 1998 Directive and the CDR), an administrative authority (OHIM) and a judicial enforcement system (the national Community design courts) exclusively related to designs. Although it is understood that the current combination of invention patents and designs under a single piece of legislation in China has historic reasons and that the current timing of the legislative process for the revision of the Patent Law does not allow a specific draft design law now, the preparation of a single draft law on designs should nevertheless be considered by the Chinese legislator. The CDR could serve as a valid point of reference for such consideration.

General arguments for separate design legislation are:

- needs for users investing in design innovation are different from the needs of users investing in inventions. The scale of investment for inventions is not comparable to the scale of investment for designs;
- life cycle of designs is much shorter than patentable inventions;
- users need to secure registration rights for new designs in a swift manner and without lengthy grant procedures, due to the shortness of the commercial life of designs in the marketplace;
- trends in numerous world IP systems (Australia, Singapore, Korea, India, Japan, Canada, New Zealand, Indonesia, etc.) are that designs are regulated under a separate piece of legislation, outside the patent legal framework;
- law-making in design matters is normally a "low profile" business for decision-makers: by legislating designs within the patent law, the specific issues related to designs are normally overshadowed by the much prominent patent issues; a separate piece of legislation is normally much more "manageable" in terms of time and procedural cost.

Additional arguments for taking the CDR as a reference are:

- intends to foster innovation, this policy consideration is very similar to the Chinese determination; for this reason, a specific system on designs fostering innovation is possible;
- serves all needs of all sectors of industry doing business in Europe: SMEs, large companies, from machinery manufacturing to decorative industries;
- enables a "user-friendly", fast, and affordable registration process;
- grants a solid right that can be enforced efficiently;
- establishes a fast route to invalidate registrations not complying with the CDR, while stopping enforcement actions only if justified.

All of the abovementioned purposes are equally valid arguments for establishing a specific Chinese legislative option on designs. However, as the current legislative process does not allow for a separate legislation on designs, the following suggestions can be taken into consideration within the ongoing revision of the Patent Law or within the drafting of the Implementing Regulations:

- Elimination of two-dimensional designs from the scope of protection of the proposed design provisions contained in the draft (Art. 24 (2) Draft Patent Law) has drawbacks. It will eliminate all elements of graphic design per se. In the EU, such designs are protected in the ad hoc legislation. The definition of "designs" in the EU is broader in terms, which covers designs other than ornamental or industrially applied, as well as designs for parts of products, thus benefiting more local and foreign industries investing on design-oriented products. Therefore, not only manufacturing industries but also decorative industries and sectors heavily investing in graphic designs (e.g. telecommunications, entertainment, marketing and media) have the possibility to seek protection for the design of their graphical assets. This notion has been followed to some extent in other jurisdictions and has been confirmed in the recent amendment of the Locarno classification on designs (as from January 2009, a class "32" on "Graphic symbols and logos, surface patterns, ornamentation").
- Interface between designs and trademarks should not be seen as an unavoidably perverse situation. While in case of conflict with a prior trade mark, the design should be clearly cancelled (as Art. 24 (2) Draft Patent Law proposes), this does not necessarily mean that the legitimate holder should be deprived from both routes of protection. The EU legislation clearly admits that the design of a product may be protected as a design but also as a trade mark, provided that the substantive requirements are met. Art. 96 CDR admits the coexistence of design and trade mark protection.
- For these reasons, it is recommended to include the following definition of a design in Art. 2 Draft Patent Law in order to define the possible subject-matter of protection: "designs means the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. Product means any industrial or handicraft

item including inter alia, parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs". The elimination of 2-dimensional designs in Art. 24 Draft Patent Law should be reconsidered in light of this.

- It is understood that the intention of the drafters is to raise the bar of eligible designs so as to avoid receiving applications for some designs formed by copying prior designs or piecing features of prior designs. The EU legislation aimed at exactly the same objective, but it did not consider necessary to use "patent" requirements for such a result to be achieved. On the contrary, a specific "design" approach was followed, consisting of requiring basically that the filed design produces a different overall impression compared to the existing body of prior designs: it is the requirement of individual character. It is proposed that such condition is used instead of the substantive differentiation embedded in Art. 24 (1) Draft Patent Law, which could be understood as an "inventive step" requirement. It is recommended that such interpretation of "inventiveness" is not applied to designs, but rather the test of "individual character".

- The draft opens the possibility for multiple applications (Art. 32 Draft Patent Law), that is, an application for one or more designs. This is welcomed (also recommended that the definition of design covers also the "appearance of part of a product"). However, the requirements for doing so are too severe and could be less rigid ("unity of class" condition only).

- Under EU law, the scope of protection of a design protects the right holder against infringers of designs which do not provide a different overall impression (Art. 10 CDR). The holder is not only protected against identical infringing goods, but also "similar" ones, provided that they do not convey a different overall impression in the eyes of an informed user. Under EU legislation, the description for designs is merely optional, which discharges the system from unnecessary translations both for filers and for the registration office. The EU legislation considers that the scope of protection is not affected neither by the indication of product nor by the description. Protection is based on the published design contained in the Office's Bulletin and accessible via the Office online data base. The EU legislation on designs is not dependant on "claims" and alike for defining the scope of protection. A design for a motor vehicle will provide its right holder protection against a toy maker using the registered design for manufacturing miniature vehicles without his/her consent. Predictability is secured by a specific provision in this direction (Art. 36 (6) CDR). A similar approach could be used in the Chinese law, instead of the approach provided for in Art. 28 and 59 Draft Patent Law. It is suggested not to make the description mandatory for designs nor condition its scope of protection.

- Abuse of design rights: under the CDR, a declaration of invalidity by OHIM has no retroactive effect and does not affect any prior judgment declaring the infringement of a defendant; however, the defendant can recourse to remedies such as claims for compensation for damage caused by the negligence or the bad faith of the right holder or even claims for unjust enrichment;

- Other issues to consider: extent duration beyond 10 years for design protection, e.g. up to 25 years (Art. 43 Draft Patent Law); provide that such period of protection starts from the date of filing, not the date of grant (Art. 41 Draft Patent Law).

e.Prescription for litigation of patent infringement

It is understood that the proposed prescription provisions in the Draft Patent Law are aimed at balancing out three categories of interests:

- the patent owner wants to exclusively exploit and enforce his right for the maximum time and get the maximum damages for the past;

- the infringing party has interest to recover its investments and to stay in the market;

- the interest of the public in a functioning patent system.

However, Art. 71 and 72 Draft Patent Law raise concern. The patentee not only loses his right to damages after two years, but the infringer may through the payment of a reasonable fee acquire the right to continue exploiting the patent which constitutes an automatic license. This may substantially weaken the right of patentees and encourage infringement. Patentees might be forced into unnecessary patent litigation at an early stage. Those starting the production or sale of goods could obtain certainty on the patent situation through a search on third parties rights and a discussion with the patentee whether the patent is valid and infringed or can be licensed.

Chinese experts referred to the fact that at present it may not be feasible for many Chinese companies to carry out an analysis of third parties" rights and that the term of 2 years is widely applied in Chinese civil law. The burden of proof for the statute of limitation is on the defendant. Chinese experts also pointed out that certain activities by the patentee such as sending a warning letter or beginning negotiations with the alleged infringers might preserve the rights of the patentee. It has, however, to be noted that such preservation of rights is not reflected in the present text of Art. 72 Draft Patent Law which requires the patentee to initiate legal or administrative procedures.

The Patent Law and the implementing rules should encourage parties to address issues of potential infringement early and to explore the possibility to find solutions through licensing or other means without forcing them too early into litigation. Implementation regulations should also specify under which circumstances a patentee should have knowledge about the infringement. A two years' time limit, however, can only be met if patentee and infringer are active in a market which is very transparent, so that it is clear when the time period starts. Insofar, it should be noted that under European laws, each infringing act starts separate terms of prescriptions, so that only those acts committed earlier than the prescribed terms before filing of a suit would no longer entitle a patentee to damages.

However, the possibility of the infringer to obtain the right to continue exploiting the patent through payment of a reasonable fee raises

still concerns. In reality, if a patentee cannot enforce his patent after a two year period, he will only have limited chances to further licence his patent. If maintained, the prescription should be limited to cases of positive knowledge of the infringement by the patentee and be subject to the condition of a substantial investment made by the infringer as a result of his legitimate trust in that the patentee will not assert his patent.

II. Ownership and licensing issues

Co-ownership on inventions and patents constitutes a major issue in the Chinese economy. There are many joint projects between companies or universities and companies. Under Chinese civil law they result in co-ownership and not in co-proprietorship on the invention and the resulting patent. According to present Chinese patent law, unanimous consent of all co-owners is required for the exploitation of patents which raises difficulties as often no agreement is reached and the exploitation of the patent is blocked as a result. Art. 15 Draft Patent Law aims to overcome these problems.

China faces the same problems with regard to co-ownership as many European jurisdictions. It is suggested that the relationship between co-owners on patents should in the first place be governed by an agreement and that statutory law should only apply in the cases of absence or invalidity of such agreement. This should include the contractual freedom of the parties as regards the choice of law, as it is inappropriate and not workable if each national patent resulting from a joint research is subject to a different legal regime of co-ownership.

According to Art. 15 Draft Patent Law only an exhaustive list of actions which affect the basis of the co-ownership on a patent requires the consent by all co-owners, namely (i) assignment of the right to apply for a patent, (ii) assignment or withdrawal of the patent, (iii) assignment, abandonment or pledge of the patent, and (iv) the grant of an exclusive license on a patent. This represents a reasonable solution to alleviate the present problems, particularly the proposal that the grant of an ordinary license does not require unanimous consent whereas the grant of an exclusive license does so.

It is suggested that where a needed consent is refused by a co-owner without reasonable ground, it can be replaced by a judgment. Furthermore, it is suggested that amendments of patent claims also require unanimous consent. Insofar, it was noted by the Chinese experts that all co-owners have to authorize one representative at SIPO for their patent, but it is understood that this representative has to comply with instructions given by all co-owners if not otherwise agreed by the parties.

There is no explicit provision on claims for entitlement in the present draft. In practice it is not uncommon that after a successful research not all co-inventors are named in the patent application and those being entitled to co-ownership based on such co-inventorship are not considered in the patent application. Often only many years later when a successful product results from such patent application the dispute on co-ownership arises. It is suggested that the Draft Patent Law is amended with a provision defining the right of an inventor or co-inventor or his successor in law to claim the assignment of sole respectively co-ownership from the registered

applicant or proprietor of the patent application or patent.

It is also suggested that there is a statute of limitation to file such entitlement suit, e.g. 2 years after grant of the patent. The statute of limitation should not apply where the patentee knew or should have known that he is not entitled to the patent as a sole owner or co-owner. In addition, it is suggested that in the Implementing Rules it is provided that a patent prosecution or an opposition procedure is stayed until the dispute on ownership is resolved. This would ensure that the rules of Art. 15 Draft Patent Law are applied with regard to all true co-owners of a patent.

Art. 15 Draft Patent Law allows for the separate exploitation of the patent by co-owners. During the course of the roundtable the question arose whether the law should provide for a compensation mechanism between co-owners in case of discrepancies regarding the success of the patent exploitation. Insofar, it is not suggested to provide any compensation requirement as each co-owner has the same possibilities of exploitation. The failure of one co-owner to fully exploit the patent should not result in a compensation obligation of the more successful co-owner.

III. Patent invalidation procedure

The interaction between infringement suits and invalidation procedures raised much concern by the Chinese experts. If the defendant in an infringement suit claims invalidity of the patent, infringement proceedings must be suspended during the invalidation procedure before the PRB. This has a great impact on the duration of the enforcement procedure as the invalidation procedure can last a very long time. Therefore, the question under consideration is how to shorten the invalidation procedure.

a.Inventions

The accelerated processing of opposition before the European Patent Office (EPO) and before its boards of appeal , as well as the German revocation system might serve as references regarding a simplification and acceleration of invalidation procedure for invention patents.

In the national law of most EPC contracting states there is a rule which makes it possible for the patent infringement court to stay its proceedings if opposition or appeal proceedings in relation to the same European patent are pending before the EPO. In order to limit the waiting time before national courts of the EPC contracting states accelerated processing of opposition and appeal procedures at the EPO can be requested. In cases where an infringement action in respect of a European patent is pending before a national court of an EPC Contracting State, a party to the opposition proceedings may request accelerated processing. The request may be filed at any time. It must be filed in written reasoned form. In addition, the EPO will also accelerate the processing of the opposition if it is informed by the national court or competent authority of an EPC Contracting State that infringement actions are pending. With regard to appeals, parties with a legitimate interest may ask the boards of appeal of the EPO to deal with their appeals rapidly. The boards of appeal can speed up an appeal as far as the procedural regulations allow. Requests for accelerated

processing must be submitted to the competent Board of Appeal either at the beginning of or during proceedings. They should contain reasons for the urgency together with relevant documents. This option is also available to the courts and competent authorities of the EPC Contracting States.

Germany currently considers a reform of the invalidation procedure to shorten the procedure. In particular, it is under discussion to introduce a nullity objection within the infringement procedure. Another thought is to confine the second instance to a mere instance for review of issues of law. The current German law provides for two possible ways to get invalidation of an invention-patent:

- Invalidation may be achieved by filing an opposition or by a nullity suit. An opposition could be filed by any person within a period of 3 months after the publication of the patent. The German Patent Office decides on the opposition as first instance. That decision may be challenged by the losing party and will be then reviewed by the German Federal Patent Court. To give an idea about the number of such cases, it was pointed out that in the year 2007 the number of oppositions filed was approximately 800 which means that roughly 4% of all granted patents were opposed.

- The second way for invalidation of a patent in Germany is the nullity suit to the German Federal Patent Court. The suit can be filed by any person and no time limit is foreseen. Unlike the opposition proceedings, the nullity suit is bound to civil law in respect of any cost arising from the procedure, namely the court costs, the costs incurred by the opponent and own costs. Because the value of the subject matters is often high and the costs depending on the value, the cost risk for both parties is significant. Only about 1% of the granted patents were attacked with a nullity suit. The second instance is the German Federal Supreme Court; which is under the current system an additional factual instance.

b. Designs

Four possible alternatives are suggested for consideration with regard to means for both simplifying and shortening the cycle of design infringement and design invalidation procedures.

i. Enable civil courts to invalidate via counterclaims

The EU system is somehow similar to the Chinese one, since both OHIM and SIPO are empowered to invalidate; however, the EU system allows also to declare the invalidation of a design by the civil courts (known as "Community designs courts", which are courts of the Member States) in the framework of a counterclaim by the defendant in an infringement procedure. It is recommended to consider this option for the Chinese design rights.

Within the Community design system, no prior art defence is foreseen as such. The defendant may however raise a plea or, most common, a counterclaim to declare the design invalid. The court may do so; the judgment will be recognised in all Member States of the EU.

ii. Allow the appeal administrative court to decide on the merits

The invalidation of Community designs usually takes place within OHIM, upon request. In this case, the decision of invalidation can be appealed within OHIM, before the Appeal Board. Such administrative instance can not only quash the decision but decide also on the merits. The decision of the Appeal Board can be further appealed before the EU Court of First Instance, which acts as an administrative court (so far, only four decisions have been appealed, for a universe of some 300,000 registered Community designs). Such court, placed in Luxembourg, can quash the decision of the Appeal Body of the Office but it can also decide on the merits without sending the case back to OHIM.

It is recommended to consider such empowerment of the administrative courts that hear appeals against the decisions of SIPO's PRB on designs. This will certainly avoid the "ping-pong" effect between instances.

iii. Use discretion to avoid oral hearings

The EU experience shows that a timely management of the invalidation procedure is essential to strengthen the stability of Community designs rights. For this reason, while the Implementing Regulations applicable to OHIM allow for the opening of an oral hearing in invalidation proceedings, the management of the Office understand that this is not normally necessary. Written submissions and evidence (as concise as possible) are sufficient to make decisions as regards the validity of designs, without the need to use oral hearings. This clearly shortens the complete timing of invalidation proceedings. It is recommended that SIPO's PRB is allowed as much discretion as possible not to use oral hearings if written submissions and evidence suffice for the decision to be made.

iv. Use the test of the "informed user", not opinions of experts in designs

This recommendation brings again the need to depart from patent law conditions when dealing with designs and justifies in itself that designs are regulated in a specific manner.

The EU system judges the validity of a design's individual character, not in the eyes of an expert, but in the eyes of an informed user. This avoids the need for expert opinions as designs are not technical matters. By avoiding any link to conditions which require expert opinions, the procedure of invalidation is very straightforward: the 3-member Invalidity Division at OHIM can take a decision, without need to receive expert opinions and without need to convey hearings with experts. The CDR facilitates the cycle of invalidation by setting a standard, specific to designs, which is far away from the patent standard of the skilled man of the art. The consequence is simple: if no expert is required, no opinion is required, no time is needed to prepare so and no time is necessary to convene a hearing, etc. The net advantage is time reduction in handling invalidation procedures.

IV. Enforcement

a.Administrative organs

To take infringement proceedings not only to courts but also to administrative organs is an old and well founded tradition in China. The Chinese experts stated that there is no need for any immediate and dramatic change as it

seems appropriate to offer the users both channels. There was, however, some dissent in the question of the future role of the administrative enforcement system. Some Chinese experts explained that especially in the patent field, the role of administrative enforcement is on the decrease, and it would be time to consider a purely judicial system. Other participants argued for the limitation of the task of administrations to restoring the market order. The majority of Chinese experts, however, opined in favour of a purely judicial enforcement system in the long term. Therefore, there might eventually be a shift towards courts if the courts acquire more competence through more practice and manage to match the administrative organs as far as speed is concerned.

With the exception of customs and police authorities, there is no experience with administrative entities in the enforcement of patents in Europe. However, the priority for any patent enforcement system should be to provide fast and efficient protection against infringements. In Europe, such protection is (with the aforementioned exception) exclusively provided through enforcement procedures in civil courts which are based on a long judicial tradition and highly qualified and specialized judges.

Although no specific recommendation can be given with regard to the administrative enforcement system due to the lack of respective experience in Europe, it is suggested to look at the efficiency of the current dual-track protection system when considering the question whether the administrative protection is still necessary. If the courts alone can provide fast and efficient protection then a purely judicial system could be considered. If this is not (yet) the case then the administrative system might be a good way to complement the protection of patents. Insofar, the discussions during the roundtable showed that the administrative enforcement is currently still deemed to be necessary in China as a complementary protection mechanism besides the judicial protection.

A subsequent question is whether the administrative enforcement should be strengthened through the provision of additional powers to competent patent enforcement agencies. The December 2006 Draft Amendments to the Patent Law contained a respective provision in Art. 67. However, this provision was deleted during the preparation of the latest draft. It is suggested to consider to reintroduction of such provision in the patent law.

Some Chinese experts also mentioned that the administrative enforcement could be further enhanced through a comprehensive legislation governing administrative procedures. Existing legislation (such as the Administrative Penalty Law of 1996, the Law on Administrative Reconsideration of 1999 or the Administrative Licensing Law of 2003) covers only certain aspects of the administrative procedure. The gaps are currently filled by administrative regulations, measures and rules etc. issued by the different agencies. A uniform and comprehensive legislation might help to avoid discrepancies and clearly define the rights and obligations of the administration and parties during the course of an administrative procedure.

b. Calculation of damages

The calculation of damages is one of the most important issues. The potential infringer will consider the damages he may have to pay before he decides to infringe or to run the risk of infringement.

Art. 68 Draft Patent Law gives priority to the loss suffered by the patentee, then profit of the infringer, then license fee. The reasons for this are unclear. However, this may be of academic interest only. Once the court has established the validity of the patent and the infringement the parties usually settle – at least in Europe – the issue of damages as the patentee does not want to disclose his figures, which would be necessary in order to substantiate his lost profits. The infringer does not want to open his books either, which he would have to, if his profits were to be calculated. On the other hand, the patentee is well aware that the infringer will do everything he can to make his profits disappear. Therefore, the parties will usually turn to license fee. And there they should be able to agree – after some bargaining – on a percentage.

As an example: The patentee would say - for instance - 10% are reasonable, whereas the infringer would say 2% are reasonable. But they both know that a figure somewhere between 5 and 6 % would be appropriate. Now, if they let the court decide, they run the risk of ending up with unrealistic 2 or 10 %. Therefore, they prefer to find themselves a solution somewhere in the area of 5 - 6 %.

In cases where the parties cannot agree on the percentage, the court should make its decision with references to existing licence agreements on a patent, or in the relevant technical field, and taking into consideration individual circumstances.

Therefore, the suggestion is twofold: Firstly, leave the choice of how the damage is to be calculated to the patentee, because his right was violated. Secondly, make the parties try to settle the issue of damages – possibly with the help of the judge – before the court decides.

V. The balance of patent rights with public interest

a. Patents and the protection of genetic resources (GR) and traditional knowledge (TK)

The introductory remarks to this field made by the Chinese participants clarified that the Chinese legislature is strongly committed to introduce provisions in the Patent Law, prohibiting applications for inventions which rely on illegally acquired genetic material and TK. Applications for inventions which rely on such material or TK will have to contain an indication of origin (direct and original source) of the genetic material and of the source of the TK. Hereby, reference was made to the Convention on Biodiversity (CBD) and to the necessity of protecting China's rich genetic heritage and TK against misappropriation. Three principles are contained in the CBD: the principle of national sovereignty, the principle of final consent and the principle of benefit sharing. By adding provisions on GR, the legislator aims at complying with the convention.

Art. 6 and 27 Draft Patent Law would introduce a substantive disclosure requirement. Art. 27 (5) Draft Patent Law stipulates: "For an invention creation, the completion of which relies on genetic resources or traditional knowledge, the applicant shall on the patent

application document indicate that genetic resource direct source and original source or the source of that traditional knowledge. If the applicant is unable to indicate the original source of the genetic resource then they must explain the reason." Furthermore, according to Art. 6 (2) Draft Patent Law: "No patent shall be granted for an invention-creation the completion of which relies on genetic resources or traditional knowledge the acquisition or use of the genetic resource or traditional knowledge which breaches the stipulations in related laws and regulations".

Such indication of the direct source of TK or GR used in the invention is meant not to constitute an extensive administrative burden for the applicant. However, the discussion identified some concerns. Initially, the question was asked, on whether the patent law is the most appropriate place to add the above provisions. This view reflects the fact that GR and TK can be used without a patent to be filed and that a patent has a life span more limited that the GR or TK it may refer to. Furthermore, the ongoing development of international rules for dealing with GR and TK should be taken into consideration, for instance the discussions in the framework of the CBD regarding the creation of an internationally acknowledged certificate of conformity, indicating that GR have been obtained legally. It should also be noted that an internationally agreed definition of TK is still missing.

Two key subjects have emerged from the general discussions on the question on how to set up an effective system for a better protection of GR and TK: (1) protection by way of defensive behaviour and (2) protection by way of active behaviour.

The protection through a defensive behaviour refers to strategies to prevent the acquisition of intellectual property rights over TK and GR by parties other than customary users of the TK or GR. This behaviour takes the approach that TK is put into the public domain in order to avoid patents being granted for inventions in relation to TK or GR due to their lack of novelty or inventive step. From the perspective of a patent office, it would therefore be very important to have easy access to TK data collections and that good and complete databases with information on TK and GR would be available. A better protection of TK and GR based on a defensive approach would also require that the existing TK is documented as far as possible and uploaded to databases and that common machine translation machines are further elaborated to ensure that patent examiners who do not speak the language of the country of the TK or GR have easy access to prior art. However, most TR resources are not accessible this way yet.

As regards the active behaviour the main aspect from the perspective of patent law is how it could be assured that access and benefit sharing of TK and GR (used as a source of material for inventions) is improved. It seems clear that the patent system can only contribute to a more transparent system supporting the possibility of access and benefit sharing. It cannot ensure that access and benefit sharing is in fact realised. This also depends on other factors which lie outside the patent system. For example, it would always be possible that certain information is kept secret and that the involved parties deal with the issue only in a contract and do not apply for a patent. In addition, it should be noted that several international instruments

address the issue of access and benefit sharing, for example the CBD or the Treaty of the Food and Agricultural Organisation (FAO). Both treaties lie outside the patent system as such and it should be noted that negotiations on an international regime on access and benefit sharing will continue within the CBD framework very soon (in May 2008 in Bonn, Germany).

The question is whether the substantive or the formal requirement in the patent law is the best way to assess prior consent between the contracting parties (e.g. including indigenous or local communities) and to improve access and benefit sharing of TK and GR.

The substantive requirement of disclosure introduced in the Draft Patent Law aims at establishing that the acquisition of TK or GR is made upon prior informed consent. Consequently, the applicant would have to provide the required evidence (not least the contract dealing with the acquisition and benefit sharing) in order to acquire the patent right. On the other hand, the patent office would have to examine whether the provided evidence is correct and whether the applicable national law regarding prior informed consent has been followed. However, this will result in an unbearable burden to the patent office, being requested to evaluate provisions possibly going beyond its national jurisdiction.

Several European states have implemented a formal disclosure requirement in their national legislation or plan to so.

In a purely formal approach the patent applicant is requested to indicate in the patent application the source of the TK or GR. Taking Switzerland as an example, if the patent application does not provide the necessary information on the GR or TK source in relation to an invention which is directly based on this resource, the Swiss patent office invites the applicant to furnish such information. The application is rejected if the information is not filed in due time. Under the Swiss patent law, the applicant is subject to criminal sanctions if it becomes clear after grant of the patent that he intentionally provided false information as regards the disclosure requirement.

In contrast to a substantive requirement, the formal requirement does not result in the revocation of a patent, if the information on the GR or TK source was not provided and if the patent office during the application and examination procedure did not realise the failure of the applicant to disclose the source (the revocation has also the effect that nobody profits nor a benefit sharing originates from the use of TK and GR).

The Implementing Rules and related regulations will have to address the alignment of the patent grant procedures: in particular, upon which conditions the new "full disclosure" requirement on the source and origin of GR for patent applications will be considered as "legally valid". The administrative procedures to this aim are not yet defined. However, three central state authorities were indicated as competent for enacting rules on the management of GR, namely the Ministry of Health, the Ministry of Agriculture, and the Ministry of Science and Technology. Reference is made to the experience made in some Latin American countries, where complicated and bureaucratic access regimes had been introduced. It is suggested that the Chinese entities

involved in regulating and controlling access to GR establish a uniform, clear and transparent access regime, limiting unnecessary burdens to applicants in the pharmaceutical and biotechnological fields.

In addition, as regards the disclosure requirement it will have to be clarified whether the invention-creation would have to make direct use of the GR or TK, or whether it would be sufficient if the invention was only indirectly based on the GR or the TK. This question is particularly important with regard to access and benefit sharing. In the context of access and benefit sharing it is essential to define the connection, the link between the invention and the source of the GR or TK and accordingly clearly define the parties involved in the chain of utilising the GR or TK that can qualify as beneficiary of such a system.

b. Measures for preventing abuse of patent rights

i. Definition of abuse of patents

The definition of "abuse of patents" constitutes a problem all over the world. Therefore, it is not surprising that the Draft Patent Law does not contain a specific definition of this term. Some Chinese experts introduced the abuse of a patent as an extension of the substantial scope or the time span of a patent. However, it was questioned whether an abuse extends to obviously invalid patents or to seeking protection outside the patented subject matter. Insofar, it is also not obvious what damages an alleged infringer could claim, but as far as the costs of the proceedings are concerned, they should be borne by the patentee.

ii. Advantages and disadvantages of prior art defence systems in the Patent Law

Anything that belongs to the prior art should not be covered by a patent. Therefore, the prior art defence is reasonable. The only question is whether the prior art defence should not be brought up in the invalidation proceeding rather than in the infringement proceeding. However, the effect would remain the same.

iii. Abuse of patent rights and forfeiture of claims, counter claims for damages for malicious litigation

Art. 65 Draft Patent Law addresses the issue of malicious enforcement of patent rights. It entitles the accused infringer to request the court to order the patentee to compensate for the damage caused to him. There were diverging views among the Chinese experts whether specific provisions are needed in the Patent Law or whether courts could refer to general law provision on malicious litigation or antimonopoly law. It was also pointed out that Art. 65 Draft Patent Law is mainly aimed at resolving problems with companies registering and trying to enforce obviously invalid utility model rights or even using forged documents in the prosecution or enforcement of patents and utility model rights.

Specific provisions on malicious litigation should generally not be necessary in a system where the losing party has to reimburse the reasonable costs of the winning party in litigation.

Specific cases of abuse of patent rights are resolved in Europe through the application of antitrust law. Moreover, the patentee is liable to the alleged infringer in case a warning letter turns out to be unjustified as the patent is either not infringed or invalid.

iv. Compulsory licensing and limitation to compensation rights only

There are limited experiences with compulsory licences in court practice in Europe. Compulsory licences have been granted in Europe so far only for drugs to treat serious or life threatening public health problems. Taking Germany as an example, it has only been awarded once in case of a substantial need of public health. However, the existence of such provision has proven to be helpful in order to further the agreement of parties on licensing in case a substantial public interest is involved.

It is suggested to limit the grant of a compulsory licence to such cases of substantial public interest. If a patentee is capable and willing to meet the public needs, compulsory licences should not be imposed. Whether this is the case would include an assessment of the terms, in particular the price at which the subject in question (e.g. a life saving drug) would be supplied.

Report prepared by European Experts invited to roundtable and IPR2 TAT

22 May 2008

August 2008 Draft Patent Law

Chapter I General Provisions

Article 1

This law is enacted in order to protect patent rights, encourage invention-creations, promote invention creation managements and application, improve independent innovation, promote scientific progress and economic social development, and construct an innovative country.

Article 2

For the purpose of this Law, "invention-creation" means inventions, utility models and designs.

Article 3

The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law.

The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.

Article 4

If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.

Article 5

No patent right shall be granted for any invention-creation that violates the laws of the State, goes against social morals or is detrimental to the public interest.

No patent right shall be granted for an invention-creation the completion of which relies on genetic resources, where the acquisition or use of the genetic resources breaches the stipulations in related laws and regulations.

Article 6

An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee.

For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee.

In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.

Article 7

No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.

Article 8

For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.

Article 9

For any identical invention-creation, only one patent right shall be granted. But, if the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if a utility model patent right has been obtained and not yet terminated, and the applicant declares to abandon the obtained patent right for utility model, then the patent right for invention may be granted.

If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.

Article 10

The right of patent application and the patent right itself may be assigned.

If a Chinese entity or individual wishes to assign a right of patent application or a patent right to a foreigner, it or he must follow procedures in accordance with the related laws and administrative regulations.

Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.

Article 11

After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, that is, make, offer to sell, sell, or import the prod-

uct incorporating its or his patented design, for production or business purposes.

Article 12

Except as provided for in Article 14 of this Law, any entity or individual exploiting the patent of another must conclude a written licensing contract with the patentee and pay the patentee a fee for the exploitation of its or his patent. The licensee shall not have the right to authorize any entity or individual other than that referred to in the contract to exploit the patent.

Article 13

After the application for an invention patent has been publicly announced, the applicant may require the entities or individuals exploiting the invention to pay an appropriate fee.

Article 14

Where any patent for invention, which belongs to any State-owned enterprise or institution, is considered of great significance to the interests of the State or the public by the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government, after approval by the State Council, the patented invention may be widely applied within reasonable limits. The exploiting entity shall pay a fee for exploitation to the patentee, the amount of which shall be determined through negotiation by both parties.

Article 15

If the patent application right or patent right is jointly owned by two or more entities or individuals, if the owners have an agreement regarding the exercise of rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through common license; Any royalties collected through license for others to exploit the patent shall be distributed amongst the owners.

Apart from the situation in the preceding paragraph, the exercise of jointly owned patent application right or patent right shall be consented by all co-owners.

Article 16

The patentee shall have the right to affix a patent marking and indicate the patent number on the patented product or on the packaging of that product.

Article 17

The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.

Article 18

An inventor or designer shall have the right to name himself as such in the patent document.

Article 19

If a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 20

Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency established in accordance with law to act as his or its agent.

If any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may entrust a patent agency to act on its or his behalf.

The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.

Article 21

Any entity or individual may file an application in a foreign country for a patent for invention-creation made in China with an advance confidentiality examination conducted by patent administration department under the State Council.

Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph.

The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.

Chapter II
Conditions for the Grant of Patent Rights

Article 22

The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely.

The patent administration department under the State Council shall transmit patent information completely, accurately and promptly, and publish the Patent Gazette regularly.

Until the publication or announcement of the application for a patent, staff members of the

patent administration department under the State Council and other persons involved have the duty to keep its content secret.

Article 23

Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness.

"Novelty" means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing an identical invention or utility model which was published in patent application documents or patent documents after the said date of filing.

Inventiveness means that, compared with the prior art, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement.

The prior art referred to in this Law means any technology known to the public before the date of filing in this country or abroad.

Article 24

Any design for which a patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing the identical design which was published in the patent documents after the said date of filing.

Any design for which a patent right may be granted shall be substantively different from the prior design or a combination of the features of the prior design.

Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person.

The prior design referred to in this Law refers to any design known to the public before the date of filing in this country or abroad.

No design for which patent right is to be granted may be identical with or simi1ar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country, or be in conflict with any prior legal rights of any other person.

Article 25

Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred:

(1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government;

(2) it was made public for the first time at a prescribed academic or technical conference; or

(3) it was disclosed by any person without the consent of the applicant.

Article 26

For any of the following, no patent right shall be granted:

(1) scientific discoveries;

(2) rules and methods for mental activities;

(3) methods for the diagnosis or for the treatment of diseases;

(4) animal and plant varieties;

(5) substances obtained by means of nuclear transformation.

(6) two-dimensional printed matter design, color or a combination of both to be mainly used as design with the function of an identifier.

For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III
Application for Patents

Article 27

When a patent application is filed for an invention or a utility model, relevant documents shall be submitted, including a written request, a specification and an abstract thereof, and a patent claim.

The written request shall state the title of the invention or utility model, the name of the inventor or designer, the name and address of the applicant and other related matters.

The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model.

The patent claim shall, on the basis of the specification, state the scope of the patent protection requested.

For an invention-creation the completion of which relies on genetic resources, the applicant shall on the patent application document indicate the direct source and original source of the genetic resource. The applicant unable to indicate the original source of the genetic resource must explain the reason.

Article 28

hen a patent application is filed for a design, relevant documents shall be submitted, including a written request and drawings or photographs of the design; the product on which the design is to be used and the category of that product shall also be indicated.

Article 29

The date on which the patent administration department under the State Council receives the patent application documents shall be the filing date of the application. If the application documents are sent by mail, the postmark date shall be the filing date of the application.

Article 30

Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.

Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administration department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.

Article 31

Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.

Article 32

Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application.

Each patent application for design shall be limited to a single design. Two or more similar designs for the same product, or two or more designs used on products belonging to a single category and sold or used in sets may be submitted together in one application.

Article 33

An applicant may withdraw his or its patent application at any time before the patent right is granted.

Article 34

An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV
Examination and Approval of Patent Applications

Article 35

Where, after receiving an application for a patent for invention, the patent administration department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administration department under the State Council may publish the application earlier.

Article 36

Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administration department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn.

The Patent administration department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.

Article 37

When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application.

For an application for a patent for invention that has been already filed in a foreign country, the patent administration department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.

Article 38

If, after completing the substantive examination of an invention patent application, the patent administration department under the State Council finds that the application does not conform with the provisions of this Law, it shall notify the applicant and ask him or it to state his or its observations or amend the application within a specified time limit. If, without any justified reason, the applicant fails to respond within the time limit, the application shall be deemed to have been withdrawn.

Article 39

If, after the applicant has stated his or its observations or made amendments, the patent administration department under the State Council still finds that the invention patent application does not conform with the provisions of this Law, it shall reject the application.

Article 40

Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administration department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.

Article 41

Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administration department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 42

The patent administration department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administration department under the State Council reject his or its application for patent, such applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant for patent of the decision.

Where the applicant for patent who is not satisfied with the decision of the Patent Reexamination Board, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.

Chapter V
Term, Termination and Invalidation of Patent Rights

Article 43

The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.

Article 44

The patentee shall pay an annual fee beginning with the year in which his or its patent right is granted.

Article 45

In either of the following cases, the patent right shall be terminated prior to the expiration of its term:

(1) if the annual fee is not paid as prescribed; or

(2) if the patentee renounces his or its patent right by a written declaration.

The termination of a patent right shall be registered and publicly announced by the patent administration department under the State Council.

Article 46

Where, starting from the date of the announcement of the grant of a patent right by the patent administration department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.

Article 47

For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administration department under the State Council.

Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.

Article 48

Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

Prior to the declaration of the patent right invalid, the decision to declare the patent right invalid shall have no retroactive effect on any judgement or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.

If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.

Chapter VI
Compulsory Licence for Exploitation of a Patent

Article 49

In any of the following cases, the patent administrative department under the State Council may, upon the request of the entity or individual which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model:

(1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not

sufficiently exploited the patent without any justified reason;

(2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act eliminates or restricts competition.

Article 50

Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.

Article 51

For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted patent right in China and to export it to the following country or region:

(1) a least developed country;

(2) a WTO member which has no or insufficient capability to manufacture the said drug, and has completed relevant procedures according to WTO treaties of which PRC is a member.

Article 52

Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administration department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the patent administration department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 53

Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the following situations:

1. non-commercial public use;

2. a compulsory license is necessary for the applicant due to an action of eliminating and restricting competition by the patentee as determined by the judicial or administrative procedure.

Article 54

The exploitation of a compulsory license shall be for the supply of the domestic market, except as otherwise provided for in Article 49(2) and 51 of this Law.

Article 55

The entity or individual applying, in accordance with the provisions of Article 49(1) or Article 52 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.

Article 56

The decision made by the patent administration department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced.

In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administration department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.

Article 57

Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.

Article 58

Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. Where the parties fail to reach an agreement, the patent administration department under the State Council shall make a ruling.

Article 59

Where the patentee is not satisfied with the decision of the patent administration department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administration department under the State Council regarding the fee payable for exploitation, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.

Chapter VII
Protection of Patent rights

Article 60

The scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim.

The scope of protection in the patent right for a design shall be determined by the product

incorporating the patented design as shown in the drawings or photographs.

Article 61

Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 62

Where any infringement dispute relates to a patent for utility model, the people's court or the administrative authority for patent affairs may ask the patentee to furnish a patent right appraisal report made by the patent administration department under the State Council.

The patent administration department under the State Council conducts a search, analysis and appraisal of the related utility models or design patents according to the request of patentee or interested party, and issue a patent right appraisal report. Patent right appraisal report is prima facie evidence for people's court and the administrative authority for patent affairs to determine the validity of the patent right.

Article 63

If during the patent infringement dispute, the suspected infringer has evidence proving its or his technology or design belongs to prior art or prior design, no patent infringement shall be found.

Article 64

Where any person passes the patent of another person off as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than four times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 200,000 yuan. Where the infringement constitutes a crime, he shall be investigated for his criminal liability.

Article 65

Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and he may be imposed a fine of not no more than RMB 200,000 yuan.

Article 66

The amount of compensation for the damage caused by the infringement of the patent right shall be determined through consultation by the parties. Where the consultation fails, it shall be assessed on the basis of the losses suffered by the patentee whose right was infringed or the profits, which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license. If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the amount of the exploitation fee, people's court may, according to the type of the patent right, the nature and gravity of the infringing act, determine a grant of damages no less than 10,000 yuan and no more than 1,000,000 yuan.

The compensation for the damage caused by the infringement of the patent right shall include reasonable expense spent by patentee to stop the infringing act.

Article 67

Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, or during the legal proceedings, request the people's court to adopt measures for ordering the suspension of relevant acts.

The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions regarding preservation of property of the Civil Procedure Law of the People's Republic of China.

Article 68

In order to stop an act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings.

After acceptance of the request, the people's court shall make a ruling within 48 hours. If the ruling is to adopt evidence preservation measures it must be immediately implemented.

The people's court may order the applicant to provide a guarantee; if the applicant fails to do

so, the application shall be rejected.

If the applicant does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.

Article 69

The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement.

Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 70

None of the following shall be deemed an infringement of the patent right:

(I) Where, after the sale of a patented product that was made by the patentee or an entity/individual authorized by the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product;

(2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;

(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;

(4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation.

(5) For the purpose of providing the information needed for the administrative approval, any entity or individual planning to manufacture a drug or a medical apparatus manufactures a patented drug or a patented medical apparatus.

Article 71

Any person who, purchases and, for production and business purposes, uses, offers to sell or sells a product manufactured and sold without authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.

Article 72

Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.

Article 73

Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.

Article 74

The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities.

Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.

Article 75

Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

Chapter VIII Supplementary Provisions

Article 76

Rules for the implementation of this Law shall be formulated by the patent administration department under the State Council and submitted to the State Council for approval before they are put into effect.

Article 77

This Law shall go into effect on.

Explanatory notes from LAO

Explanation Concerning the Amendments to the Patent Law of the People's Republic of China (Draft)

The Patent Law of the People's Republic of China (below referred to as the current Patent Law) was executed in April 1, 1985, and was amended twice on September 4, 1992 and on August 25, 2000. Since the implementation of the current Patent Law, it has played an important role in encouraging and protecting invention creations, promoting scientific progress and innovation, and facilitating development of Chinese economy and society. Along with the development of domestic and international environment, it is necessary to further improve the patent law system of China.

First, the CCP's 17th Congress Report provided the goal of improving indigenous innovation capability and constructing an innovative country. The State Council formulated the Outline for the National Intellectual Property Rights Strategy. Therefore, it is necessary to amend and improve the Patent Law, to further strengthen the protection of patent rights, to encourage indigenous innovation, to promote implementation of patented technology, to impel the patented technology to transform to the realistic productive forces, and reduce the transformation time.

Second, the WTO Doha Ministerial Conference has passed the Declaration Concerning the TRIPs Agreement and Public Health (hereafter referred to as Declaration), and the General Council of WTO has passed Protocol to Amend the TRIPs Agreement (hereafter referred to as "Protocol") to implement the Declaration. Declaration and Protocol permits the WTO members to grant compulsory licenses according to certain requirements for exploiting pharmaceutical patents exceeding the limitations set in the TRIPs Agreement. On such basis, it is required to make necessary amendments to the current Patent Law. Convention on Biological Diversity has made stipulations regarding protecting genetic resources through patent system. China is a country rich in genetic resources, so it is necessary to amend the current Patent Law so as to be able to exercise the rights granted by the treaty.

State Intellectual property Office(SIPO) has drafted Patent Law of the People's Republic of China (Draft for Review) (below referred to as Review Draft) based on summarizing the implementation experience of current Patent Law, and submitted it to the State Council in December 27, 2006 for examination and approval. After receiving this report, Legal Affairs Office (LAO) has solicited opinions from 72 central departments and entities, 35 local governments, 14 Local courts, more than 20 enterprise and business units, more than 50 experts twice, and also received comments from relevant foreign government agencies, industry associations and international organizations; LAO has also carried out investigations at

places such as Guangdong to study on patent practice of enterprises, patent administrative enforcement by the local authority and the patent judicial enforcement by the local courts; LAO has hosted many expert seminars and two international conferences to discuss on critical issues such as facilitating construction of innovative nation through implementation of patent system, the compliance with international treaties of patent law amendment, etc.. Based on repeated communication and coordination with SIPO, Education, Science, Culture and Public Health Committee of NPC, Law Committee of NPC and Supreme Court, LAO has repeatedly studied and revised the Draft for Review and then formulated Patent Law of the People's Republic of China (Draft) (below referred to as "Draft"). LAO and SIPO conducted a report to Education, Science, Culture and Public Health Committee of NPC on June 27, 2008. Further revisions have been made according to the Committee members' comments afterward. The draft has been passed after the discussion by the State Council 19th Routine Conference on July 30, 2008. The main content of the draft is explained as following:

1. Amendments made to current Patent Law according to the requirement of encouraging indigenous innovation and improving indigenous innovation capability.

In order to achieve the goal of the construction of an innovative nation, the Law of the People's Republic of China on Scientific and Technological Progress proposed by the State Council to the National People's Congress in year 2007 for examination and discussion had already included a series of policies and measures to enlarge the input of science and technology, integrate the resource of science and technology, encourage enthusiasm of the scientific research institution and technical personnel, and stimulate the technology progress of enterprises. At this point, the Draft made the following amendments of the current Patent Law aiming at employing patent system to encourage indigenous innovation:

(1) To "improve indigenous innovation capability" and "construct an innovative country" are added into the purpose of legislation. The purpose of legislation of the current Patent Law has been amended into: this law is enacted in order to protect patent rights, encourage invention-creations, promote invention creation managements and application, improve indigenous innovation capability, promote scientific progress and economic social development, and construct an innovative country. (Article 1)

(2) The standards of patent issuance have been raised. The current Patent Law takes the "standard of relative novelty" in the requirements of granting patents, which stipulates that no identical invention or utility model that for which patent right is to be granted has been publicly disclosed in domestic or foreign publications or has been publicly used or made known to the public by any other means in the country; no design for which patent right is to be granted has been publicly disclosed in publications in the country or abroad or has been publicly used in the country. According to these rules, some technology that has not been publically disclosed in publications can be granted with patent if there is no public use

or corresponding products sold domestically, although these technology has been publicly used or corresponding products have been sold abroad. It leads to the low quality of patents granted in our country. This not only does not favour the encouragement of indigenous innovation, but also hinder the application of foreign existing technology in our country. So the Draft takes "the standard of absolute novelty", stipulating that the invention-creations granted with patent shall not be known to public both in this country and abroad. (Article 11, Article 12). In order to further improve the quality of the design patent, the Draft stipulates that no patent right shall be granted for two-dimensional printed matter design that mainly used as design with the function of an identifier. (Article 13)

(3) The stipulation that the Chinese patent shall be filed before filing a foreign patent on a same subject matter is deleted. The current Patent Law stipulates that invention-creations made in China shall be filed for a Chinese patent before filing for a foreign patent. In order to encourage foreign patent applications and increase international competitiveness of our country, the Draft stipulates that any entity or individual may file a patent application in a foreign country for invention-creation made in China, which thus eliminates the limitations that a Chinese patent shall be filed first. At the same time, considering that some patents may possibly involve China's national security, confidentiality examination is required. The draft stipulates that any entity or individual may file an application in a foreign country for a patent for invention-creation made in China with an advance confidentiality examination conducted by patent administration department under the State Council. (Article 9)

(4) The right of offering to sell is granted to the patentee of design patent. Offering to sell refers to commitments made in advertisement, on shop shelves, in displaying in exhibitions or through other methods to sell products. No right of offering to sell is stipulated in current Patent Law regarding patent right for designs. In order to strengthen protection of design patent, the Draft added the right of offering to sell in design patent right. After such amendments, the design patent right holders can prevent others from offering to sell the patented products by advertisements, on shop shelves or displaying at exhibitions or through other methods without authorization. (Article 5)

(5) It is specified that the damages for patent infringement shall include the costs of the patent owner to defend its/his rights, the punishment for infringing acts is intensified, and the stipulation for statutory compensation is added. From the viewpoint of the practical experience of protecting patents, if the costs of the patent owners to defend its/his rights cannot be compensated, then its/his loss due to the infringement could not be fully compensated. For the purpose of effectively protecting the legal interests of the patent right holder, the Draft added a new stipulation: The compensation for the damage caused by the infringement of the patent right shall include reasonable expense spent by patentee to stop the infringing act. At the same time, for the purpose of striking

infringing acts, the penalty for passing off another's patent has been increased from 3 times to 4 time of illegal income; if there is no illegal income, the fine to be imposed has been increased from 50,000 yuan to 200,000 yuan. The fine to be imposed on acts passing any non-patented product off as patented product has also been increased from 50,000 yuan to 200,000 yuan. (Article 23, Article 24) In addition, in order to increase the efficiency of judicial protection, the Draft also stipulated: In the lawsuit proceedings, If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the amount of the exploitation fee, people's court may, according to the type of the patent right, the nature and gravity of the infringing act, determine a grant of damages no less than 10,000 yuan and no more than 1,000,000 yuan. (Article 25)

(6) Pre-litigation evidence preservation stipulation is newly added. In order to prevent the infringer from transferring or destroying evidence before the patent owner files lawsuit, the Draft added a new stipulation: In order to stop an act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings. (Article 27)

2. Amendments made to the current Patent Law according to the requirements for promoting the wide adoption of technology.

(1) It is stipulated that any co-owner may independently exploit or license others to exploit the patent through common license. For the purpose of protecting legal rights of co-owners over co-owned patent as well as promoting exploitation of co-owned patent, the Draft stipulates: If the patent application right or patent right is jointly owned by two or more entities or individuals, if the owners have an agreement regarding the exercise of rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through common license; any royalties collected through license for others to exploit the patent shall be distributed amongst the owners. Apart from the situation in the preceding paragraph, the exercise of jointly owned patent application right or patent right shall be consented by all co-owners. (Article 7) The "common license" refers to that, co-owner could exploit or license others to exploit the said patented technology while the licensee is exploiting the same patented technology.

(2) It is stipulated that no patent infringement shall be found if the technology under exploitation belongs to prior art. Based on provisions of current Patent Law, in patent infringement cases, the defendant will have to submit re-examination application to the Patent Re-examination Board(PRB) if it/he holds that the patent is invalid. Court shall wait until the PRB's declaration of the invalidity of the patent before deciding no infringement by the defendant is found. In order to prevent maliciously using public prior art in patent applications, hindering the implementation of prior art, helping those

implementing prior art to promptly extricate themselves from patent infringement disputes, the Draft added a new stipulation: If during the patent infringement dispute, the accused infringer has evidence proving its or his technology or design belongs to prior art or prior design, no patent infringement shall be found. (Article 22) Based on this article, the accused infringer is not required to file an application with the PRB, and the court can directly determine that the accused infringer has not infringed.

(3) New item has been added into circumstances not considered as infringement. By reference to foreign experiences, the Draft added a new item into circumstances not considered as infringement: For the purpose of providing the information needed for the administrative approval, any entity or individual intending to manufacture a drug or a medical apparatus manufactures a patented drug or a patented medical apparatus. (Article 28)

3. Amendments made to the current Patent Law according to the stipulations in foreign treaties especially the new regulations after China joined the WTO.

First, Protocol to Amend the TRIPs Agreement stipulated that for the purpose of public health, a compulsory license can be granted for manufacturing and exporting patented pharmaceuticals to a designated country or region. Compulsory license refers to a license granted by a national administrative body according to statutory requirements to provide permission for a qualified entity or individual to exploit the invention or utility model of others. According to the stipulations in the Protocol, the Draft added a new stipulation: For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted patent right in China and to export it to the following country or region:

(1) a least developed country;

(2) a WTO member which has no or insufficient capability to manufacture the said drug, and has completed relevant procedures according to WTO treaties of which PRC is a member. (Article 17)

In addition, TRIPs agreement stipulated that against acts by patentee to eliminate or restrict competition, compulsory license could be adopted to secure applicant's reasonable interests. On such basis, the Draft added a stipulation: a compulsory license can be granted to the applicant where an action of eliminating and restricting competition by the patentee has been determined by the judicial or administrative procedure. (Article 16)

Second, Convention on Biological Diversity stipulated that in exploitation of genetic resources the principles of state sovereignty, informed consent and benefit sharing shall be followed. It also distinctly stipulates that the patent system should assist in implementing the goal of protecting genetic resources.

At present, a few countries have already used their patent law systems to protect genetic resources. China is a country rich in genetic resources. In order to prevent the illegal theft of China's genetic resources to conduct

technological development and file patent applications, the Draft added a new stipulation: For an invention-creation the completion of which relies on genetic resources, the applicant shall on the patent application document indicate the direct source and original source of the genetic resource. The applicant unable to indicate the original source of the genetic resource must explain the reason. (Article 14) It is also added: No patent right shall be granted for an invention-creation the completion of which relies on genetic resources, where the acquisition or use of the genetic resources breaches the stipulations in relevant laws and regulations. (Article 2)

In addition, the draft has also made literal amendments to some articles of the current Patent Law.

Comments from EUCCC on August 2008 Draft Patent Law

General Comments:

The current draft has been improved a lot when compared to previous draft of March 2008, especially in the section related to patent protection. We are pleased to note many of EUCCC's previous comments have been taken into consideration. Nevertheless, in order to further improve the draft, we have some specific comments which are listed in the table below:

However, there are still a number of issues that will affect especially R&D-oriented pharmaceutical companies like for example the introduction of the Bolar exemption (without the granting a patent term extension) further the genetic resource issue which we believe is an important issue and CBD has outlined many measures but not granting a patent right seems not to be the right way to solve this issue. Further with regards to compulsory licenses TRIPS compliance is very important and it remains to be seen how this will be handled. Regarding the change for the first filing requirement there needs also to be more specification and we doubt that it will be practical that every patent filing should undergo such an examination instead it seems better to define certain areas of technology and the rest can be filed without the examination.

Specific Comments

Chapter I General Provisions

Article 5

Although according to our previous argumentation the reference to traditional knowledge has been deleted, this article still remains problematic with regard to invention-creations the completion of which relies on genetic resources.

The underlying idea for this article seems drawn from CBD, but CBD outlines many measures to be taken and only allows according to article 16(5) …*that patents and other intellectual property rights may have an influence on the implementation of this convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objective*

We still feel that not granting the patent right might be unfair to the inventor who will usually not be the one breaching any regulation, therefore other means like criminal sanctions for the one breaching the law would be more effective and fair as the invention remains an invention

the problem lies in the USE of the invention but those means are not foreseen in the patent law.

Article 9

Our previous comment on the March 2008 remains valid

" We welcome the clarification in the law that an applicant who filed both a utility model patent application and an invention patent application has to abandon the former in order to get a patent for the latter. However, Art. 6.2.2 of the Examination Guideline of SIPO provides that the utility model patent has to be abandoned with retroactive effect to the filing date which is not necessary in order to prevent double protection.

We thus suggest that giving up the utility model right should not be retroactive (i.e. from the utility model application filing date) but only as from the invention patent grant date."

Article 10

The wording right of patent application but later the term the right to apply for a patent is not consistent (probably both times the right of patent application is meant). We therefore recommend clarifying.

Article 11

The revised Patent Law is silent about contributory infringements. While Chinese jurisdiction acknowledges joint infringement, it seems to be controversially discussed, whether legal actions can only be taken against all joint infringers together and whether joint infringers shall only be liable if they infringe knowingly.

To avoid such discussions and define a clear and sufficient protection, patent laws of most industrialized countries sufficiently cover contributory infringement. Just to name a few: Belgium Article 27 (2) and (3) Patent Law, Denmark § 3 (2) Patent Law, France Article L 613-4 CPI, Germany § 10 Patent Law, Luxembourg Article 46 Patent Law, the Netherlands Article 73 ROW, Spain Article 51 Patent Law, Sweden § 3 (2) Patent Law, the Czech Republic § 13a Patent Law, Turkey Article 74 VO 551, UK Section 60 (2) and (3) Patent Acts, and US 35 U.S.C. 271 (c).

We suggest to keep the existing rules as paragraph 1 as in the March version, and also add contributory infringement, specifically by adding after the first article the following two paragraphs:

2. A patent shall also confer on its proprietor the right to prevent all third parties not having his consent from supplying or offering to supply a person, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.

Paragraph 2 shall not apply when the means are staple commercial products, except when the third party induces the person supplied to commit acts prohibited by paragraph.

Article 13

One of the most important ways of patent exploitation is via standardization implementation. In order to meet current standardization activities requirements, to clarify the relation of patents re standards, we suggest to add the following sentence:

"If the patented invention is used in a standard, the patentee is entitled to license his patent on reasonable and non-discriminatory terms and conditions."

Article 14

The introduction of a direct negotiation in article 14 is welcome.

Article 15

Even if there is no agreement, the enforcement of the patent should be decided independently by each co-owner.

We further recommend including a detailed description about independent licensing and consequently how royalties shall be allocated among collective owners. This consideration is relevant when a patent is jointly owned by a JV but without an agreement about mutual owned patent in place yet.

Article 17

We note that the "positive step" consisting in granting priority to the agreement between entity and inventor has been deleted. We recommend including it back. This agreement should again be included into this article.

"the extent the invention-creation is applied and the economic benefits it yields" is difficult to determine, thus we suggest deleting this wording based on the extent of application and the economic benefits yielded. Instead, the following words should be added: "taking into account the salary that the inventor has already received and the investments made by the entity with regard to the infrastructure that enabled the inventor or designer to make the invention-creation and with regard to marketing the invention-creation".

Article 20

We would like to reiterate our previous comments:

"In-house patent agents employed by companies in China who have passed the Chinese patent agent examination should be able to prosecute patents on behalf of any foreign company related to their employer."

Article 21

It is a welcomed change that the vague wording of "significant public interest" has been removed.However, we would suggest that the prior security/secrecy examination by SIPO is unnecessary, because it cannot prevent the applicant, either intentionally or unintentionally, from divulging national security /secrecy information in the current information era, especially in the internet age, by conducting a prior check that is only carried out on patent applications without checking all other forms in which somebody may publish information. The effective way is self-examination by the applicant and the patent law imposes a sanction for the violation as provided by the draft Art. 72. Also for all other publications (e.g. in newspapers or on the internet) that may jeopardize security / secrecy, self-examination followed by criminal sanctions in case of violations is the normal practice, and there is no reason why only for patent applications there should be a prior check by a CN governmental organization.This proposal is also compliant with the relevant legislation of many other countries like. Netherlands, Germany, UK, Belgium, Japan, Korea, So we suggest deleting the statement: "subject to a prior security/ secrecy examination by the Patent Administration Department Under the State Council."And in the beginning the following statement could be added:"except for the inventions involving national security or secrets,"

The modified text is as follows: **Except for the inventions involving national security or secrets,** any entity or individual may file an application in a foreign country for an invention-creation completed in China. Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph.The Patent Administration Department Under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.

Alternatively we suggest explaining the confidentiality examination in detail, especially how long it will take. The applicant looses time for his filing date if he does not file in CN first getting the application date while the confidentiality examination is carried out. We also suggest clarifying how the confidentiality is to be guarantee during the examination.

Chapter II Conditions for the Grant of Patent Rights

Article 23

The definition of prior art should be further elaborated, e. g. to what level a technology should be known to the public so it can be defined as prior art. It should further be clarified how to treat an invention which is novel but partially identical to the core sector of an existing technology.

A general definition of prior art could be included, e.g. "prior art shall consist of everything which has been made available to the public anywhere in the world in any way before the date of filing".

Article 25

We would like to reiterate our previous comments:"Where an invention-creation ***or design*** for which a patent is applied ***is disclosed*** in one of the following manners, within six months before the date of filing, ***said disclosure does*** not constitute prior art or prior design referred to in this Law ***for determination of the novelty*** of the said patent application:

(1) where it was first exhibited ***by the applicant or his predecessor/successor in title*** at an international exhibition sponsored or recognized by the Chinese Government;

(2) where it was first made public ***by the applicant or his predecessor/successor in title*** at a prescribed academic or technological meeting;

(3) where it was disclosed by any person obligated to the applicant not to disclose without the consent of the applicant **or his predecessor/successor in title.**"

However for the first paragraph we would like to suggest following additional amendments:

The words "or design" could be deleted as an invention-creation may be an invention, a utility model, or a design. Further, we suggest that the words "**for determination of the novelty**" should not be maintained as that would imply that publications for which the grace period can be invoked as regards novelty can still be used as prior art to establish that there is no inventive step.

Chapter III Application for Patents

Article 27

See comments for Art.5

The comments regarding Art 27 PCT we provided on the March 2008 draft remain valid

For PCT national phase applications, the last paragraph is a violation of Art. 27 PCT as it is a requirement as to form and/or contents of an application that is different from or additional to those which are provided for in the PCT

We are also concerned about, which "reasons" will be accepted, like e. g. that the material has been acquired from a third party. However, it might be difficult in many cases for the applicant to explain, why the third party was the legal owner

Article 32

As the second paragraph amended, we note that our request for partial designs has not been integrated. We would like to reiterate that this is common international practice and the registration of partial designs should be allowed.

Chapter V Term, Termination and Invalidation of Patent Rights

Article 47

We note that the December 06 draft added that it should be Administrative Procedure. The March 08 moved to Civil Procedure. The current version goes back to the original text, i. e. there is no precision.

We assume that this question might be left to Implementing Rules.

Chapter VI Compulsory Licence for Exploitation of a Patent

Article 49

This underlined modification to the previous drafts in article 49 takes into account our comments and is welcome.

However, as in previous comments the statement "whichever expire last" could help to reduce the ambiguity of 'para (1)" ,which is also compliant with Article 5A (4) of Paris convention.

So the proposed modified text is as follows:

where the patentee, after the third anniversary of the grant of the patent right fourth anniversary of the filing date of patent application, **whichever expires last,** has not exploited the patent or has not sufficiently exploited the patent without any justified reason;

On the other hand, para. (2) is unchanged and unacceptable as such. The wording should be TRIPS compliant (Article 31k): where it is stated "anti-competitive practices" which further should be defined in the Anti-Monopoly Law what will be regarded as anti-competitive practice – which is completely different to "an act eliminates or restricts competition" as the patent per se restricts competition for a limited period of time.

Also, see new Article 53 (rather 54) paragraph 2, which expresses the same idea, but restricted to semi-conductor technology.

Article 50

The deletion of the second paragraph, in the Dec 06 draft ("epidemic disease", which had evolved to "public health" in the March 08 draft) is welcome.

Article 51

Article 51 has been added in view of the "Declaration on the implementation of Para 6 of the Doha Agreement" which generally deals with the possibility of granting compulsory license on drugs for export in the interest of public health and access to medicine. Reference should be made to the Declaration as many conditions apply.

Article 52

Reiterate previous comments:

"May" in article 52 second paragraph should be changed to "shall".

Article 53

We note that the second paragraph is identical to 49.2 and refer to the comments made above.

Article 54

Regarding reference to Art. 49(2) this refers to Art 31(k) Trips where 31(f) domestic use - does not need to be applied so it seems TRIPS conform

Article 55

We note that Art. 55 only makes reference to Art. 49 (1) and Art. 52. We recommend to amend it so that it also refers to Art 51 as the "Declaration on the implementation of Para 6 of the Doha Agreement" does not waive Art. 31b TRIPS (under point 9 it only refers to Art. 31 f and h TRIPS)

We would also recommend replacing "on reasonable terms" by the wording taken from Art. 31bTRIPS "*on reasonable commercial terms and conditions*".

Article 53

We note that the specification about which court has jurisdiction has been deleted. We assume that defining this was left to the Implementation Rules.

Chapter VII
Protection of Patent rights

Article 60

We believe that clarity would be improved if the words "the contents of" are deleted (like has been done in the EPC2000)

We would like to reiterate our previous comments regarding the inclusion of the Doctrine of Equivalence:

Although the judicial interpretation provides for the Doctrine of Equivalents, but its effect is not as stable as a law. Moreover, the relevant judicial interpretation is only applicable for the judicial enforcement channel and not for administrative enforcement channel, whereas the latter is an important Chinese characteristic enforcement mechanism. Thus we suggest putting this doctrine into Patent law, so that there is a stable and uniform effect for both enforcement channels.

We recommend adding a one paragraph:

"For the purpose of determining the extent of protection conferred by a patent for an invention or a utility model, due account shall be taken of any element which is equivalent to an element specified in the claims."

Article 62

We note that nothing is provided to make the registrant of a Utility model or Design that is cancelled pay for the costs incurred by the application for cancellation.

Article 64

4 times and 200,000 in article 64 is definitely an improvement.

Article 65

The raise from 50,000 to 200,000 in article 65 is welcome.

Article 66

For a clear understanding article 66 should read "In addition to the above stated damages …"

Further we recommend defining what reasonable expenses are.

Article 67&68

These two articles 67 and 68 are confusing. There are three types of remedies: injunction to suspend, preservation of assets and preservation of evidence. It seems that the three should be placed under the 48 hours delay and the obligation to sue within 15 days or the bond. We recommend clarifying this.

Article 70

The inclusion of the Bolar Exemption is not balanced without the patent term extension as this term is in favour of the generic industry. Adopting the Bolar Exemption without any other balancing provisions would be in contradiction to international practice and would act as a disincentive for investments in pharmaceutical research in China.

Article 71

Article 71 states that products bought in good faith do not cause any liability in spite of an infringement. This leaves a lot of room for interpretation and causes major insecurity for Chinese and foreign companies concerning the rule of law.

We therefore propose replacing "legitimate source" by a more precise wording e. g. "obtains the product from a licensee of the patentee or from somebody who directly or indirectly obtained the products from the patentee or its licensee".

Article 72

The sanction provided in previous drafts (refusal to grant Chinese patent if filed abroad without authorization) is abandoned. This is welcome and in line with international practice.

Comments from the EC Delegation and DG Trade of the European Commission on August 2008 Draft Patent Law

Current Patent Law (2000 Version)	August 29 2008 Patent Law Draft Amendments	Comments
Chapter I General Provisions	**Chapter I General Provisions**	
Article 1 This Law is enacted in order to protect patent rights for inventions-creations, encourage invention-creations, to facilitate the wide application of inventions-creations, promote the progress and innovation of science and technology, and meet the needs of the socialist modernization drive.	Article 1 This law is enacted in order to protect patent rights, encourage invention-creations, promote invention creation managements and application, improve independent innovation, promote scientific progress and economic social development, and construct an innovative country.	
Article 2 For the purpose of this Law, "invention-creation" means inventions, utility models and designs.	Article 2 For the purpose of this Law, "invention-creation" means inventions, utility models and designs.	

Article 3 The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.	Article 3 The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.	
Article 4 If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.	Article 4 If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.	

Article 5 No patent right shall be granted for any invention-creation that violates the laws of the State, goes against social morals or is detrimental to the public interest.	**Article 5** No patent right shall be granted for any invention-creation that violates the laws of the State, goes against social morals or is detrimental to the public interest. No patent right shall be granted for an invention-creation the completion of which relies on genetic resources, where the acquisition or use of the genetic resources breaches the stipulations in related laws and regulations.	A patent does not grant the right to execute an invention if other laws and regulations expressively forbid so. In light of this principle the proposed change may seem superfluous.

Article 6 An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.	**Article 6** An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.	

Article 7 No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.	**Article 7** No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.	
Article 8 For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.	**Article 8** For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.	

Article 9 If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.	**Article 9** For any identical invention-creation, only one patent right shall be granted. But, if the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if a utility model patent right has been obtained and not yet terminated, and the applicant declares to abandon the obtained patent right for utility model, then the patent right for invention may be granted. If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.	First paragraph added.

Article 10	Article 10	
The right of patent application and the patent right itself may be assigned. If a Chinese entity or individual wishes to assign a right of patent application or a patent right to a foreigner, it or he must obtain the approval of the relevant competent department under the State Council. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.	The right of patent application and the patent right itself may be assigned. If a Chinese entity or individual wishes to assign a right of patent application or a patent right to a foreigner, it or he must follow procedures in accordance with the related laws and administrative regulations. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.	The revised wording is an improvement over previous versions. The omission of the right to apply for a patent is positive. The current wording still may require the compulsory compliance with the Technology Import and Export Administration Rules TIER prior to a transfer of a right of patent application or patent right before being considered as valid. A transfer application is usually based upon a private contract, whose validity should not be made dependant on administrative rules which can delay the entering into force of the private transfer contract without any remedies by the parties. It is therefore recommended to return to the original wording of Article 10.

Article 11	Article 11	
After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, that is, make, sell or import the product incorporating its or his patented design, for production or business purposes.	After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, that is, make, offer to sell, sell, or import the product incorporating its or his patented design, for production or business purposes.	The enlargement of the scope of protection for design patents is a highly desirable and positive change in the draft law. It is strongly recommended to add a paragraph on the applicability of the doctrine of equivalence for the scope of protection. It is recommended to add a paragraph on indirect infringement.

Article 12 Except as provided for in Article 14 of this Law, any entity or individual exploiting the patent of another must conclude a written licensing contract with the patentee and pay the patentee a fee for the exploitation of its or his patent. The licensee shall not have the right to authorize any entity or individual other than that referred to in the contract to exploit the patent.	**Article 12** Except as provided for in Article 14 of this Law, any entity or individual exploiting the patent of another must conclude a written licensing contract with the patentee and pay the patentee a fee for the exploitation of its or his patent. The licensee shall not have the right to authorize any entity or individual other than that referred to in the contract to exploit the patent.	
Article 13 After the application for an invention patent has been publicly announced, the applicant may require the entities or individuals exploiting the invention to pay an appropriate fee.	**Article 13** After the application for an invention patent has been publicly announced, the applicant may require the entities or individuals exploiting the invention to pay an appropriate fee.	

Article 14 Where any patent for invention, which belongs to any State-owned enterprise or institution, is of great significance to the interests of the State or the public, the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval by the State Council, decide that the patented invention be widely applied within the approved limits, and allow designated entities to exploit that invention. The exploiting entity shall, according to the regulations of the State, pay a fee for exploitation to the patentee. Any patent for invention belonging to a Chinese individual or an entity under collective ownership, which is of great significance to the interests of the State or the public and needs to be widely applied, may be treated alike by making reference to the provisions of the preceding paragraph.	**Article 14** Where any patent for invention, which belongs to any State-owned enterprise or institution, is considered of great significance to the interests of the State or the public by the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government, after approval by the State Council, the patented invention may be widely applied within reasonable limits. The exploiting entity shall pay a fee for exploitation to the patentee, the amount of which shall be determined through negotiation by both parties.	First paragraph amended while second paragraph deleted. It should be clarified whether this rule also applies to private companies who jointly co-own a patent in China with a State-owned company or institution: International cooperation agreements in the scientific area with universities and (partially) state-owned research labs may be severely affected if this rule is applicable also in case of such co-ownership.

	Article 15 If the patent application right or patent right is jointly owned by two or more entities or individuals, if the owners have an agreement regarding the exercise of rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through common license; Any royalties collected through license for others to exploit the patent shall be distributed amongst the owners. Apart from the situation in the preceding paragraph, the exercise of jointly owned patent application right or patent right shall be consented by all co-owners.	The whole article added. It should be explicitly stipulated that co-ownership entitles a co-owner to enforce a patent separately in the name of all co-owners. The ability to defend a patent greatly enhances attractiveness of co-ownership as co-owners are not unduly restricted. A defendable patent in turn is more conducive to attract international cooperation.
Article 15 The patentee shall have the right to affix a patent marking and indicate the patent number on the patented product or on the packaging of that product.	**Article 16** The patentee shall have the right to affix a patent marking and indicate the patent number on the patented product or on the packaging of that product.	

Article 16 The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.	**Article 17** The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.	
Article 17 An inventor or designer shall have the right to name himself as such in the patent document.	**Article 18** An inventor or designer shall have the right to name himself as such in the patent document.	
Article 18 If a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	**Article 19** If a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	

Article 19	Article 20	Allowing in-house counsels with certified qualification as patent attorney to act on behalf of foreign companies would greatly facilitate filing procedures in front of SIPO and give incentives for foreign companies to hire Chinese patent attorneys as additional job opportunity to this service industry.
Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency designated by the patent administration department under the State Council to act as his or its agent. If any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may entrust a patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency <u>established in accordance with law</u> to act as his or its agent. If any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may entrust a patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.	

Article 20	Article 21	First paragraph amended. The term of "confidentiality examination" is nowhere defined in any patent-related law or regulation, thus leaving ample room for a system that could strongly impede freedom of inventors to decide for themselves where to file first. It may also impede timely filing of inventions and design-creations abroad, without means of redress by right holders. The current wording seems to allude to the foreign filing system practiced in the US; it is hoped that the Implementing Rules will prescribe a very fast and simple procedure. It should be stressed that European countries rarely feature comparable rules and if so apply them to a very limited number of inventions and with great restraint. Prior confidentiality examination if deemed necessary should only be required by law for those inventions which are military sensitive or clearly touch upon vital interests of the state. Article 72 draft law should be sufficient to preserve vital state interests; a separate confidentiality examination seems unnecessary.
Where any Chinese entity or individual intends to file an application in a foreign country for a patent for invention-creation made in China, it or he shall file first an application for patent with the patent administration department under the State Council, appoint a patent agency designated by the said department to act as its or his agent, and comply with the provisions of Article 4 of this Law. Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.	<u>Any entity or individual may file an application in a foreign country for a patent for invention-creation made in China with an advance confidentiality examination conducted by patent administration department under the State Council</u>. Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.	

Article 21 The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.	Article 22 The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The patent administration department under the State Council shall transmit patent information completely, accurately and promptly, and publish the Patent Gazette regularly. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.	Second paragraph added.

Chapter II Conditions for the Grant of Patent Rights	Chapter II Conditions for the Grant of Patent Rights	
Article 22 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that, before the filing date of the application, no identical invention or utility model has been publicly disclosed in domestic or foreign publications or has been publicly used or made known to the public by any other means in the country, nor has any other person previously filed with the patent administration department under the State Council an application describing an identical invention or utility model which was recorded in patent application documents published after the said date of filing.	Article 23 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing an identical invention or utility model which was published in patent application documents or patent documents after the said date of filing.	Second and third paragraph amended, fifth paragraph added. The "prior art" should be broadly interpreted and not be restricted to "technology". Article 54(2) EPC uses the definition "The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way before the state of filing of the European patent applications"

Article 22 (Continued) "Inventiveness" means that, compared with the technology existing before the filing date of the application, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. "Usefulness" means that the invention or utility model can be made or used and can produce positive results.	**Article 23 (Continued)** Inventiveness means that, compared with the prior art, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. The prior art referred to in this Law means any technology known to the public before the date of filing in this country or abroad.	
Article 23 No design for which patent right is to be granted may be identical with or simi1ar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country, or be in conflict with any prior legal rights of any other person.	**Article 24** Any design for which a patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing the identical design which was published in the patent documents after the said date of filing. Any design for which a patent right may be granted shall be substantively different from the prior design or a combination of the features of the prior design. Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person.	The article does not define what is deemed to be qualified as "substantively different". European law uses the concept of "individual character", which requires a higher degree of distinction to prior designs, thus enhancing quality designs.

	Article 24 (Continued) The prior design referred to in this Law refers to any design known to the public before the date of filing in this country or abroad. No design for which patent right is to be granted may be identical with or simi1ar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country, or be in conflict with any prior legal rights of any other person.	
Article 24 Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.	**Article 25** Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.	It should be clarified whether "filing date of the application" refers to the priority date or the national filing date in China.

Article 25 For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.	**Article 26** For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. (6) two-dimensional printed matter design, color or a combination of both to be mainly used as design with the function of an identifier. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.	(6) added The exclusion of two-dimensional designs adds little value in the fight against misuse of the design patent system, yet decreases the available level of protection for creations in the design sector. It is recommended to abolish paragraph 6.

Chapter III Application for Patents	**Chapter III Application for Patents**	
Article 26 When a patent application is filed for an invention or a utility model, relevant documents shall be submitted, including a written request, a specification and an abstract thereof, and a patent claim. The written request shall state the title of the invention or utility model, the name of the inventor or designer, the name and address of the applicant and other related matters.	**Article 27** When a patent application is filed for an invention or a utility model, relevant documents shall be submitted, including a written request, a specification and an abstract thereof, and a patent claim. The written request shall state the title of the invention or utility model, the name of the inventor or designer, the name and address of the applicant and other related matters. The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model.	Sixth paragraph added The omission of traditional knowledge in the added paragraph is positive. Previous comments on genetic resources and source indication obligations continue to apply. It seems unclear in the current draft what sanctions shall apply in case of deemed non-compliance with paragraph 6.

Article 26 (Continued) The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model. The patent claim shall, on the basis of the specification, state the scope of the patent protection requested.	**Article 27 (Continued)** The patent claim shall, on the basis of the specification, state the scope of the patent protection requested. For an invention-creation the completion of which relies on genetic resources, the applicant shall on the patent application document indicate the direct source and original source of the genetic resource. The applicant unable to indicate the original source of the genetic resource must explain the reason.	
Article 27 hen a patent application is filed for a design, relevant documents shall be submitted, including a written request and drawings or photographs of the design; the product on which the design is to be used and the category of that product shall also be indicated.	**Article 28** hen a patent application is filed for a design, relevant documents shall be submitted, including a written request and drawings or photographs of the design; the product on which the design is to be used and the category of that product shall also be indicated.	
Article 28 The date on which the patent administration department under the State Council receives the patent application documents shall be the filing date of the application. If the application documents are sent by mail, the postmark date shall be the filing date of the application.	**Article 29** The date on which the patent administration department under the State Council receives the patent application documents shall be the filing date of the application. If the application documents are sent by mail, the postmark date shall be the filing date of the application.	

Article 29 Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administration department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	**Article 30** Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administration department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	

Article 30 Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.	**Article 31** Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.	
Article 31 Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design used on one type of product. Two or more designs used on products belonging to a single category and sold or used in sets may be submitted together in one application.	**Article 32** Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design. Two or more similar designs for the same product, or two or more designs used on products belonging to a single category and sold or used in sets may be submitted together in one application.	Second paragraph amended The wording in the second paragraph seems ambiguous, as the first sentence stipulates a one design-one application rule, whereas the second one stipulates two exceptions. Multiple applications in the sense of European law for example would allow filing for one design on several products, as long as these follow the Locarno Classification. A rule on partial designs is missing in the current draft which speaks of "same product". Given the increase of separable and designed functions in many products it would be desirably to allow partial designs of a product to fall under the "same product" definition.

Article 32 An applicant may withdraw his or its patent application at any time before the patent right is granted.	**Article 33** An applicant may withdraw his or its patent application at any time before the patent right is granted.	
Article 33 An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	**Article 34** An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	

Chapter IV Examination and Approval of Patent Applications	Chapter IV Examination and Approval of Patent Applications	
Article 34 Where, after receiving an application for a patent for invention, the patent administration department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administration department under the State Council may publish the application earlier.	Article 35 Where, after receiving an application for a patent for invention, the patent administration department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administration department under the State Council may publish the application earlier.	

Article 35	Article 36	
Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administration department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administration department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.	Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administration department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administration department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.	

Article 36 When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an application for a patent for invention that has been already filed in a foreign country, the patent administration department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.	**Article 37** When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an application for a patent for invention that has been already filed in a foreign country, the patent administration department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.	

Article 37 If, after completing the substantive examination of an invention patent application, the patent administration department under the State Council finds that the application does not conform with the provisions of this Law, it shall notify the applicant and ask him or it to state his or its observations or amend the application within a specified time limit. If, without any justified reason, the applicant fails to respond within the time limit, the application shall be deemed to have been withdrawn.	**Article 38** If, after completing the substantive examination of an invention patent application, the patent administration department under the State Council finds that the application does not conform with the provisions of this Law, it shall notify the applicant and ask him or it to state his or its observations or amend the application within a specified time limit. If, without any justified reason, the applicant fails to respond within the time limit, the application shall be deemed to have been withdrawn.	
Article 38 If, after the applicant has stated his or its observations or made amendments, the patent administration department under the State Council still finds that the invention patent application does not conform with the provisions of this Law, it shall reject the application.	**Article 39** If, after the applicant has stated his or its observations or made amendments, the patent administration department under the State Council still finds that the invention patent application does not conform with the provisions of this Law, it shall reject the application.	

Article 39 Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administration department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.	**Article 40** Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administration department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.	
Article 40 Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administration department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	**Article 41** Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administration department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	

Article 41 The patent administration department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administration department under the State Council reject his or its application for patent, such applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant for patent of the decision. Where the applicant for patent who is not satisfied with the decision of the Patent Reexamination Board, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	**Article 42** The patent administration department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administration department under the State Council reject his or its application for patent, such applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant for patent of the decision. Where the applicant for patent who is not satisfied with the decision of the Patent Reexamination Board, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	

Chapter V Term, Termination and Invalidation of Patent Rights	Chapter V Term, Termination and Invalidation of Patent Rights	
Article 42 The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	Article 43 The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	
Article 43 The patentee shall pay an annual fee beginning with the year in which his or its patent right is granted.	Article 44 The patentee shall pay an annual fee beginning with the year in which his or its patent right is granted.	
Article 44 In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2) if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administration department under the State Council.	Article 45 In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2) if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administration department under the State Council.	

Article 45 Where, starting from the date of the announcement of the grant of a patent right by the patent administration department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.	Article 46 Where, starting from the date of the announcement of the grant of a patent right by the patent administration department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.	

Article 46	Article 47	
For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administration department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.	For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administration department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.	

Article 47	Article 48	
Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. Prior to the declaration of the patent right invalid, the decision to declare the patent right invalid shall have no retroactive effect on any judgement or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.	Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. Prior to the declaration of the patent right invalid, the decision to declare the patent right invalid shall have no retroactive effect on any judgement or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.	

Article 47 (Continued) If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.	Article 48 (Continued) If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.	

Chapter VI Compulsory Licence for Exploitation of a Patent	Chapter VI Compulsory Licence for Exploitation of a Patent	
Article 48 Where any entity which is qualified to exploit the invention or utility model has made a request for authorization from the patentee of an invention or a utility model to exploit its or his patent on reasonable terms and has been unable to obtain such authorization within a reasonable period of time, the patent administration department under the State Council may, upon the application of that entity, grant a compulsory license to exploit the patent for the invention or utility model.	Article 49 In any of the following cases, the patent administrative department under the State Council may, upon the request of the entity or individual which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model: (1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not sufficiently exploited the patent without any justified reason; (2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act eliminates or restricts competition.	Three years limitation from current Implementation Rules of Patent Law. The second paragraph requires stringent and clear definitions and guidelines; the absence of the use of compulsory licensing in countries around the globe indicates that only under very rare circumstances the exercise of a patent, whose essence is per se a monopoly to exclude others from the use of the patented subject matter, will fall under such regulation.

Article 49 Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.	**Article 50** Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.	
	Article 51 For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted patent right in China and to export it to the following country or region: (1) a least developed country; (2) a WTO member which has no or insufficient capability to manufacture the said drug, and has completed relevant procedures according to WTO treaties of which PRC is a member.	The whole article added.

Article 50 Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administration department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administration department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	**Article 52** Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administration department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administration department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	

	Article 53 Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the following situations: non-commercial public use; a compulsory license is necessary for the applicant due to an action of eliminating and restricting competition by the patentee as determined by the judicial or administrative procedure.	The whole article added.
	Article 54 The exploitation of a compulsory license shall be for the supply of the domestic market, except as otherwise provided for in Article 49(2) and 51 of this Law.	The whole article added.

Article 51 Any entity or individual applying for a compulsory license in accordance with the provisions of this Law shall furnish proof that it or he has not been able to conclude a licensing contract on reasonable terms with the patentee.	Article 55 The entity or individual applying, in accordance with the provisions of Article 49(1) or Article 52 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.	

Article 52 The decision made by the patent administration department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administration department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.	**Article 56** The decision made by the patent administration department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administration department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.	
Article 53 Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.	**Article 57** Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.	

Article 54 Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. Where the parties fail to reach an agreement, the patent administration department under the State Council shall make a ruling.	**Article 58** Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. Where the parties fail to reach an agreement, the patent administration department under the State Council shall make a ruling.	
Article 55 Where the patentee is not satisfied with the decision of the patent administration department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administration department under the State Council regarding the fee payable for exploitation, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	**Article 59** Where the patentee is not satisfied with the decision of the patent administration department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administration department under the State Council regarding the fee payable for exploitation, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	

Chapter VII Protection of Patent rights	Chapter VII Protection of Patent rights	
Article 56 The scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim. The scope of protection in the patent right for a design shall be determined by the product incorporating the patented design as shown in the drawings or photographs.	Article 60 The scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim. The scope of protection in the patent right for a design shall be determined by the product incorporating the patented design as shown in the drawings or photographs.	It is recommended to use the wording "determined by the patent claims", omitting "content of".

Article 57 Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.	Article 61 Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.	Second paragraph goes into Article 62.

Article 57 (Continued) If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China. Where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process. Where the infringement relates to a patent for utility model, the people's court or the administrative authority for patent affairs may ask the patentee to furnish a search report made by the patent administration department under the State Council.	**Article 61 (Continued)** If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.	

	Article 62 Where any infringement dispute relates to a patent for utility model, the people's court or the administrative authority for patent affairs may ask the patentee to furnish a patent right appraisal report made by the patent administration department under the State Council. The patent administration department under the State Council conducts a search, analysis and appraisal of the related utility models or design patents according to the request of patentee or interested party, and issue a patent right appraisal report. Patent right appraisal report is prima facie evidence for people's court and the administrative authority for patent affairs to determine the validity of the patent right.	From 57(2) of current patent law and amended.
	Article 63 If during the patent infringement dispute, the suspected infringer has evidence proving its or his technology or design belongs to prior art or prior design, no patent infringement shall be found.	The whole article added.

Article 58 Where any person passes the patent of another person off as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 50,000 yuan. Where the infringement constitutes a crime, he shall be investigated for his criminal liability.	**Article 64** Where any person passes the patent of another person off as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than four times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 200,000 yuan. Where the infringement constitutes a crime, he shall be investigated for his criminal liability.	
Article 59 Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced, in addition, he may be imposed a fine of not no more than RMB 50,000 yuan.	**Article 65** Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and he may be imposed a fine of not no more than RMB 200,000 yuan.	

Article 60 The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the losses suffered by the patentee whose right was infringed or the profits, which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license.	**Article 66** The amount of compensation for the damage caused by the infringement of the patent right shall be determined through consultation by the parties. Where the consultation fails, it shall be assessed on the basis of the losses suffered by the patentee whose right was infringed or the profits, which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license. If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the amount of the exploitation fee, people's court may, according to the type of the patent right, the nature and gravity of the infringing act, determine a grant of damages no less than 10,000 yuan and no more than 1,000,000 yuan. The compensation for the damage caused by the infringement of the patent right shall include reasonable expense spent by patentee to stop the infringing act.	

Article 61 Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and the preservation of property. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China.	Article 67 Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, or during the legal proceedings, request the people's court to adopt measures for ordering the suspension of relevant acts. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions regarding preservation of property of the Civil Procedure Law of the People's Republic of China.	"during the legal proceedings" added for preliminary injunctions. "preservation of property" moved out.

	Article 68 In order to stop an act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings. After acceptance of the request, the people's court shall make a ruling within 48 hours. If the ruling is to adopt evidence preservation measures it must be immediately implemented. The people's court may order the applicant to provide a guarantee; if the applicant fails to do so, the application shall be rejected. If the applicant does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.	The whole article added.

Article 62 The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	**Article 69** The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	

Article 63 None of the following shall be deemed an infringement of the patent right: (I) Where, after the sale of a patented product that was made or imported by the patentee or with the authorization of the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell or sells that product; (2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;	**Article 70** None of the following shall be deemed an infringement of the patent right: (I) Where, after the sale of a patented product that was made by the patentee or an entity/individual authorized by the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product; (2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;	From first paragraph of article 63 of current law. (5) added. The Bolar exemption included in paragraph 5 of the draft is not balanced by a Supplementary Protection Certificate or patent term extension to compensate for the restrictions of the patent right.

Article 63 (Continued) (3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation. Any person who, for production and business purposes, uses or sells a patented product without knowing that it was made and sold without the authorization of the patentee or that it was directly obtained by a patented process, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.	**Article 70 (Continued)** (3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation. (5) For the purpose of providing the information needed for the administrative approval, any entity or individual planning to manufacture a drug or a medical apparatus manufactures a patented drug or a patented medical apparatus.	

	Article 71 Any person who, purchases and, for production and business purposes, uses, offers to sell or sells a product manufactured and sold without authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.	From second paragraph of article 63 of current law, amended.
Article 64 Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.	**Article 72** Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.	The new draft should refer to Article 21 draft law.

Article 65 Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.	**Article 73** Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.	
Article 66 The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.	**Article 74** The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.	

Article 67 Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.	**Article 75** Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.	
Chapter VIII Supplementary Provisions	**Chapter VIII Supplementary Provisions**	
Article 68 Rules for the implementation of this Law shall be formulated by the patent administration department under the State Council and submitted to the State Council for approval before they are put into effect.	**Article 76** Rules for the implementation of this Law shall be formulated by the patent administration department under the State Council and submitted to the State Council for approval before they are put into effect.	
Article 69 This Law shall go into effect on April 1, 1985.	**Article 77** This Law shall go into effect on.	

10 October 2008

Conclusion report by IPR2 (September 2008)

The People's Republic of China is currently revising the Patent Law with the aim to strengthen and to promote patent protection. As part of this process, a workshop has been hosted by the Legislative Affairs Commisasion (LAC) of the Standing Committee of the National People's Congress. This event provided an opportunity for the Chinese drafting team of the patent law and European experts to look at the issues related to the finalization of the draft patent law before its final adoption by the National People's Congress.

Prior to the workshop, the experts were provided with a list of topics which the drafting team considers of particular importance for its further drafting work. These topics and a number of additional questions with relevance for the drafting work were in the focus of the discussions among the participants during the course of the workshop. The workshop was based on the latest draft amendment submitted by the State Council to the Standing Committee of NPC in August 2008 (August 2008 Draft).

The workshop was held in a highly cooperative atmosphere and the experts greatly benefited from the exchange with the members of the drafting team under the chairmanship of Mr Gao Zhixin, Director General of the General Office of LAC. Experts made 14 presentations on selected topics proposed by LAC, followed by discussions.

The document is intended as a reference and information basis for all interested circles on the discussion. The comments are the sole responsibility of the European experts invited to the workshop and the IPR2 TAT and can in no way be taken to reflect the views of the European Union or any other institution and organization.

Protection of patent rights

How to define "Novelty" as one of the conditions for granting a patent?

1.1 Novelty as patentability requirement plays a central role in the patent protection system. It delimits patentable inventions from the prior art. Historically, two approaches have been used and partly still are used: the relative and the absolute novelty approach. The August 2008 Draft of the Patent Act of PR of China has now switched from the relative novelty approach to the absolute novelty approach. This brings Chinese Patent Law closer in line with the approach used in Europe and in most countries of the world.

1.2 However, it has to be understood that also the so called absolute novelty standard, as applied, e.g., in Articles 54 and 55 of the European Patent Convention (EPC), is not a pure absolute novelty. According to Article 54 (1) EPC "An invention is new if it does not form part of the state of the art." Although under Article 54 (2) EPC the state of the art comprises everything made available to the public by means of a written or oral description, by use or in any other way, before the date of the filing of the European patent application, and although also prior rights, the so-called fictitious prior art is included, Article 54 (4) and (5) EPC and Article 55 EPC contain provisions which clearly show that the European standard is not one of pure "absolute" novelty.

1.2.1 Under Article 54(4) EPC substances or compositions, comprised in the state of the art, for use in methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body, for which European patents cannot be granted (Article 53 (c) EPC), are considered new, provided that their use for any such method is not comprised in the state of the art. In other words, a substance, which in the state of the art was used only as a herbicide, can still be patented if the invention for the first time discloses its use as a medicine for the treatment of an illness.

1.2.2 Moreover, under Article 54(5) EPC, also the patentability of any substances or composition for which the first medical use, in the sense of Article 54(4) EPC already forms part of the state of the art, is not excluded from patentability for any (further) specific use in a therapeutic etc. method (referred to in Article 53 (c) EPC), provided that such use is not comprised in the state of the art.

1.2.3 Article 55 EPC, dealing with "non-prejudicial disclosures", provides for limited grace periods of 6 months, preceding the filing, i.e. the application in the European Patent Office, in case of the evident abuse in relation to the applicant or his legal predecessor (a), and in case of the display of the invention at an official, or officially recognized international exhibition (b).

2.1.1 So far, Article 23(2) August 2008 Draft basically corresponds to Article 54 (1) and (3) EPC, however, with the quite important difference that in Article 23 (4) August 2008 Draft prior art is defined as "meaning any technology" known to the public before the date of filing in this country or aboard. The issue may arise what is to be understood under the term "technology", is this something narrower than, e.g. "everything made available under Article 54 (4) EPC".

2.1.2 Although Article 23 (3) August 2008 Draft excludes from patentability "method for diagnosis or for the treatment of the diseases", without offering a definition of those methods, it seemingly does not provide for a possibility of patenting the so-called "first" medical use (indication) of substances comprised in the prior art, and seemingly also not for "further" medical uses of known substances. It may be emphasized that the issue of especially the patentability of further medical uses has been widely discussed worldwide, but it finally has been recognized that it is of utmost importance to offer adequate protection also for such uses. This is true

in general, since the second and even the third use may be more important than the first one. Therefore, research in further medical uses is essential for the progress of medicine. The German Federal Supreme Court and the Germen Federal Constitutional Court (in the so called "Clinical trials" decisions) have explicitly recognized this importance and have, therefore, exempted from the effects of the patent activities aimed at finding further medical uses, including clinical trials for that purpose.

2.2 Article 25 August 2008 Draft provides for a broader grace period than article 55 EPC and brings Chinese law closer to not only that of the USA but also of Japan and also of a number of other countries, e.g. Australia, Brazil, Canada and Mexico. Some aspects of Article 25 August 2008 Draft, however, may be in need of some further thoughts, e.g.: which is the decisive date, from which the 6 month period is to be calculated, i.e. national application date or the priority date; what is to be understood under "prescribed academic or technical conference". Especially the term "prescribed" appears quite obscure. Also the wording of article 25 (3) August 2008 Draft, "disclosed by any person without the consent of the applicant", appears much too vague. It allows the assumption that it will cause problems in practice.

3.1 It has to be observed that the presentation on the novelty in the workshop has not provoked any questions or discussion by the participants. Nonetheless, it appears necessary to draw attention to and suggest further considerations in respect to the following:

3.1.1 The issue of the protection of first and any further medical use.

3.1.2 The definition of prior art, especially as regards the interpretation of the term "technology" in Article 23 (4) CPA.

3.1.3 The point in time from which the 6 month period provided for in Article 25 (1) August 2008 Draft is to be calculated.

3.1.4 The term "prescribed academic or technical conference" in Article 25(2) August 2008 Draft.

3.1.5 The phrase "disclosed by any person without the consent of the applicant" in article 25(3) CPA.

3.2 To our understanding, depending on the general principles of the legal system in China, these terms should be more specifically defined either in the Implementing Regulations to the Patent Law, if this would not be sufficient, in the Patent Law itself.

The mandatory procedure for filing in a foreign country an application for a patent for an invention-creation that is completed in China

1. National patent laws of, e.g. Germany and United Kingdom do not contain provisions corresponding to that of Article 21 (1) August 2008 Draft. They dispose only of provisions dealing with applications related to, e.g., state secrets, as specifically defined in the criminal law (Section 50 of the German Patent Act or Article 22 of the UK Patent Act titled "Security and Safety"). Thus, these provisions basically correspond to Article 4 August 2008 Draft, which deals with applications for invention-creations involving "national security or the vital interest of the state that require secrecy." It may be observed that a more specific classification of what has to be understood as "national security or the vital interest of the state that require secrecy" by a reference to, e.g., criminal law provision(s) as in the German Patent Act would be advisable.

2. From the comments made by the Chinese governmental institutions on Article 21 August 2008 Draft it is understood that China has not only drafted this provision with an eye on 35 U.S.C. Section 181 et seq., but it is also determined to practice it the same way as the USPTO, i.e. that it should not pose an obstacle and result in delays in processing of patent applications. Therefore, the only comment to be made is that this provision, in view of the existence of the Article 4 August 2008 Draft may be unnecessary and could only complicate an expeditious filing of patent applications also abroad.

Coexistence of patents for invention-creations and patents for utility models

1. In the course of the workshop the question was raised whether in Europe provisions exist which would correspond to Article 9 (1) August 2008 Draft, i.e. which, eventually, prohibit protection by patent for invention-creation and by patent for utility model for the same invention.

2.1 Firstly, it has to be emphasized that no protection for utility models exists at the EU-Community level. All efforts in this regard were terminated in 1997.

2.2 Furthermore, not all EU- Member States dispose of utility model protection, e.g. the UK. Where such protection exists, it is not EU wide harmonized.

2.3.1 Under the German law, double protection is possible. Applications for the two forms of protection must not be filed on the same date but can claim the priority of each. Moreover, under Section 5 of the German Utility Model Protection Act, a utility model application can be filed and claim the priority of the patent application also within 2 month from the end of the month in which processing of the patent application or any opposition procedure is terminated, at latest, however, by the end of the 10th year from the date of filing the patent application. This is so because maximum term of protection for a utility model is 10 years.

2.3.2 In respect of the German Law, however, it has to be noted that the protection requirements for utility models differ from those for patents. This is particularly true as regards the relevant prior art, where, in case of utility models, e.g. a general grace period of 6 months preceding the priority date is provided for.

Protection of design patents, differences to invention and utility models patents

The discussion focused on clarifying the scheme of protection of designs in Europe. The EU has a specific body of law (the 1998 Directive harmonising national laws on design and the 2002 Community designs Regulation) dedicated to industrial designs and designs in general. Also, a specific grant authority (OHIM) was set for administering the registration system of designs at EU level.

As regards patents, the establishment of an EU-wide patent system is under discussion after many years, without a final solution being yet adopted. As regards utility models, the EU abandoned in 1997 the proposal for harmonising European laws related to this IP right, and therefore, there is no EU-wide utility model as such, but some specific rules in several EU countries (e.g. Germany, Spain, etc.)

The reasons that explain why designs are dealt differently from patents in the EU are the following:

The needs for users investing in design innovation are different from the needs of users investing in inventions. The scale of investment for inventions is not comparable to the scale of investment for designs;

The life cycle of designs is much shorter than patentable inventions;

The users need to secure registration rights for new designs in a swift manner and without lengthy grant procedures, due to the shortness of the commercial life of designs in the marketplace;

The trend in numerous world IP systems (Australia, Singapore, Korea, India, Japan, Canada, New Zealand, Indonesia, etc.) is that designs are regulated under a separate piece of legislation, outside the patent legal framework;

Law-making in design matters is normally a "low profile" business for decision-makers: by legislating designs within the patent law, the specific issues related to designs are normally overshadowed by the much prominent patent issues; a separate piece of legislation is normally much more "manageable" in terms of time and procedural cost (e.g. this explains that the EU has managed to adopt rules on designs, but not yet on a Community-wide patent)

All of the abovementioned purposes are equally valid arguments for establishing a specific Chinese law on designs. However, as the current legislative process does not allow for a separate legislation on designs, the following suggestions can be taken into consideration within the ongoing revision of the Patent Law. The August 2008 Draft contains significant changes as regards designs as well which are to be welcomed (e.g. inclusion of "offer to sale" in Article 11 August 2008 Draft).

However, the following suggestions were made when considering the specific characteristics of designs as compared to patents and utility models.

First, as regards Article 24 August 2008 Draft, the text could be reworded, by making reference to novelty (like in the case of inventions) and by using a notion specific to designs such as "individual character", instead of the notion of "substantive differentiation". The notion of "individual character" serves also to raise the threshold of registrability of designs and avoid receiving applications for some designs formed by copying prior designs or pieces of prior designs. Should the "substantive differentiation" notion stay in the draft, it is suggested to determine the standard for determining the differentiation (an informed user or a skilled person?)

Second, the elimination of two-dimensional designs from the scope of protection of the proposed design provisions contained in the draft (Article 26 (6) August 2008 Draft) has drawbacks. It will eliminate all elements of graphic design per se. In the EU, such designs are protected in the ad hoc legislation. The definition of "designs" in the EU is broader in terms, which covers designs other than ornamental or industrially applied, as well as designs for parts of products, thus benefiting more local and foreign industries investing on design-oriented products. Therefore, not only manufacturing industries but also decorative industries and sectors heavily investing in graphic designs (e.g. telecommunications, entertainment, marketing and media) have the possibility to seek protection for the design of their graphical assets. This notion has been followed to some extent in other jurisdictions and has been confirmed in the recent amendment of the Locarno classification on designs (as from January 2009, a class "32" on "Graphic symbols and logos, surface patterns, ornamentation"). China as a member of this convention should consider the impact of this change in the proposed amendment.

Can separate patent rights be granted for associated designs (several similar designs)?

The question relates to the possibility to file several designs in one application. The August 2008 Draft opens the possibility for multiple applications (Art. 32 August 2008 Draft). This is a positive step. However, it is unclear whether the intention is to allow the filing of a multiple application for several designs or to allow filing for a set of articles (e.g. cutlery) to be protected as one design. Both legislative options are wise but the wording of Article 32 August 2008 Draft should be clearer in this respect.

Under the EU system, an application may be filed with an unlimited number of designs. This is known as a "multiple application". The designs must be applied to products belonging to the same class of the International Locarno Classification (e.g. all designs for toys). In this respect, the answer to the question is "yes", separate design rights can be granted to several designs filed in one application.

For example, in the EU, an applicant may file the design of a chair, of a table and/or a cupboard in the same application, even if they do not share any common features. But it is also acceptable to file an application with many designs of the same product (e.g. the new collection of ties).

Each design will be examined and accepted for registration in an independent manner. At the end, each design will be protected with a separate design right. Of course, each design in the application must be new and hold individual

character, taking into account the existing body of design previously disclosed.

A different issue is the "set of articles" situation: a set of fork, knife and spoon can be filed as ONE design, provided that they share common features and the representation shows the set. Protection is allocated to the set, not to each individual component of the set. Should the applicant wish to protect each component, it may do so by filing a "multiple application", that is an application for registering a spoon, a knife and a fork. Each will be a separate design right.

The wording of the Chinese law should differentiate between the two situations mentioned above.

Co-owned rights

When to licence a co-owned right to a third party, whether an unanimous approval is required;

Enforcement of co-owned rights: how to treat this issue in case the co-owners have different opinions

1. General comment

Article 15 August 2008 Draft provides that, in the case of co-owned rights, where the co-owners have an agreement regarding the exercise of rights, the agreement should apply. This provision is fully in accordance with international practice according to which the principle of freedom of contract governs the ownership of IP rights in relation to co-ownership of rights.

Article 15 August 2008 Draft also provides that, if there is no such agreement, any co-owner may independently exploit and work the patent. This is also in line with international law and practice.

2. Licensing

As regards licensing of a co-owned right to a third party, Article 15 August 2008 Draft provides that, in the absence of agreement, a co-owner may independently license others to exploit the patent through "common licence". It is noted, however, that Article 15(4) of the March 2008 Draft provided that any licence should require the agreement of all co-owners.

In this connection, attention was drawn to the fact that the general rule in the majority of national laws, including the laws of Germany and the United Kingdom, is that no co-owner should be entitled to licence patent rights to third parties, without the consent of the other co-owners. Unanimous agreement is required. The rationale for the rule is that every co-owner is only entitled to its own share or fraction of the patent and not to the patent as a whole. The rule applies to all kinds of licences, both exclusive and non-exclusive. This approach is recommended also in the AIPPI Resolution on the Impact of Co-ownership of IP Rights on their Exploitation of 9 October 2007.

However, the law should provide that such consent may not be unreasonably refused. In the event of dispute, one possibility of resolving the problem is to give the Patent Office the power to regulate the matter. For example, the United Kingdom Patent Act 1977 (s. 37) gives the head of the UK Intellectual Property Office the power to regulate the relationship between the co-owners of a patent in order to prevent the proper exploitation of the patent being unreasonably prevented by one or more of the co-owners. It would be useful to provide for some means of settling disputes because otherwise, in cases of disagreement between the co-owners, the alternatives are to maintain the status quo (no licensing at all), to persuade the co-owner who disagrees to assign his share or to dispose of the patent to a third party. Another possibility would be to provide for disputes to be referred to arbitration.

3. Enforcement

It was noted that the majority of national laws provide that each co-owner may act individually in defence of a patent, subject to the obligation to inform the other co-owners (cf AIPPI Study on Co-ownership of IP Rights, October 2007, and Resolution referred to above). This is the position also under the laws of Germany and the United Kingdom.

This means that a co-owner who does not agree with enforcement action taken by another has no direct means to stop proceedings. However, for example, national laws generally provide that the acting co-owner must take action on behalf of all the co-owners and may not make claims only on its own behalf. Damages must be shared. This is the case under the laws of Germany and the United Kingdom. The UK Patent Act specifically provides that the other co-owners must be joined as parties to the proceedings. In the case of dispute, the Comptroller of Patents has the power to regulate the matter as in the case of licensing (see above).

In practice, questions concerning the enforcement of rights are dealt with normally by means of the contractual arrangements governing the relationship between the co-owners with respect to the co-owned patent. It was noted that the August 2008 Draft does not seek to regulate this matter but also leaves it to contract.

Invalidation procedure

How to simplify the patent invalidation procedure and to link it with litigation procedure for patent infringement (stay of procedure, prior art defence, usefulness of German model?);

How to shorten the cycle of patent invalidation and infringement litigation, including appeals.

1. Invention patents

The present procedures in Europe for patent invalidation are in need of simplification. There is a two-tier system in existence, the procedures under the EPC (which have the advantage that they are centralized procedures having effect throughout the present 34 Member States) and procedures at the national level.

1.1 Procedures under the EPC

The EPC provides for the following procedures for invalidation of patents: the opposition procedure which is subject to appeal to the boards of appeal of the European Patent Office (EPO) and the new limitation and revocation procedure under the EPC 2000.

The opposition procedure, which is subject to

appeal, provides the possibility for any person to file opposition against a patent within 9 months of the publication of the mention of the grant of the patent in the European Patent Bulletin (Article 99 (1) EPC). Opposition therefore is a post-grant procedure. It is an adversarial procedure, governed by the principle of party disposition. The reason for the 9 month time limit for filing opposition is to provide certainty in the interests of both the patent proprietor and the public and the original intention was that opposition proceedings should be completed quickly. In practice due to workload, this has not always proved possible.

In order to link the EPC opposition procedure to national infringement proceedings, Article 105 EPC provides that a third party may intervene in opposition proceedings where proceedings for infringement of the same patent have been instituted against him or where, following a request of the proprietor of the patent to cease alleged infringement, the third party has instituted proceedings for a ruling that he is not infringing the patent. An admissible intervention is treated as an opposition.

Decisions in opposition proceedings are subject to appeal and since in both instances decisions may only be taken on grounds on which the parties have had an opportunity to comment and parties have an absolute right to oral proceedings, the opposition and appeal procedure may take from 5 to 10 years to be completed. This is due not only to the actual proceedings in a particular case, but also to the backlog of work at the EPO. The appeal procedure is final, however, as there is no further instance with jurisdiction over the EPC.

In order to expedite the opposition and appeal procedure, it is possible in certain cases to request accelerated processing of a case before the EPO. In opposition cases, where a patent infringement action in respect of a European patent is pending before a national court, a party to the opposition or the national court or competent authority may request accelerated processing at any time. The EPO must then take action within three months. On appeal, the parties to an appeal and the courts and competent authorities of contracting states may request accelerated processing also where infringement proceedings are pending and where potential licensing agreements hinge on the outcome of the appeal.

In an effort to facilitate the limitation or invalidation of patents in cases where the patent proprietor has become aware of the need for it, the EPC 2000 has introduced a new procedure (Article 105a-c EPC and R. 90-96 EPC). This allows a patentee to request that the scope of protection of his patent be limited by an amendment of the claims or that the patent be revoked completely. The request may not be filed while opposition proceedings are pending. The aim of the procedure is to restrict the number of invalid or obsolete European patents in the marketplace.

1.2 Invalidation by national Courts

Once a European patent is granted, a bundle of national patents comes into existence. Actions for invalidation of these patents may then be taken before the national courts of each State designated in the European patent. Since the EPO now has 34 Member States, the cost and

administrative burden of taking multiple actions to challenge patents and indeed to enforce them in so many countries is very great and represents a major disadvantage of the present system. The system is therefore widely regarded as too expensive as well as cumbersome; moreover it leads to great uncertainty for patent owners and users since the national courts may hand down conflicting decisions.

1.3 Proposal for a European Patent Court

A draft Agreement on the European Union Patent Court dated 14 May 2008 is currently under consideration by the Member States of the European Union. The aim is to save costs and to speed up the litigation process by establishing a centralised European court with EU-wide jurisdiction with exclusive competence in respect of inter alia: (a) actions for actual or threatened infringements or for a declaration of non-infringement; (b) actions or counterclaims for revocation (Article 15 Draft Agreement).

The Court will comprise a Court of First Instance (including a central division as well as local and/or regional divisions) and a Court of Appeal (Article 4 Draft Agreement). All European patents (and any future Community patents) will be subject to its exclusive jurisdiction.

The proposal for a European Patent Court remains controversial and not much progress has been made with it but it is hoped that the fact that the new court will deal with both infringement and validity will simplify and speed up patent litigation in Europe. There are considerable disadvantages to the present situation. For example, the United Kingdom courts have taken to deciding on the validity of European patents (UK) in the context of infringement actions in the UK without waiting for the outcome of opposition proceedings concerning the same patent at the EPO, mainly because of the considerable delays there. In Germany, where validity and infringement are dealt with separately by different courts, the system is subject also to delay as infringement proceedings can be stayed as soon as the validity of the patent is put in question. Moreover, there have been cases where infringement actions have been taken against the same European patent in more than one country (e.g. the Netherlands and the UK) with different outcomes.

The European experts would recommend therefore that a unified system with the courts dealing with both infringement and revocation be adopted in China.

2. Design (Patents)

Four possible alternatives are suggested for consideration with regard to means for both simplifying and shortening the cycle of design infringement and design invalidation procedures.

2.1 Enable civil courts to invalidate via counterclaims

The EU system is somehow similar to the Chinese one, since both OHIM and SIPO are empowered to invalidate; however, the EU system allows also to declare the invalidation of a design by the civil courts (known as "Community designs courts", which are courts of the Member States) in the framework of a coun-

terclaim by the defendant in an infringement procedure. Therefore, invalidation of Community designs is not centralised before OHIM but it is decentralised among national courts (although only via counterclaims, no direct judicial actions). It is recommended to consider this option for the Chinese design rights.

Within the Community design system, no prior art defence is foreseen as such. The defendant may however raise a plea or, most common, a counterclaim to declare the design invalid. Should a counterclaim be raised, the court will decide and in the meantime, protective and provisional measures will be granted by the court upon request of the right holder. This is very important since it means that the legal challenge of the validity of a Community design does not compromise its immediate enforcement: the right holder may seek provisional protection while the court makes a decision on the validity. This represents a good compromise for all parties: while it decides the validity question, the design owner can seek provisional seizure of infringing goods. Once the court decides on the validity, the judgment will be recognised in all Member States of the EU and will be recorded in the Register administered by OHIM.

Allow the appeal administrative court to decide on the merits

The invalidation of Community designs usually takes place within OHIM, upon request. In this case, the decision of invalidation can be appealed within OHIM, before the Appeal Board (which is a second administrative instance). This instance can not only quash the decision but decide also on the merits. The decision of the Appeal Board can be further appealed before the EU Court of First Instance, which acts as an administrative court (so far, only four decisions have been appealed, for a universe of some 300,000 registered Community designs). Such court, placed in Luxembourg, can quash the decision of the Appeal Body of the Office but it can also decide on the merits without sending the case back to OHIM.

It is recommended to consider such empowerment of the administrative courts that hear appeals against the decisions of SIPO's Patent Review Board on designs. This will certainly avoid the "ping-pong" effect between instances, shortening the full cycle.

The average cycle from a decision is:

8 months for a decision by the invalidation division of OHIM

If the decision is appealed, 12 months for a decision by the Boards of OHIM

If the decision of the Boards is appealed before the Court of First Instance, over 24 months for a judicial decision

Use discretion to avoid oral hearings

The EU experience shows that a timely management of the invalidation procedure is essential to strengthen the stability of Community designs rights. For this reason, while the Implementing Regulations applicable to OHIM allow for the opening of an oral hearing in invalidation proceedings, the management of the Office understand that this is not normally necessary. Written submissions and evidence (as concise as possible) are sufficient to make decisions as regards the validity of designs, without the need to use oral hearings. This clearly shortens the complete timing of invalidation proceedings. It is recommended that SIPO's Patent Review Board is allowed as much discretion as possible not to use oral hearings if written submissions and evidence suffice for the decision to be made.

Use the test of the "informed user", not opinions of experts in designs

This recommendation brings again the need to depart from patent law conditions when dealing with designs and justifies in itself that designs are regulated in a specific manner.

The EU system judges the validity of a design's individual character, not in the eyes of an expert, but in the eyes of an informed user. This avoids the need for expert opinions as designs are not technical matters. By avoiding any link to conditions which require expert opinions, the procedure of invalidation is very straightforward: the 3-member Invalidity Division at OHIM can take a decision, without need to receive expert opinions and without need to convey hearings with experts. The CDR facilitates the cycle of invalidation by setting a standard, specific to designs, which is far away from the patent standard of the skilled man of the art. The consequence is simple: if no expert is required, no opinion is required, no time is needed to prepare so and no time is necessary to convene a hearing, etc. The net advantage is time reduction in handling invalidation procedures.

Legal consequences of invalidity of a patent

Whether patent infringement decisions made by the court and signed patent licensing agreements as well as patent transfer agreements are still effective after the declaration of invalidity of the patent;

Under which conditions can compensation for damages licensing fees, patent transfer costs and other patent related costs be returned after the declaration of invalidity of a patent.

1. Effect on contracts of determination of invalidity

There are no provisions on this issue in the EPC, although it is provided that if a patent is declared invalid, it is invalid ab initio. It is left to the national law of the Member States to determine the consequences of invalidity on agreements.

First, there is a general principle both in German and English law that parties to a contract (licence or assignment) have freedom to determine what the consequences should be for the contract of a determination of invalidity. There are many different kinds of provision which may be agreed, some of which would provide (for example) for royalties to cease upon a declaration of invalidity, some which would provide for royalties to continue. The parties may, if they wish, provide by contract that royalties are to be returned if a patent is declared invalid, but this is a matter for private agreement. Both German and English law give full effect to the parties' choice.

Second, the only limitation in German and English law to parties' freedom of contract is competition law which may restrict the ability to provide that royalties should be paid for non-patented products. However, this is exceptional and, in practice, it is of almost no importance. The courts of the UK and Germany recognise that there can be significant commercial benefits from taking a licence under a patent which is later determined to be invalid and they will enforce a contract to this effect.

In consequence, neither in Germany nor in England will the courts order the return of licence fees under a licence or other agreement unless the parties have agreed that this should happen. Unless the parties have provided in the contract, there is no automatic effect on a patent assignment agreement if the patent is later declared invalid.

2. Return of damages and other sums following declaration of invalidity

The law relating to the return of damages in Germany and in the UK is somewhat different. In German law, it is possible to ask the court to order the patent proprietor to repay damages when a patent is later declared invalid, relying on a doctrine of unjust enrichment. But this is limited to the sums that the patent proprietor still has. In the UK, the courts place a greater weight on legal certainty, relying on the principle that "business needs to know where it stands". Accordingly, even if a patent is declared to be invalid in later proceedings, a defendant will not be able to ask for a return of damages from the patent proprietor. There are however, special provisions for the (very rare) cases in which the first proceedings are not final when the declaration of invalidity is made.

Compulsory licensing

1. General remarks

1.1 On the role of compulsory licensing of patents it should be observed from the outset that compulsory licenses provide a mechanism by which the competing interests of patent proprietors and the general public may be balanced. Thus, they are designed to ensure that patented invention can be used in order to satisfy (meet) the interest of the public in the exploitation of the respective patent. Compulsory licenses are permitted under the Paris Convention and TRIPs, subject to certain limitations and requirements. The instrument of the compulsory license is provided for in the patent laws of most countries, but it is extremely rarely used. It may be concluded that it works predominantly as a deterrent, i.e. by putting enough pressure on the patent owner to license voluntarily. For example, even in the very much debated patents of the U.S. company Myriad Genetics on the BRAC 1&2 breast cancer genes, no single application for a compulsory license was filed in any country.

1.2 Some additional general comments may be made especially in view of the new Doha Type of compulsory licenses on matters of public health as provided for in the August 2008 Draft and the EU Regulation (EC) No. 816/2006 of May 17th, 2006.

1.2.1 A compulsory license may be granted only if there is a patent protecting an invention of interest.

1.2.2 Excessive granting of compulsory licenses and even the threat of compulsory licensing may seriously affect the sustainable generation of badly needed inventions of interest.

1.2.3 In the case of Doha Type compulsory licenses, such licensing may have a detrimental impact on developing drugs of particular interest exactly for the countries at issue, i.e. it lead to the termination of much needed R&D activities.

1.2.4 As regards the Doha type of compulsory licenses it remains to be seen how they will work in the long term. So far, only the Canada-Rwanda compulsory license activity has become known. Since even the generic drug producers can engage in production of drugs only if they can make a profit, presumably, this type of compulsory licenses will be in need of state subsidies in order to work.

2. Some remarks on German Law

2.1 Before commenting on the German rules on granting compulsory licenses, as set forth in Section 24 German Patent Act it should be noted that the German as well as the August 2008 Draft rules on compulsory licenses are in line with the Paris Convention and the TRIPs Agreement, however, with one significant exception: namely the August 2008 Draft does not provide for the limitation of the granting of compulsory licenses as provided for in Article 5 A (4) Paris Convention. According to the latter provision, an application for the granting of a compulsory license "shall be refused if the patentee justifies his inaction by legitimate reasons". As discussed in the workshop, such legitimate reasons may include waiting for marketing approval of a drug, or inability to get import permission granted, etc. Thus, the deficiency in the August 2008 Draft should be remedied.

2.2 Under Section 24 German Patent Act unsuccessful efforts of the applicant for the license to get a contractual license granted within a reasonable period of time on usual business conditions is required. Moreover, it is an essential requirement that the grant of the sought license is justified (geboten) in the public interest.

2.3 As regards compulsory licensing of dependent patents (Article 31(l) TRIPs) it should be observed that the German Patent Act on the same basis provides also for the compulsory licenses in favour of dependent owners of a plant variety certificate.

2.4 In case of no or insufficient exploitation of a patent in the country, in order to meet the need for supply of the patented product, a compulsory license may be granted, too. However, it should be noted that importation is equated with exploitation in the country.

2.5 The authority competent for granting compulsory licenses is the German Federal Patent Court (Section 81 German Patent

Act). Action for granting a compulsory license is directed against the patentee as registered in the Register of patents. Against the decisions of the Federal Patent Court, an appeal can be lodged with the Federal Supreme Court.

2.6 At the request of the plaintiff (applying for the grant of a compulsory license) the court may issue the compulsory license by provisional measure. That may be the case if the applicant made it credible that the requirements for the grant are fulfilled and the issue of the compulsory license may be expected soon. A security (financial) may be requested. Such a decision can be taken only after an oral hearing has taken place. If the action for the grant of the compulsory license is withdrawn or rejected, the provisional measure is terminated. If it turns out that the grant of the provisional measure is unjustified from the outset, the applicant is obliged to compensate the patentee for all damages caused by the execution of the provisional measure.

2.7 It should be added that in recent years the Federal Patent Court has granted only one compulsory license in a case dealing with drugs. It held that the grant of the compulsory license was justified because the applicant, in contrast to the patentee, had already received an approval for marketing the drug (alpha interferon) for a very narrow medical indication. The court limited the license to the period until the patentee received marketing approval for the drug or until an alternative drug had appeared on the market. An additional reason for granting the compulsory license was the fact that the drugs available for treating the respective disease (a special type of arthritis) had severe side effects. The Supreme Court, eventually, rejected the application and revoked the compulsory license because it found that while indeed the drug had no or fewer side effects than those available, it was not efficient either (the Polyferon case).

Litigation for patent infringement

How the law should provide for scope of protection and, in particular, whether it should provide a specific doctrine of equivalents in the patent law or leave the doctrine of scope of protection to be developed by the courts;

Whether the law should state that the prosecution file can be taken account of in determining scope of protection;

Whether the law should provide for a prior art defence in infringement proceedings;

How the law should provide for limitation of patent claims.

1. Scope of protection

Article 60 August 2008 Draft states:

"The scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim."

Article 69 EPC states:

"(1) The extent of protection conferred by a European patent or a European patent application shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims ."

1.1 Scope of protection – rules of interpretation

However, both the EPC and the Member States also provide specifically for the approach to interpretation of the extent of protection. The Protocol on Interpretation of Article 69 EPC, as amended by EPC 2000, provides:

Article 1

General principles

Article 69 should not be interpreted as meaning that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Nor should it be taken to mean that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

Article 2

Equivalents

For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is equivalent to an element specified in the claims."

1.2Scope of protection – case law

In addition, all of the main EPC Member States have developed in case law approaches to determining the scope of protection and the issues that may be taken into account. In each case, protection is given more broadly than the strict wording of the claims. The courts of the EPC Member States have also developed special doctrines for certain kinds of patent claims (for example, the strict approach to numerical limits in German law).

In Germany, the BGH has developed a three step test setting out the conditions in which a product not falling within the literal wording may be regarded as infringing (Schneidmesser/ Custodiol). In the UK, the courts approach to interpretation of the wording of the patent is to give wider protection in appropriate cases (Improver, Amgen, Rockwater). Although these approaches are different, in practice, they are often likely to lead to the same or similar results. There may be some advantages in leaving development of the precise principles to the courts as has been done in these countries, since it enables greater flexibility to take account of changing technology and patenting practice.

1.3 Issues for consideration in PRC Patent Law

(i) Legislators may wish to consider providing expressly for a doctrine of equivalents in the patent law (for example under Article 76 August 2008 Draft). Or they may consider it preferable to leave development of the doctrine to the courts to be provided for in rules.

(ii) Legislators may wish to consider providing expressly for the matters which may be taken into consideration in determining the scope of protection of a patent. Or they may consider it preferable to leave the development of the doctrine to the courts or to be provided for in rules.

2. Use of the prosecution file

The draft PRC Patent Law does not state that the prosecution file may be taken into account in determining scope of protection. This is similar to the EPC which is silent on the question.

In Germany, the UK and several other EU Member States, there is a reluctance to refer to the prosecution file, except in very special circumstances. These are likely to be exceptional cases where, for example, there has been an express disclaimer of an embodiment or there has been an earlier decision of the patent office interpreting the claims (cf. German law). This is in contrast to some other countries, including the US, where there is more regular reference to the prosecution file as a means of interpreting the claims.

The German and UK courts consider that there are disadvantages in treating the file as relevant in general for several reasons. In particular, first, it should be possible to determine the scope of protection from the patent alone. Second, the file is often very large and the time and cost of examining the file as well as the patent (particularly if it is mainly in a language not widely spoken) outweighs the benefit. In one English case, the court said that "life is too short" for the limited assistance which the file can provide. For this reason it is suggested that it may not be appropriate to state in the PRC Patent Law that the file should generally be used.

3. Prior Art Defence

3.1 Article 63 August 2008 Draft states:

"If during the patent infringement dispute, the suspected infringer has evidence proving its or his technology or design belongs to the prior art or prior design, no patent infringement shall be found."

There is no equivalent provision under the EPC. However, in both Germany and the UK, the courts have developed principles to ensure that an infringement claim cannot succeed if the defendant's product is prior art or an obvious development over the prior art. In both countries, the courts consider this to be a basic principle.

In Germany, this is provided for by the Formstein defence. This only applies in the case of non-literal infringement (infringement by equivalence). However, the defence is not commonly used. In Germany, infringement proceedings will often be stayed to wait a determination of validity, where a serious case of invalidity is shown. Accordingly, if the patent is held invalid in the invalidity proceedings there is no need for a prior art defence.

In the UK, it is always possible to raise invalidity of the patent in proceedings for infringement. In the majority of infringement cases in the UK, invalidity is raised as a defence and, very often, invalidity of the patent is the main defence to an infringement claim. This is particularly so for a number of second tier pharmaceutical patents (enantiomers, crystalline forms, formulations). However, as in Germany, there is also a specific prior art defence (Gillette defence). This applies if the defendant proves that his product is part of the prior art or an obvious development of the prior art. However, because of the opportunities for challenging a patent in infringement proceedings in the UK, this is not frequently used. In practice, the ability to raise invalidity in infringement proceedings is regarded as a very important aspect of patent law in the UK.

3.2 Issues for consideration

3.2.1 In addition to Article 63 August 2008 Draft, Legislators may consider a provision, either in the PRC Patent Law or in rules of procedure, to ensure that the that an accused infringer has the opportunity to raise the issue of invalidity of the patent in any proceedings for infringement or that the proceedings for infringement can be stayed pending the determination of invalidity, at least where a serious case of invalidity is shown.

3.2.2 Legislators may also wish to consider that, at least for patents, the prior art defence under Article 63 August 2008 Draft should extend to matters which are obvious developments from the prior art (as in Germany and the UK) and not just the prior art itself.

4. Limitation (prescription) of claims for infringement and estoppel/laches

4.1 Limitation

Limitation for claims for infringement is provided for in Article 69 August 2008 Draft and provides for a period of 2 years counted from the day on which the patentee or the interested parties became aware of the act of infringement.

The EPC does not provide for any specific period of limitation of patent claims. In the national law of the EPC Member States limitation is (generally) provided for under the general law of limitation relating to civil claims, rather than in the patents legislation itself.

Limitation periods are different in the Member States. In Germany, there is a basic period of 3 years from the end of the year in which the claim arises and in which the patent owner becomes aware of the infringer although there are detailed provisions for particular cases (for example, injunctions, delivery up and accounts of profits). Each separate act of infringement starts the period running again. In the UK, the period for patent claims is the same as for most other commercial claims, namely 6 years from the date of the act of infringement, although in the case, for example, of concealment or fraud, the period starts from the date of knowledge of the act of infringement. The period is a general one and applies to all claims for damages, accounts of profits and so on.

In the UK and Germany each separate sale of a product or use of a process is regarded as a separate act of infringement. In the UK and Germany, if infringement is continuing at the date of judgment, an injunction will be granted. In the UK, for example, a patent-owner can claim damages or the infringer's profits for infringement going back 6 years from the date on which the claim was started.

4.2 Estoppel/laches

The defence of estoppel and laches is a court-developed doctrine in both German and English law. Both in Germany and in England there are strict conditions for the application of the defence and it is rarely successful. The burden lies on the defendant to establish the defence.

In German law, the patent owner must have knowingly allowed infringement for a long period and have given the infringer reason to believe that he waived his rights. There is no defined timing required. The infringer must have taken preparations showing that he relied on the waiver of rights. In England, there are at least two separate doctrines: estoppel (which requires particular steps to have been taken in reliance on the claimant's inaction), acquiescence/laches (which may not require specific reliance by the defendant to be shown but may require an exceptionally long period). In the UK the precise conditions for the application of the defence are under consideration by the higher courts. It is, however, clear that the defence is only available in exceptional circumstances. There is no defined period of time but it is generally recognised that it must be considerable. The defence has never succeeded in a patent case.

Measures for preventing abuse of patent right

TRIPS Articles 8, 13, 31 and 295 contain provisions relevant to the ability of Member States to provide competition law remedies for alleged abuse of intellectual property rights.

It is possible to regulate abuse under the **general competition laws** applicable to undertakings. Competition laws of the EU and EPC Member States also prevent certain restrictive terms in **patent licence agreements**. In addition, **compulsory licensing** provisions may address and provide a deterrent to certain potential abuses.[1] Certain national laws provide for **specific remedies** to prevent (for example) unjustified threats of proceedings for infringement. Apart from compulsory licensing provisions and specific remedies, the laws regulating abuse are generally not included in the patent law but form part of the general competition law.

1. Competition Law and compulsory licensing to give effect to it

Under EU and the laws of a number of Member States, certain kinds of abuses of intellectual property rights can be regarded as abuses of dominant position. Article 82 EC provides:

"(1) Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States."

The application of this law to patent cases is limited, because of the principles developed by the European Court of Justice:

Mere ownership of an intellectual property right such as a patent does not confer a dominant position.

Refusal to licence is not, of itself, an abuse.

Arbitrary refusal to supply, fixing of prices at an unfair level may constitute abuse.

Refusal to licence which is not objectively justified so as to prevent the emergence of a new product on a related market may constitute abuse.

Patent litigation may constitute abuse if it is "manifestly unfounded" and was brought with the aim of eliminating competition.

2. Procedural mechanisms for giving effect to competition law in patent cases

National competition laws of the Member States and the EU provide for two methods of enforcement which have an impact on patent rights.

First method is the enforcement by investigations by national or EU competition authorities. However, investigations by public authorities can be lengthy. In the EU, a finding of abuse can lead to substantial fines: Microsoft case - leveraging near monopoly in PC operating systems into the market for workgroup server systems: fine c. 500 million euros; AstraZeneca case– abuse of grant procedure for supplementary patent protection: fine 60 million euros.

Determinations by competition authorities may also affect the ability to enforce patents or result in compulsory licences. For example, Section 51 UK Patents Act 1977 provides that a determination of the Competition Commission that a proprietor has engaged in an anti-competitive practice may be given effect by grant of compulsory licences under specified conditions. In the Microsoft case, an order was made by the Commission (confirmed by the Court of First Instance) requiring Microsoft to give access to third parties to inter-operability information protected by intellectual property rights on reasonable terms, to enable them to compete.

Second, private enforcement of competition law is possible by the undertakings adversely affected by alleged abuses of patent rights.

1 See, for example, TRIPS Article 31(c), (k) which contemplates that a compulsory licence may be granted "to remedy a practice determined after judicial or administrative process to be anti-competitive".

Potential infringers may also rely on violations of competition law as a defence to patent infringement actions in a number of Member States but only if there is a nexus between the patent claim and the abuse. Or they may rely on abuse to counterclaim for damages. In practice, cases are not very common although the presence of this remedy can provide a deterrent to certain kinds of conduct[2].

There is a comprehensive code in EU law regulating the terms than may be included in patent and other technology agreements (see Regulation 772/2004/EC on Technology Transfer Agreements). This addresses certain kinds of potentially anti-competitive conduct. This is provided for under competition law, not the patent law.

3. Specific provisions

The laws of certain EPC Member States also provide for specific remedies against particular kinds of abuses.

For example, English law (Section 70 UK Patents Act 1977) provides that a person who is adversely affected by **unjustified threats of patent infringement** can claim from the patent proprietor damages (for example, if a competitor loses a contract lost because a customer is worried about being sued but the patent is not in fact infringed). This can be a powerful remedy and has resulted in substantial awards of damages and injunctions against the patent proprietor to prevent repetition of the threats. The conditions under which such a claim can be brought are limited but presence of this provision acts a deterrent to proprietors sending out threatening letters to customers.

English law also provides (Section 71 UK Patents Act 1977) that any person can ask the court to confirm that a product or process does not infringe where an allegation of infringement has been made, or where the proprietor has not confirmed that it is not infringing. This **negative declaration** procedure is important also where an undertaking wishes to ensure that its product or process is free from patent problems in advance of making investments in manufacturing plants.

In certain countries, there may be remedies (for example by way of higher legal costs) for claims that are manifestly unfounded but they may not act as a significant deterrent.

4.Issues to consider

(i) Legislators may wish to consider providing either in the PRC Patent Law or in procedural rules that violations of competition law may, in appropriate circumstances, provide a defence to patent infringement claims, as is the case in certain EU Member States.

2 For example Intel v. Via, in which the UK court contemplated that there should be a substantial investigation in a patent infringement case into Intel's patent licensing practices: Intel may not have found this welcome and the case settled.

(ii) Legislators may wish to consider including specific provisions in the PRC Patent Law to address issues such as unjustified threats and to provide a mechanism by which potential infringers can obtain clearance from the courts of products and processes they wish to use independent of an infringement claim.

Others

Procedures to ensure efficient enforcement of valid patents and revocation of invalid patents

Some questions raised at the Workshop related to procedures for infringement and invalidity in EU countries. As noted above, procedures for infringement and validity claims are of considerable importance in ensuring both that valid patents are efficiently enforced and that invalid patents are efficiently invalidated. The same applies to designs.

The question of enforcement is more commonly addressed but the issue of dealing with invalid patents must also be kept in mind. No patent granting authority is perfect and, often, not all relevant information about the prior art will be available at the time of examination. Therefore, a significant proportion of patents are revoked when they are more fully considered by the courts. This is an important aspect of the law in many EU countries. As an English appeal judge said in 2008 of an invalid pharmaceutical patent: "The only solution to this type of undesirable patent is a rapid and efficient method for obtaining its revocation. Then it can be got rid of before it does too much harm to the public interest."

Therefore, it is recommend that careful consideration should be given not only to the substantive law relating to patents and designs but also to the procedures for enforcement and invalidation to ensure that they are efficient and fair. In certain EU countries, there are specialist intellectual property courts, sometimes with technical judges with great experience of patent law. These have generally been beneficial and are well-respected. This is something which may be considered. In addition, consideration may be given to the kind of evidence which can be used in such claims such as expert evidence from the parties or court-appointed experts. Some countries have special provisions in the procedure law of patent courts (e.g. Sections 73-99 German Patent Act, Rule 63 UK Civil Procedure Rules) and this may also be a further issue, perhaps to be considered for implementing rules.

Report prepared by European Experts invited to roundtable and IPR2 TAT

26 September 2008

Appendix

Comparison Patent Law 2000 and Patent Law 2008

Current Patent Law (English translation)	Amended Patent Law (English translation)
Chapter I General Provisions	Chapter I General Provisions
Article 1 This Law is enacted in order to protect patent rights for inventions-creations, encourage invention-creations, to facilitate the wide application of inventions-creations, promote the progress and innovation of science and technology, and meet the needs of the socialist modernization drive.	Article 1 This law is enacted in order to protect the legitimate rights of patentees, encourage invention-creations, promote the application of invention-creation, enhance innovative capacity, and promote scientific progress and economic social development.
Article 2 In the present Law, "invention-creation" means inventions, utility models and designs.	Article 2 In the present Law "invention-creation" means inventions, utility models and designs. The term "invention" refers to a new technical solution put forward for a product, method or the improvement thereof. The term "utility model" refers to a new practical technical solution for a product's form, structure, or the combination thereof. The term "design" means a new design of a product's shape, pattern or the combination thereof, or the combination of its colour and shape and/or pattern, that is aesthetically pleasing and industrial applicable.

Article 3 The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.	**Article 3** The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.
Article 4 If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.	**Article 4** If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.
Article 5 No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to the public interest.	**Article 5** No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to the public interest. No patent right shall be granted for any invention-creation which is completed on the basis of genetic resources of which the acquisition or use breaches the stipulations of related laws and regulations.

Article 6 An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.	**Article 6** An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.
Article 7 No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.	**Article 7** No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.
Article 8 For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.	**Article 8** For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.

Article 9 If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.	**Article 9** For any identical invention-creation, only one patent right shall be granted. However, with respect to the application of a utility model patent and invention patent for the identical invention-creation filed by the same applicant on the same day, the invention patent may be granted if this utility model patent right obtained first is still in force, and the applicant declares to abandon the obtained utility model patent that has been granted. If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.
Article 10 The right to apply for a patent and the patent right may be assigned. Any assignment of the right to apply for a patent or of the patent right from a Chinese entity or individual to a foreigner must be approved by the related competent department of the State Council. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.	**Article 10** The right to apply for a patent and the patent right itself may be assigned. Any assignment of the right to apply for a patent or of the patent right from a Chinese entity or individual to a foreigner, foreign enterprise or other foreign organizations, shall be done in accordance with procedures in the related laws and administrative regulations. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.

Article 11 After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, that is, make, sell or import the design patented product for production or business purposes.	**Article 11** After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, namely make, offer to sell, sell, or import the design patented product for production or business purposes
Article 12 Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.	**Article 12** Any entity or individual exploiting the patent of another shall conclude with the patentee a license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.
Article 13 After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.	**Article 13** After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14 Where any patent for invention, which belongs to any State-owned enterprise or institution, is of great significance to the interests of the State or the public, the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval by the State Council, decide that the patented invention be widely applied within the approved limits, and allow designated entities to exploit that invention. The exploiting entity shall, according to the regulations of the State, pay a fee for exploitation to the patentee. Any patent for invention belonging to a Chinese individual or an entity under collective ownership, which is of great significance to the interests of the State or the public and needs to be widely applied, may be treated alike by making reference to the provisions of the preceding paragraph.	**Article 14** Where any patent for invention, belonging to any State-owned enterprise or institution, is of great significance to the interest of the State or to the public interest, the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval by the State Council, decide that the patented invention be spread and applied within the approved limits, and allow designated entities to exploit that invention. The exploiting entity shall, according to the regulations of the State, pay a fee for exploitation to the patentee.
Article 15 (Moved to Article 17) The patentee shall have the right to affix a patent marking and indicate the patent notice on the patented product or on the packaging of that product.	**Article 15 (Newly added)** If the co-owners of a patent application right or patent right have an agreement on the exercise of those rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through ordinary licenses; Any royalties obtained through licensing others to exploit the patent shall be distributed amongst all the co-owners. Except for the situation provided in the above paragraph, the exercise of a jointly-owned patent application right or patent right shall be consented by all co-owners.

Article 16 The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.	**Article 16** The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.
Article 17 The inventor or designer has the right to be named as such in the patent document.	**Article 17 (Combination of Original Article 15 and 17)** The inventor or designer has the right to be named as such in the patent document. The patentee is entitled to put patent notice on the patented product or the package thereof.
Article 18 Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	**Article 18** Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 19	Article 19
Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent or has other patent matters to handle in China, he or it shall entrust a patent agency designated by the patent administration department under the State Council to act as his or its agent. Chinese entity or individual who intends to file in China a patent application or engage in any other patent related affairs could entrust any legally established patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent or has other patent matters to handle in China, he or it shall entrust a patent agency legally established to act on its or his behalf. Any Chinese entity or individual who intends to file a patent application in China or engage in any other patent related affairs could entrust any legally established patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.

Article 20	Article 20
Any Chinese entity or individual intends to file a patent application in a foreign country for an invention-creation made in China, shall first file a patent application with the patent administrative department under the State Council, appoint a patent agency designated by the said department to act as its or his agent, and comply with the provisions of Article 4 of this Law. Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.	Any entity or individual intending to file a patent application in a foreign country for an invention-creation made in China, shall apply in advance for a confidentiality examination conducted by the patent administrative department under the State Council. The procedures and duration regarding the confidentiality examination shall be enforced in accordance with the State Council regulatios. Any Chinese entity or individual may file an international application for a patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for a patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council. Any foreign patent application that violates the provision of the first paragraph of this Article will not be granted a patent right if the patent is applied for in China.

Article 21 The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.	Article 21 The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The patent administrative department under the State Council shall completely, correctly and timely publish patent information in the the patent gazette on a regular basis. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.

Chapter II Conditions for the Grant of Patent Rights	Chapter II Conditions for the Grant of Patent Rights
Article 22 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that, before the filing date of the application, no identical invention or utility model has been publicly disclosed in domestic or foreign publications or has been publicly used or made known to the public by any other means in the country, nor has any other person previously filed with the patent administrative department under the State Council an application describing an identical invention or utility model which was recorded in patent application documents published after the said date of filing. "Inventiveness" means that, compared with the technology existing before the filing date of the application, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. "Usefulness" means that the invention or utility model can be made or used and can create positive results.	Article 22 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that the invention or utility model shall neither belong to the prior art, nor has any entity or individual previously filed before the date of filing with the patent administrative department under the State Council an application on an identical invention or utility model which was recorded in patent application documents or other gazetted patent documents published after the said date of filing. "Inventiveness" means that, compared with the prior art the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. "Usefulness" means that the invention or utility model can be made or used and can create positive results. The "prior art" referred to in this Law refers to any technology known to the public before the filing date of the patent application in China or abroad.

Article 23 Any design for which patent right may be granted must not be identical with and simi1ar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country, and must not be in conflict with any prior right of any other person.	**Article 23** Any design for which a patent right may be granted must not belong to an prior design; nor has any entity or individual previously filed before the date of filing with the patent administration department under the State Council an application on an identical design which was published in patent documents published after the said date of filing. The design for which a patent right may be granted must be substantially different from prior designs or a combination of the features of prior designs. Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person. The prior design referred to in this Law means any design known to the public before the filing date of the patent application in China or abroad.
Article 24 Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.	**Article 24** Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.

Article 25 For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.	**Article 25** For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. (6) two dimensional designs of images, colours or combinations of the two that mainly serve as indicators. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III Application for Patents	Chapter III Application for Patents
Article 26 Where a patent application for invention or utility model is filed, a request, a specification and its abstract, and claims shall be submitted. The written request shall state the title of the invention or utility model, the name of the inventor or designer, the name and address of the applicant and other related matters. The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model. The patent claim shall, on the basis of the specification, state the scope of the patent protection requested.	**Article 26** Where a patent application for invention or utility model is filed, a request, a specification and its abstract, and claims shall be submitted. The written request shall state the title of the invention or utility model, the name of the inventor, the name and address of the applicant and other related matters. The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model. The patent claim shall, on the basis of the specification, clearly and briefly specify the scope of the patent protection claimed. An applicant who files a patent application for an invention-creation completed on the basis of genetic resources shall in the patent application document indicate the direct and indirect source of the genetic resources; the applicant unable to indicate the original source of the genetic resource must provide an explanation.

Article 27 When a patent application is filed for a design, request, drawings or photographs of the design shall be submitted, and the product incorporating the design and the class to which that product belongs shall be indicated.	**Article 27** When a patent application is filed for a design, documents including a request, drawings or photographs of the design as well as a brief explanation of the design and should be submitted. The drawings or photographs submitted by the applicant should clearly indicate the design sought to be protected by the patent.
Article 28 The date on which the patent administrative department under the State Council receives the patent application documents shall be the date of filing. If the application documents are sent by mail, the postmark date shall be the filing date of the application.	**Article 28** The date on which the patent administrative department under the State Council receives the patent application documents shall be the date of filing. If the application documents are sent by mail, the postmark date shall be the filing date of the application.

Article 29	Article 29
Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.
Article 30 Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.	**Article 30** Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.

Article 31	Article 31
Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design used on one type of product. Two or more designs used on products belonging to a single category and sold or used in sets may be submitted together in one application.	Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design. Two or more similar designs used on the same product, or two or more designs used on the products belonging to a single category and sold or used in sets may be submitted together in one application.
Article 32 An applicant may withdraw the patent application at any time before the patent right is granted.	**Article 32** An applicant may withdraw the patent application at any time before the patent right is granted.
Article 33 An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	**Article 33** An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV Examination and Approval of Patent Applications	Chapter IV Examination and Approval of Patent Applications
Article 34 Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council may publish the application earlier.	Article 34 Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council may publish the application earlier.
Article 35 Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administrative department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administrative department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.	Article 35 Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administrative department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administrative department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.

Article 36 When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an patent application for an invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.	Article 36 When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an patent application for an invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.
Article 37 Where the Patent Administrative Department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.	Article 37 Where the Patent Administrative Department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.

Article 38 If after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.	**Article 38** If after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.
Article 39 Where it is found after examination as to substance that there is no cause for rejecting the patent application for a invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.	**Article 39** Where it is found after examination as to substance that there is no cause for rejecting the patent application for a invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.
Article 40 Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	**Article 40** Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 41 The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant is not satisfied with the decision to reject his or its application for patent issued by the patent administrative department under the State Council, such applicant may, within three months from the date of receiving the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant of the decision. Where the patent applicant who is not satisfied with the decision of the Patent Reexamination Board, the applicant could, within three months from the date of receiving the notification, bring suit before the people's court.	**Article 41** The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant is not satisfied with the decision to reject his or its application for patent issued by the patent administrative department under the State Council, such applicant may, within three months from the date of receiving the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant of the decision. Where the patent applicant who is not satisfied with the decision of the Patent Reexamination Board, the applicant could, within three months from the date of receiving the notification, bring suit before the people's court.
Chapter V **Term, Termination and Invalidation of Patent Rights**	**Chapter V** **Term, Termination and Invalidation of Patent Rights**
Article 42 The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	**Article 42** The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.
Article 43 The patentee shall pay an annual fee beginning with the year in which the patent right is granted.	**Article 43** The patentee shall pay an annual fee beginning with the year in which the patent right is granted.

Article 44 In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2) if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administrative department under the State Council.	**Article 44** In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2) if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administrative department under the State Council.
Article 45 Where, starting from the date of the announcement of the grant of a patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.	**Article 45** Where, starting from the date of the announcement of the grant of a patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.

Article 46 For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administrative department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.	**Article 46** For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administrative department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.

Article 47 Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. The decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling concerning patent infringement which has been issued and enforced by the people's court, as well as on any decision concerning disputes of patent infringement which has been enforced or compulsorily executed, or on any contract of patent license or assignment of patent right which has been performed prior to the declaration of the patent right invalid; however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated. If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee the fees for patent exploitation or patent assignment, which is obviously contrary to the principle of equity, the patentee or the assignor shall repay the whole or part of the above-mentioned fees.	Article 47 Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. The decision declaring the patent right invalid shall have no retroactive effect on any judgment or mediation decision concerning patent infringement which has been issued and enforced by the people's court, as well as on any decision concerning disputes of patent infringement which has been enforced or compulsorily executed, or on any contract of patent license or assignment of patent right which has been performed prior to the declaration of the patent right being invalid. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated. If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right does not refund the damages for patent infringement, royalty fee forpatent exploitation or patent assignment, which is obviously contrary to the principle of equity, the whole or part of above-mentioned fees should be refunded.

Chapter VI Compulsory Licence for Patent Exploitation	Chapter VI Compulsory Licence for Patent Exploitation
Article 48 Where any entity which is qualified to exploit the invention or utility model has made a request for authorization from the patentee of an invention or a utility model to exploit its or his patent on reasonable terms and has been unable to obtain such authorization within a reasonable period of time, the patent administrative department under the State Council may, upon the application of that entity, grant a compulsory license to exploit the patent for the invention or utility model.	Article 48 In any of the following cases, the patent administrative department under the State Council may, upon the application of that entity or individual, grant a compulsory license to exploit the patent for the invention or utility model. (1) where the patentee after the expiration of three years from the date of granting the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not sufficiently exploited the patent without any justified reasons; (2) where it has been legally determined that the enforcement of the patent right by the patentee is an act of monopoly, to avoid or to eliminate the adverse effects caused to competition.
Article 49 Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.	Article 49 Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.

	Article 50 (Newly added) For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted a patent right in China and to export it to the countries or regions specified in related international conventions in which China is a contracting member.
Article 50 (Now Article 51) Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	Article 51 Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.
	Article 52 (Newly added) Where the invention-creation covered by the compulsory license relates to semi-conductor technology, the exploitation under the compulsory license is limited to the use for the purpose of public interest and the conditions specified in Article 48(2).

	Article 53 (Newly added) Except as otherwise provided for in Article 48(2) and 50 of this Law, the compulsory license is used mainly for the supply of the domestic market.
Article 51 (Now Article 54) Any entity or individual applying for a compulsory license in accordance with the provisions of this Law shall furnish proof that it or he has not been able to conclude a licensing contract on reasonable terms with the patentee.	Article 54 (Original Article 51) Any entity or individual applying a compulsory license in accordance with the provisions of Article 48(1) or Article 51 of this Law, shall provide proof that it or he has made requests for a license to the patentee to exploit the patent on reasonable conditions but was not licensed within a reasonable period of time.
Article 52 The decision made by the patent administrative department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.	Article 55 The decision made by the patent administrative department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.
Article 53 Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.	Article 56 Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.

Article 54 Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall make a ruling.	**Article 57 (Original Article 54)** Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable royalty fee for patent exploitation or handle the exploitation fee issue in accordance to the relevant provisions of international conventions in which China participates. The amount of the fee shall be decided by both parties upon consultation. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall make a ruling.
Article 55 Where the patentee is not satisfied with the decision of the patent administrative department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administrative department under the State Council regarding the fee payable for exploitation, he or it may, within three months from the date upon receiving the notification, file suit to the people's court.	**Article 58** Where the patentee is not satisfied with the decision issued by patent administrative department under the State Council on granting a compulsory license for patent exploitation, or where the patentee or the entity or individual that is granted the compulsory license for patent exploitation is not satisfied with the ruling made by the patent administrative department under the State Council regarding the royalty fee for exploitation, he or it may, within three months from the date upon receiving the notification, file suit to the people's court.

Chapter VII Protection of Patent rights	Chapter VII Protection of Patent rights
Article 56 The scope of protection for an invention patent or a utility model patent shall be determined on the basis of the patent claim which could be explained according to the specification and attached drawings. The scope of protection for a design patent shall be determined by the product's design shown in the drawings or photographs.	**Article 59 (Original Article 56)** The scope of protection for an invention patent or a utility model patent shall be determined on the basis of the patent claim which may be explained by use of the specification and appended drawings. The scope of protection for a design patent shall be determined by the product's design shown in the drawings or photographs. The brief statement of the patent could be used to interpret the design of the product shown in the drawings or photographs.

Article 57	Article 60
Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.	Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter. When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

(Article 57 Continued)	
Where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process. Where the infringement relates to a patent for utility model, the people's court or the administrative authority for patent affairs may ask the patentee to furnish a search report made by the patent administrative department under the State Council.	
	Article 61 (Original para 57(2)) Where any infringement dispute involves a invention patent for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the course of producing its or his product is different from the patented process. Where the infringement relates to a utility model patent or <u>design patent</u>, the people's court or the patent administrative authority may require the patentee to furnish a patent evaluation report issued by the patent administrative department under the State Council <u>after searching, analyzing and evaluating the patent which may be used as evidence to determine or settle patent disputes.</u>

	Article 62 (Newly added) During a patent infringement dispute, if the alleged infringer has evidence proving its or his technology or design belongs to the prior art or is a prior design, it will not constitute patent infringement.
Article 58 Where any person passes off others' patent, the infringer shall, in addition to bearing the civil liability according to law, amend his act ordered publicly by the patent related administrative authority. The illegal earnings shall be confiscated and a fine will be imposed for not more than three times of the illegal earnings; if there are no illegal earnings, the fine will not be more than RMB 50,000 yuan; where the infringement constitutes a crime, the infringer shall be liable for criminal liability.	**Article 63** Where any person passes off others' patent, the infringer shall, in addition to bearing the civil liability according to law, amend his act ordered publicly by the patented related administrative authority. The illegal earnings shall be confiscated and a fine will be imposed of not more than four times of the illegal earnings; if there are no illegal earnings, the fine will not be more than RMB 200,000 yuan; where the infringement constitutes a crime, the infringer shall be liable for criminal liability.
Article 59 **(Merged with new Article 63)** Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced, in addition, he may be imposed a fine of not no more than RMB 50,000 yuan.	**Article 64 (Newly added)** The relevant patent administrative authority may, based on the evidence it obtains, query the related parties and conduct investigations concerning infringing activities when investigating the suspected passing-off matters; and may examine the place where the suspected infringement took place; view, reproduce any contracts, invoices, books and other materials related to the suspected infringement; examine the products related to suspected infringement, and may seal up or seize the products which has been proved to pass off patent rights. The parties should neither reject nor interfere the legal performance of duty by the patent related administrative authority, and should to assist and cooperate.

Article 60 The amount of compensation for the damage caused by patent infringement shall be assessed on the basis of the loss actually suffered by the patentee, or the profits which the infringer has earned through the infringement if it is difficult to specify the above loss. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the royalty fee for patent exploitation.	**Article 65** The amount of compensation for the damage caused by patent infringement shall be assessed on the basis of the loss actually suffered by the patentee, or the profits which the infringer has earned through the infringement if it is difficult to specify the above loss. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the royalty fee for patent exploitation. The amount of damage shall include the reasonable costs incurred for stopping the patent infringement. If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the loyalty fee for patent exploitation, the people's court may award damages no less than 10,000 yuan and no more than 1,000,000 yuan depending on the type of patent right, the nature and gravity of the infringing act etc.

Article 61	Article 66 (Original Article 61)
Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before filing a suit, applies with the people's court for ordering the suspension of relevant acts and the preservation of property. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China.	Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before filing a suit, apply to the people's court for an order to stop the relevant acts. The applicant shall provide a guarantee for the above-mentioned motions; if the applicant does not provide a bond, the application shall be rejected. Upon receiving the request, the people's court shall make a ruling within 48 hours where there are special circumstances that require extenstion, the court may extend the 48 hours. If a ruling is made to stop the related acts, this ruling should be enforced immediately. If the parties are not satisfied with the ruling, they could apply for a one-time review; the enforcement of the ruling will not be suspended during the course of review. If the applicant does not file a lawsuit within 15 days after the people's court issued an order to stop related acts, the people's court shall withdraw the prior ruling. If the application is in error, the applicant shall compensate to the opposite party for losses caused by stopping the relevant acts.

	Article 67 (Newly added)
	In order to prevent infringing activities, under the circumstance that the evidence might be destoryed or later be difficult to obtain, the patentee or a related injured party may before filing a law suit apply to the people's court for evidence preservation. The people's court may order the applicant to provide a guarantee for the application of evidence preservation, and if no guarantee is provided by the applicant, reject the application. Upon accepting the request, the people's court shall make a ruling within 48 hours; If the court rules to preserve evidence, this ruling should be enforced immediately. If the applicant does not file a lawsuit within 15 days after the people's court issued an order to preserve evidence, the people's court shall withdraw the prior ruling.

Article 62	Article 68
The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement.	The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement.
Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 63	Article 69
None of the following shall be deemed an infringement of the patent right:	None of the following shall be deemed an infringement of the patent right:
(I) Where, after the sale of a patented product that was made or imported by the patentee or with the authorization of the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell or sells that product;	(I) Where, after the sale of a patented product or products directly obtained by using the patented process, which was made by the patentee or an entity/individual authorized by the patentee, any other person uses, offers to sell, sells or imports that product;
(2) Before the date of filing the patent application, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;	(2) Before the date of filing the patent application, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;
(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;	(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;
(4) Where any person uses the patent concerned solely for the purposes of scientific research and experiments.	(4) Where any person uses the patent concerned solely for the purposes of scientific research and experiments.
Any person, who, for production and business purposes, uses or sells a patented product without knowing that it was made and sold without the authorization of the patentee or that it was directly obtained by a patented process, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.	(5) For the purpose of providing the information needed for the administrative approval, manufacture, use, import of a drug or a medical apparatus, and exclusively for such manufacture any import of a patented drug or a patented medical apparatus.

	Article 70 (Original last para Article 63) Any person, who, for business purposes, uses, offers to sell or sells a patented product without knowing that it was made and sold without the authorization of the patentee, shall not be liable for any damages if he can prove that he obtained the product from a legitimate source.
Article 64 Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.	Article 71 Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.
Article 65 Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.	Article 72 Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.

Article 66 The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.	Article 73 The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.
Article 67 Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.	Article 74 Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

Chapter VIII Supplementary Provisions	Chapter VIII Supplementary Provisions
Article 68 Rules for the implementation of this Law shall be formulated by the patent administrative department under the State Council and submitted to the State Council for approval before they are put into effect.	Article 75 Rules for the implementation of this Law shall be formulated by the patent administrative department under the State Council and submitted to the State Council for approval before they are put into effect.
Article 69 This Law shall go into effect on April 1, 1985.	Article 76 This Law shall go into effect on April 1, 1985.

Comparison patent law drafts (2006-2008)

December 2006 Draft Patent Law	March 2008 Draft Patent Law	August 2008 Draft Patent Law	Patent Law of the PRC (2008)
Chapter I General Provisions	Chapter I General Provisions	Chapter I General Provisions	Chapter I General Provisions
Article 1 This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation, to foster the spreading and application of inventions-creations, and to promote the development of science and technology and of economics and society, for meeting the needs of the socialist modernization and construction of an innovative country.	Article 1 This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation, to foster the spreading and application of inventions-creations, and to promote the development of science and technology and of economics and society, for meeting the needs of the socialist modernization and construction of an innovative country.	Article 1 This law is enacted in order to protect patent rights, encourage invention-creations, promote invention creation managements and application, improve independent innovation, promote scientific progress and economic social development, and construct an innovative country.	Article 1 This law is enacted in order to protect the legitimate rights of patentees, encourage invention-creations, promote the application of invention-creation, enhance innovative capacity, and promote scientific progress and economic social development.

Article 2	Article 2	Article 2	Article 2
In this Law, inventions-creations" mean inventions, utility models and designs. "Invention" means any new technical solution relating to a product, a process or improvement thereof. "Utility model" means any new technical solution relating to the shape, structure, or their combination, of a product, which is fit for practical use. "Design" means any new design of the shape, pattern, or their combination and the combination of color and shape or pattern, of a product, which creates an aesthetic feeling and is fit for industrial application.	In this Law, inventions-creations mean inventions, utility models and designs. "Invention" means any new technical solution relating to a product, a process or improvement thereof. "Utility model" means any new technical solution relating to the shape, structure, or their combination, of a product, which is fit for practical use. "Design" means any new design of the shape, pattern, or their combination and the combination of color and shape or pattern, of a product, which creates an aesthetic feeling and is fit for industrial application.	For the purpose of this Law, "invention-creation" means inventions, utility models and designs.	In the present Law "invention-creation" means inventions, utility models and designs. The term "invention" refers to a new technical solution put forward for a product, method or the improvement thereof. The term "utility model" refers to a new practical technical solution for a product's form, structure, or the combination thereof. The term "design" means a new design of a product's shape, pattern or the combination thereof, or the combination of its colour and shape and/or pattern, that is aesthetically pleasing and industrial applicable.

Article 3	Article 3	Article 3	Article 3
People's governments at all levels shall take effective measures to promote the creation, management, protection and application of patent rights. The patent administrative department under the State Council is responsible for the patent work throughout the country. It receives and examines patent applications and grants patent rights for inventions-creations in accordance with law. The patent administrative departments of local people's governments are responsible for the administrative work concerning patents in their respective administrative areas. They promote the spreading and application of patented technology and the propagation of patent information, guide enterprises and institutions to conduct patent work, handle and mediate in patent disputes in accordance with law, and investigate and prosecute patent violations.	The country adopts effective measures to promote patent creativity, management, protection and utilization.	The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.	The patent administration department under the State Council is responsible for the patent work throughout the country. It accepts and examines patent applications and grants patent rights for inventions-creations in accordance with law. The administrative authority for patent affairs under the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the administrative work concerning patents in their respective administrative areas.

Article 4	Article 4	Article 4	Article 4
Where an invention-creation for which a patent is applied for relates to the security or other vital interests of the State and is required to be kept secret, the application shall be treated in accordance with the Law of the Protection of State Secrets Law of the People's Republic of China and other relevant prescriptions of the State. Where any entity or individual intends to file an application in a foreign country for a patent for invention-creation made in China, it or he must be approved by the Patent Administrative department Under the State Council.	The patent administrative department under the State Council is responsible for the patent work throughout the country. It receives and examines patent applications and grants patent rights for inventions-creations in accordance with law. The patent administrative departments of the Provincial, Autonomous Region and Municipal local people's governments are responsible for the administrative work concerning patents in their respective administrative areas.	If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.	If an invention-creation for which a patent is applied involves national security or other vital interests of the State that require secrecy, the matter shall be treated in accordance with the relevant provisions of the State.
Article 5	**Article 5**	**Article 5**	**Article 5**
No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest. However, it is not allowed that no patent right is granted for an invention-creation only the exploitation of which is prohibited under the laws of the State.	Where an invention-creation for which a patent is applied for relates to National security or other significant interests of the State and is required to be kept secret, the application shall be treated in accordance with the Protection of State Secrets Law of the People's Republic of China on and other related regulations.	No patent right shall be granted for any invention-creation that violates the laws of the State, goes against social morals or is detrimental to the public interest. No patent right shall be granted for an invention-creation the completion of which relies on genetic resources, where the acquisition or use of the genetic resources breaches the stipulations in related laws and regulations.	No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to the public interest. No patent right shall be granted for any invention-creation which is completed on the basis of genetic resources of which the acquisition or use breaches the stipulations of related laws and regulations.

Article 6	Article 6	Article 6	Article 6
An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply	No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest. However, it is not allowed that no patent right is granted for an invention-creation only the exploitation of which is prohibited under the laws of the State. No patent right shall be granted for an invention-creation completely relying on genetic resources or traditional knowledge the acquisition or use of the genetic resources of traditional knowledge which breaches the stipulations in related laws and regulations.	An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.	An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.

Article 7	Article 7	Article 7	Article 7
No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.	An invention-creation, made by a person in execution of the tasks of the entity to which he belongs, or made by him mainly by using the material and technical means of the entity is a service invention-creation. For a service intention-creation, the right to apply for a patent belongs to the entity. After the application is approved, the entity shall be the patentee. For a non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the inventor or creator shall be the patentee. In respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and own a patent is provided for, such a provision shall apply.	No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.	No entity or individual may suppress the application of an inventor or designer for a patent in respect of an invention-creation that is not job-related.

Article 8	Article 8	Article 8	Article 8
For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise provided for, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applied for it shall be the patentee.	No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.	For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.	For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applies for it shall be the patentee.

Article 9	Article 9	Article 9	Article 9
For an invention-creation which is completed under a scientific research project funded mainly with government investment, except that the invention-creation is of great significance to the security or interest of the State, the right to apply for a patent belongs to the entity undertaking the project. After approval of the application, the entity is the patentee. According to the provisions of the preceding paragraph, the right to apply for a patent belongs to the entity undertaking the scientific research project. The competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval of the application, decide that the patented invention-application be spread and applied within the approved limits, and allow designated entities to exploit that invention. Concrete measures implementing the provisions of the present article are provided by the State Council.	For an invention-creation jointly made by two or more entities or individuals, or made by an entity or individual in execution of a commission given to it or him by another entity or individual, the right to apply for a patent belongs, unless otherwise provided for, to the entity or individual that made, or to the entities or individuals that jointly made, the invention-creation. After the application is approved, the entity or individual that applied for it shall be the patentee.	For any identical invention-creation, only one patent right shall be granted. But, if the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if a utility model patent right has been obtained and not yet terminated, and the applicant declares to abandon the obtained patent right for utility model, then the patent right for invention may be granted. If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.	For any identical invention-creation, only one patent right shall be granted. However, with respect to the application of a utility model patent and invention patent for the identical invention-creation filed by the same applicant on the same day, the invention patent may be granted if this utility model patent right obtained first is still in force, and the applicant declares to abandon the obtained utility model patent that has been granted. If two or more applicants apply separately for a patent on the same invention-creation, the patent right shall be granted to the person who applied first.

Article 10	Article 10	Article 10	Article 10
Except for the circumstances provided in the present article, paragraph two, for any identical invention-creation, only one patent right shall be granted. Where the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if the applicant declares to abandon the obtained patent right for utility model upon grant of the patent right for invention, then the grant of the patent right for utility model does not affect the grant of the patent right for invention. Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.	For any identical invention-creation, only one patent right shall be granted, except for the circumstances provided for in paragraph 3. Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first. Where the same applicant applies for both a patent for utility model and a patent for invention for the identical invention-creation on the same day, if the applicant declares to abandon the obtained patent right for utility model upon grant of the patent right for invention, then the grant of the patent right for utility model does not affect the grant of the patent right for invention.	The right of patent application and the patent right itself may be assigned. If a Chinese entity or individual wishes to assign a right of patent application or a patent right to a foreigner, it or he must follow procedures in accordance with the related laws and administrative regulations. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.	The right to apply for a patent and the patent right itself may be assigned. Any assignment of the right to apply for a patent or of the patent right from a Chinese entity or individual to a foreigner, foreign enterprise or other foreign organizations, shall be done in accordance with procedures in the related laws and administrative regulations. Where the right to apply for a patent or the patent right is assigned, the parties shall conclude a written contract and register it with the patent administration department under the State Council. The patent administration department under the State Council shall announce the registration. The assignment shall take effect as of the date of registration.

Article 11	Article 11	Article 11	Article 11
For assignments of the right to apply for a patent, the patent application and the patent right, the parties concerned shall conclude a written contract. For any assignment of the right to apply for a patent, the patent application or the patent right by a Chinese entity or individual to a foreigner, a foreign enterprise or another foreign organization, relevant procedures must be followed in accordance with provisions of the laws and administrative regulations. Where a patent application or patent right is assigned, the parties shall register it with the Patent Administrative department Under the State Council. The Patent Administrative department Under the State Council shall announce the registration. The assignment of the patent application or the patent right shall take effect as of the date of registration.	For assignments of the right to apply for a patent, the patent application and the patent right, the parties concerned shall conclude a written contract. For any assignment of the right to apply for a patent, the patent application or the patent right by a Chinese entity or individual to a foreigner, a foreign enterprise or another foreign organization, relevant technology import-export approval procedures must be followed in accordance with the related technology import-export management laws and administrative regulations. Where a patent application or patent right is assigned, the parties shall register it with the patent administrative department under the State Council. The patent administrative department under the State Council shall announce the registration. The assignment of the patent application or the patent right shall take effect as of the date of registration.	After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, that is, make, offer to sell, sell, or import the product incorporating its or his patented design, for production or business purposes.	After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, or use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the design, namely make, offer to sell, sell, or import the design patented product for production or business purposes

Article 12	Article 12	Article 12	Article 12
After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, unless otherwise provided in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorporating its or his patented design, for production or business purposes.	After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes. After the grant of the patent right for a design, unless otherwise provided in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorporating its or his patented design, for production or business	Except as provided for in Article 14 of this Law, any entity or individual exploiting the patent of another must conclude a written licensing contract with the patentee and pay the patentee a fee for the exploitation of its or his patent. The licensee shall not have the right to authorize any entity or individual other than that referred to in the contract to exploit the patent.	Any entity or individual exploiting the patent of another shall conclude with the patentee a license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

Article 13	Article 13	Article 13	Article 13
Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent. After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.	After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.	After the application for an invention patent has been publicly announced, the applicant may require the entities or individuals exploiting the invention to pay an appropriate fee.	After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14	Article 14	Article 14	Article 14
Where the right to apply for a patent, patent application or patent right is shared by two or more entities or individuals, the following acts shall be consented by all co-owners, unless agreed upon otherwise: (1). Assigning the right to apply for a patent; (2) assigning or withdrawing the patent application; (3) assigning, abandoning or pledging the patent right; and (4). Licensing others to exploit the patent. Where the patent right is shared by two or more entities or individuals, any co-owner may exploit the patent alone unless agreed upon otherwise.	Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.	Where any patent for invention, which belongs to any State-owned enterprise or institution, is considered of great significance to the interests of the State or the public by the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government, after approval by the State Council, the patented invention may be widely applied within reasonable limits. The exploiting entity shall pay a fee for exploitation to the patentee, the amount of which shall be determined through negotiation by both parties.	Where any patent for invention, belonging to any State-owned enterprise or institution, is of great significance to the interest of the State or to the public interest, the competent departments concerned under the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government may, after approval by the State Council, decide that the patented invention be spread and applied within the approved limits, and allow designated entities to exploit that invention. The exploiting entity shall, according to the regulations of the State, pay a fee for exploitation to the patentee.

Article 15	Article 15	Article 15	Article 15 (Newly added)
The patentee has the right to affix a patent marking and to indicate the number of the patent on the patented product or on the packing of that product.	Where the right to apply for a patent, patent application or patent right is shared by two or more entities or individuals, the following acts shall be consented by all co-owners, unless agreed upon otherwise: (1). Assigning the right to apply for a patent; (2). Assigning or withdrawing the patent application; (3). Assigning, abandoning or pledging the patent right; and (4). Licensing others to exclusively exploit the patent. Where the patent right is shared by two or more entities or individuals, any co-owner may exploit the patent alone unless agreed upon otherwise.	If the patent application right or patent right is jointly owned by two or more entities or individuals, if the owners have an agreement regarding the exercise of rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through common license; Any royalties collected through license for others to exploit the patent shall be distributed amongst the owners. Apart from the situation in the preceding paragraph, the exercise of jointly owned patent application right or patent right shall be consented by all co-owners.	If the co-owners of a patent application right or patent right have an agreement on the exercise of those rights, the agreement shall apply. If there is no such agreement, any co-owner may independently exploit or license others to exploit the patent through ordinary licenses; Any royalties obtained through licensing others to exploit the patent shall be distributed amongst all the co-owners. Except for the situation provided in the above paragraph, the exercise of a jointly-owned patent application right or patent right shall be consented by all co-owners.

Article 16	Article 16	Article 16	Article 16
The entity that is granted a patent right shall award to the inventor or creator of a service invention-creation a reward and, upon exploitation of the patented invention-creation, shall pay the inventor or creator a reasonable remuneration based on the extent of spreading and application and the economic benefits yielded.	The patent rights holder has the right to affix a patent marking and to indicate the number of the patent on the patented product or on the packing of that product. The patent rights holder must according to the previous clause regulating patent marking and patent number conduct this according to the patent administrative department under the State Council.	The patentee shall have the right to affix a patent marking and indicate the patent number on the patented product or on the packaging of that product.	The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.

Article 17 (Combination of Original Articles 15 and 17)	Article 17	Article 17	Article 17 (Combination of Original Article 15 and 17)
The inventor or designer has the right to be named as such in the patent document. The patentee is entitled to put patent notice on the patented product or the package thereof.	The entity that is granted a patent right shall award to the inventor or creator of a service invention-creation a reward and, upon exploitation of the patented invention-creation, shall pay the inventor or creator a reasonable remuneration based on the extent of spreading and application and the economic benefits yielded. Regarding the method and amount of the reward and remuneration paid to the inventor or creator of the invention creation, the unit obtaining the patent rights and the service invention creation inventor or creator must make an agreement. If there is no agreement then this will be determined according to the related national legislation.	The entity that is granted a patent right shall reward to the inventor or creator of a service invention--creation and, upon exploitation of the patented invention-creation, shall give the inventor or creator a reasonable remuneration based on the extent the invention-creation is applied and the economic benefits it yields.	The inventor or designer has the right to be named as such in the patent document. The patentee is entitled to put patent notice on the patented product or the package thereof.

Article 18	Article 18	Article 18	Article 18
Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	The inventor or creator has the right have their name written in the patent document as the inventor or creator.	An inventor or designer shall have the right to name himself as such in the patent document.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 19	Article 19	Article 19	Article 19
Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, it or he shall appoint a patent agency established in accordance with law to act as his or its agent. Where any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may appoint a patent agency established in accordance with law to act as its or his agent. The patent agency and its employed patent attorney shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency and its employed patent attorney shall be formulated by the State Council.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	If a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are party, or on the basis of the principle of reciprocity.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent or has other patent matters to handle in China, he or it shall entrust a patent agency legally established to act on its or his behalf. Any Chinese entity or individual who intends to file a patent application in China or engage in any other patent related affairs could entrust any legally established patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.

Article 20	Article 20	Article 20	Article 20
Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of Article 4 of this Law. The Patent Administrative department Under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, it or he shall appoint a patent agency established in accordance with law to act as his or its agent. Where any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may appoint a patent agency established in accordance with law to act as its or his agent. Patent agencies shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing patent agencies shall be formulated by the State Council.	Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency established in accordance with law to act as his or its agent. If any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may entrust a patent agency to act on its or his behalf. The patent agency shall comply with the provisions of laws and administrative regulations, and handle patent applications and other patent matters according to the instructions of its clients. In respect of the contents of its clients' inventions-creations, except for those that have been published or announced, the agency shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency shall be formulated by the State Council.	Any entity or individual intending to file a patent application in a foreign country for an invention-creation made in China, shall apply in advance for a confidentiality examination conducted by the patent administrative department under the State Council. The procedures and duration regarding the confidentiality examination shall be enforced in accordance with the State Council regulations. Any Chinese entity or individual may file an international application for a patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for a patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council. Any foreign patent application that violates the provision of the first paragraph of this Article will not be granted a patent right if the patent is applied for in China.

Article 21 The Patent Administrative department Under the State Council and its Patent Reexamination Board shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The Patent Administrative department Under the State Council shall periodically publish Patent Gazette, and propagate the patent information in a complete, correct and timely manner. Until the publication or announcement of the application for a patent, staff members of the Patent Administrative department Under the State Council and other persons involved have the duty to keep its contents secret.	**Article 21** Any unit or individual who applies for a patent overseas for an invention-creation completed in China must be approved by the patent administrative department under the State Council. Besides those involving national security or significant public interest that are required to be kept confidential, the patent administrative department under the State Council must approve others. An invention-creation completed in China that is applied for as a patent in China, will be regarded as providing a foreign patent application request from the patent administrative department under the State Council. Within 6 months of the patent administrative department under the State Council receiving the application if they have not issued a ruling regarding the foreign patent application, it will be regarded as permitting the applicant to apply for a foreign patent.	**Article 21** Any entity or individual may file an application in a foreign country for a patent for invention-creation made in China with an advance confidentiality examination conducted by patent administration department under the State Council. Any Chinese entity or individual may file an international application for patent in accordance with any international treaty concerned to which China is party. The applicant filing an international application for patent shall comply with the provisions of the preceding paragraph. The patent administration department under the State Council shall handle any international application for patent in accordance with the international treaty concerned to which China is party, this Law and the relevant regulations of the State Council.	**Article 21** The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The patent administrative department under the State Council shall completely, correctly and timely publish patent information in the the patent gazette on a regular basis. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.

	Article 21 (Continued) Chinese units or individuae related international treaties the People's Republic of China is a party to. When filing an international patent application the applicant must abide by paragraph 1 of this article. The patent administrative department under the State Council must handle international patent applications in accordance with the international treaties it is party to, this law and related regulations of the State Council.		

	Article 22 The Patent Administrative department Under the State Council and its Patent Reexamination Board shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The Patent Administrative department Under the State Council shall periodically publish Patent Gazette, and propagate the patent information in a complete, correct and timely manner. Until the publication or announcement of the application for a patent, staff members of the Patent Administrative department Under the State Council and other persons involved have the duty to keep its contents secret.	Article 22 The patent administration department under the State Council and the Patent Reexamination Board under the department shall handle any patent application and patent-related request according to law and in conformity with the requirements for being objective, fair, correct and timely. The patent administration department under the State Council shall transmit patent information completely, accurately and promptly, and publish the Patent Gazette regularly. Until the publication or announcement of the application for a patent, staff members of the patent administration department under the State Council and other persons involved have the duty to keep its content secret.	

Chapter II Requirements for Grant of Patent Right	Chapter II Requirements for Grant of Patent Rights	Chapter II Conditions for the Grant of Patent Rights	Chapter II Conditions for the Grant of Patent Rights
Article 22 Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability. Novelty means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the Patent Administrative department Under the State Council an application which described the identical invention or utility model and was published in patent application documents or announced in patent documents after the said date of filing.	Article 23 Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability. Novelty means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the patent administrative department Under the State Council an application which described the identical invention or utility model and was published in patent application documents or announced in patent documents after the said date of filing.	Article 23 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that, the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing an identical invention or utility model which was published in patent application documents or patent documents after the said date of filing.	Article 22 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness. "Novelty" means that the invention or utility model shall neither belong to the prior art, nor has any entity or individual previously filed before the date of filing with the patent administrative department under the State Council an application on an identical invention or utility model which was recorded in patent application documents or other gazetted patent documents published after the said date of filing.

Article 22 (Continued)	Article 23 (Continued)	Article 23 (Continued)	Article 22 (Continued)
Inventiveness means that, as compared with the prior art, the invention has prominent substantive features and represents a notable progress for a person skilled in the relevant field of technology and that the utility model has substantive features and represents progress for a person skilled in the relevant field of technology. Practical applicability means that the invention or utility model can be made or used and can produce effective results. The prior art referred to in this Law means any technology known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.	Inventiveness means that, as compared with the prior art, the invention has prominent substantive features and represents a notable progress for a person skilled in the relevant field of technology and that the utility model has substantive features and represents progress for a person skilled in the relevant field of technology. Practical applicability means that the invention or utility model can be made or used and can produce effective results. The prior art referred to in this Law means any technology known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.	Inventiveness means that, compared with the prior art, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. The prior art referred to in this Law means any technology known to the public before the date of filing in this country or abroad.	"Inventiveness" means that, compared with the prior art the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement. "Usefulness" means that the invention or utility model can be made or used and can create positive results. The "prior art" referred to in this Law refers to any technology known to the public before the filing date of the patent application in China or abroad.

Article 23	Article 24	Article 24	Article 23
Any design for which patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the Patent Administrative department Under the State Council an application which described the identical design and was published after the said date of filing, and for a designer in the relevant field, the design is substantively different from the prior design or a combination of the feature of the prior design. Any design for which patent right may be granted must not be in conflict with any prior right of any other person. The prior design referred to in this Law refers to any design known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.	Any design for which a patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application which described the identical design and was published after the said date of filing, and for a designer in the relevant field, the design is substantively different from the prior design or a combination of the feature of the prior design. Any design for which a patent right may be granted must not belong to a flat surface printed product design, color or other combination made up of the main marking use for the design. Any design for which a patent right may be granted must not be in conflict with any prior right of any other person. The prior design referred to in this Law refers to any design known to the public before the date of filing by way of public disclosure in publications, public use or any other means in this country or abroad.	Any design for which a patent right may be granted shall neither belong to the prior design, nor has any other person filed before the date of filing with the patent administrative department under the State Council an application describing the identical design which was published in the patent documents after the said date of filing. Any design for which a patent right may be granted shall be substantively different from the prior design or a combination of the features of the prior design. Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person. The prior design referred to in this Law refers to any design known to the public before the date of filing in this country or abroad. No design for which patent right is to be granted may be identical with or simi1ar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country, or be in conflict with any prior legal rights of any other person.	Any design for which a patent right may be granted must not belong to an prior design; nor has any entity or individual previously filed before the date of filing with the patent administration department under the State Council an application on an identical design which was published in patent documents published after the said date of filing. The design for which a patent right may be granted must be substantially different from prior designs or a combination of the features of prior designs. Any design for which a patent right may be granted must not be in conflict with any prior legal rights of any other person. The prior design referred to in this Law means any design known to the public before the filing date of the patent application in China or abroad.

Article 24	Article 25	Article 25	Article 24
Where an invention-creation for which a patent is applied for became known to the public in one of the following manners, within six months before the date of filing, it is not deemed to constitute a prior art or a prior design referred to in this Law for the said patent application: (1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government; (2) where it was first made public at a prescribed academic or technological meeting; (3) where it was disclosed by any person without the consent of the applicant.	Where an invention-creation for which a patent is applied for became known to the public in one of the following manners, within six months before the date of filing, it is not deemed to constitute a prior art or a prior design referred to in this Law for the said patent application: (1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government; (2) where it was first made public at a prescribed academic or technological meeting; (3) where it was disclosed by any person without the consent of the applicant.	Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.	Any invention-creation for which a patent is applied shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred: (1) it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government; (2) it was made public for the first time at a prescribed academic or technical conference; or (3) it was disclosed by any person without the consent of the applicant.

Article 25	Article 26	Article 26	Article 25
For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) diagnostic, therapeutic and surgical method for the treatment of humans or animals; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation; (6) designs mainly serving as a sign and made of the pattern, color or its combination of two-dimensional printed matter. For processes used in producing products referred to in items (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law. For an invention-creation, the completion of which depends on genetic resources, but the acquisition and exploitation of said genetic resources are contrary to relevant laws and regulations of the State, no patent right shall be granted.	For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) diagnostic, therapeutic and surgical method for the treatment of humans or animals; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. For processes used in producing products referred to in items (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.	For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. (6) two-dimensional printed matter design, color or a combination of both to be mainly used as design with the function of an identifier. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.	For any of the following, no patent right shall be granted: (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. (6) two dimensional designs of images, colours or combinations of the two that mainly serve as indicators. For processes used in producing products referred to in item (4) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III Application for Patent	Chapter III Patent Applications	Chapter III Application for Patents	Chapter III Application for Patents
Article 26 Where an application for a patent for invention or utility model is filed, application documents such as a request, a description and its abstract, and claims shall be submitted. The request shall state the title of the invention or utility model, the name of the inventor or creator, the name and the address of the applicant and other related matters. The description shall set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant filed of technology to carry it out; where necessary, drawings are required.	**Article 27** Where an application for a patent for invention or utility model is filed, application documents such as a request, a description and its abstract, and claims shall be submitted. The request shall state the title of the invention or utility model, the name of the inventor or creator, the name and the address of the applicant and other related matters. The description shall set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant filed of technology to carry it out; where necessary, drawings are required.	**Article 27** When a patent application is filed for an invention or a utility model, relevant documents shall be submitted, including a written request, a specification and an abstract thereof, and a patent claim. The written request shall state the title of the invention or utility model, the name of the inventor or designer, the name and address of the applicant and other related matters. The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model.	**Article 26** Where a patent application for invention or utility model is filed, a request, a specification and its abstract, and claims shall be submitted. The written request shall state the title of the invention or utility model, the name of the inventor, the name and address of the applicant and other related matters. The specification shall describe the invention or utility model in a manner sufficiently clear and complete so that a person skilled in the relevant field of technology can accurately produce it; where necessary, drawings shall be appended. The abstract shall describe briefly the technical essentials of the invention or utility model.

Article 26 (Continued)	Article 27 (Continued)	Article 27 (Continued)	Article 26 (Continued)
For an invention-creation, the completion of which depends on genetic resources, the applicant shall indicate the source of said genetic resources in the description. The abstract of the description shall state briefly the main technical points of the invention or utility model. The claims shall be supported by the description and shall define the extent of the patent protection asked for in a clear and concise manner.	The abstract in the description shall briefly explain the main technical points of the invention or utility model. The claims shall be supported by the description and shall define the scope of the patent protection asked for in a clear and concise manner. For an invention-creation, the completion of which relies on genetic resources or traditional knowledge, the applicant shall on the patent application document indicate that genetic resource direct source and original source or the source of that traditional knowledge. If the applicant is unable to indicate the original source of the genetic resource then they must explain the reason.	The patent claim shall, on the basis of the specification, state the scope of the patent protection requested. For an invention-creation the completion of which relies on genetic resources, the applicant shall on the patent application document indicate the direct source and original source of the genetic resource. The applicant unable to indicate the original source of the genetic resource must explain the reason.	The patent claim shall, on the basis of the specification, clearly and briefly specify the scope of the patent protection claimed. An applicant who files a patent application for an invention-creation completed on the basis of genetic resources shall in the patent application document indicate the direct and indirect source of the genetic resources; the applicant unable to indicate the original source of the genetic resource must provide an explanation.

Article 27 Where an application for a patent for design is filed, application documents such as a request, drawings or photographs of the design as well as a brief explanation of the design shall be submitted.	**Article 28** Where applying for a design patent, application documents such as a request, drawings or photographs of the design as well as a brief explanation of the design shall be submitted.	**Article 28** hen a patent application is filed for a design, relevant documents shall be submitted, including a written request and drawings or photographs of the design; the product on which the design is to be used and the category of that product shall also be indicated.	**Article 27** When a patent application is filed for a design, documents including a request, drawings or photographs of the design as well as a brief explanation of the design and should be submitted. The drawings or photographs submitted by the applicant should clearly indicate the design sought to be protected by the patent.
Article 28 The date on which the Patent Administrative department Under the State Council receives the application shall be the date of filing. If the application is sent by mail, the date of mailing indicated by the postmark shall be the date of filing.	**Article 29** The date on which the patent administrative department under the State Council receives the application shall be the date of filing. If the application is sent by mail, the date of mailing indicated by the postmark shall be the date of filing.	**Article 29** The date on which the patent administration department under the State Council receives the patent application documents shall be the filing date of the application. If the application documents are sent by mail, the postmark date shall be the filing date of the application.	**Article 28** The date on which the patent administrative department under the State Council receives the patent application documents shall be the date of filing. If the application documents are sent by mail, the postmark date shall be the filing date of the application.

Article 29 Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the Patent Administrative department Under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	**Article 30** Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department Under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	**Article 30** Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administration department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.	**Article 29** Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority. Where, within twelve months from the date on which any applicant first filed in China an application for a patent for invention or utility model, he or it files with the patent administrative department under the State Council an application for a patent for the same subject matter, he or it may enjoy a right of priority.

Article 30 Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to meet the time limit for submitting the patent application document, the claim to the right of priority shall be deemed not to have been made.	**Article 31** Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to meet the time limit for submitting the patent application document, the claim to the right of priority shall be deemed not to have been made.	**Article 31** Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.	**Article 30** Any applicant who claims the right of priority shall make a written declaration when the application is filed, and submit, within three months, a copy of the patent application documents that was first filed; if the applicant fails to make the written declaration or fails to submit a copy of the patent application documents within the time limit, the claim to the right of priority shall be deemed not to have been made.
Article 31 An application for a patent for invention or utility model shall be limited to one invention or utility model. Two or more inventions or utility models belonging to a single general inventive concept may be filed as one application. An application for a patent for design shall be limited to one design incorporated in one product. Two or more similar designs for the same product, or two or more designs which are incorporated in products belonging to the same class and are sold or used in sets may be filed as one application.	**Article 32** An application for a patent for invention or utility model shall be limited to one invention or utility model. Two or more inventions or utility models belonging to a single general inventive concept may be filed as one application. An application for a patent for design shall be limited to one design incorporated in one product. Two or more similar designs for the same product, or two or more designs which are incorporated in products belonging to the same class and are sold or used in sets may be filed as one application.	**Article 32** Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design. Two or more similar designs for the same product, or two or more designs used on products belonging to a single category and sold or used in sets may be submitted together in one application.	**Article 31** Each patent application for invention or utility model shall be limited to a single invention or utility model. Two or more inventions or utility models belonging to a single inventive concept may be submitted together in one application. Each patent application for design shall be limited to a single design. Two or more similar designs used on the same product, or two or more designs used on the products belonging to a single category and sold or used in sets may be submitted together in one application.

Article 32 An applicant may withdraw his or its application for a patent at any time before the patent right is granted.	**Article 33** An applicant may withdraw his or its application for a patent at any time before the patent right is granted.	**Article 33** An applicant may withdraw his or its patent application at any time before the patent right is granted.	**Article 32** An applicant may withdraw the patent application at any time before the patent right is granted.
Article 33 An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	**Article 34** An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	**Article 34** An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.	**Article 33** An applicant may amend his or its application for a patent, but the amendment to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and the claims, and the amendment to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV Examination and Approval of Application for Patent	Chapter IV Examination and Approvals of Patent Applications	Chapter IV Examination and Approval of Patent Applications	Chapter IV Examination and Approval of Patent Applications
Article 34 Where, after receiving an application for a patent for invention, the Patent Administrative department Under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the Patent Administrative department Under the State Council publishes the application earlier.	Article 35 Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council can publish the application earlier.	Article 35 Where, after receiving an application for a patent for invention, the patent administration department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administration department under the State Council may publish the application earlier.	Article 34 Where, after receiving an application for a patent for invention, the patent administrative department under the State Council, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application promptly after the expiration of eighteen months from the date of filing. Upon the request of the applicant, the patent administrative department under the State Council may publish the application earlier.

Article 35	Article 36	Article 36	Article 35
Upon the request of the applicant for a patent for invention, made at any time within three years from the date of filing, the Patent Administrative department Under the State Council will proceed to examine the application as to its substance. If, without any justified reason, the applicant fails to meet the time limit for requesting examination as to substance, the application shall be deemed to have been withdrawn. The Patent Administrative department Under the State Council may, on its own initiative, proceed to examine any application for a patent for invention as to its substance when it deems it necessary.	Upon the request of the applicant for a patent for invention, made at any time within three years from the date of filing, the patent administrative department Under the State Council will proceed to examine the application as to its substance. If, without any justified reason, the applicant fails to meet the time limit for requesting examination as to substance, the application shall be deemed to have been withdrawn. The patent administrative department under the State Council may, on its own initiative, proceed to examine any application for a patent for invention as to its substance when it deems it necessary.	Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administration department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administration department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.	Upon the applicant's request for an invention patent made at any time within three years from the filing date of an application, the patent administrative department under the State Council may carry out substantive examination of that application. If, without any justified reason, the applicant fails to meet the time limit for requesting such substantive examination, the application shall be deemed to have been withdrawn. The Patent administrative department under the State Council may of its own accord carry out substantive examination of an application for an invention patent when it deems it necessary.

Article 36	Article 37	Article 37	Article 36
When the applicant for a patent for invention requests examination as to substance, he or it shall furnish pre-filing date reference materials concerning the invention. For an application for a patent for invention that has been already filed in a foreign country, the Patent Administrative department Under the State Council may ask the applicant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application shall be deemed to have been withdrawn.	When the applicant for a patent for invention requests examination as to substance, he or it shall furnish pre-filing date reference materials concerning the invention. For an application for a patent for invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the applicant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application shall be deemed to have been withdrawn.	When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an application for a patent for invention that has been already filed in a foreign country, the patent administration department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.	When requesting substantive examination of an invention patent application, the applicant shall furnish reference materials concerning the invention that were available prior to the filing date of the application. For an patent application for an invention that has been already filed in a foreign country, the patent administrative department under the State Council may ask the app1icant to furnish within a specified time limit documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, at the expiration of the specified time limit, without any justified reason, the said documents are not furnished, the application sha1l be deemed to have been withdrawn.

Article 37	Article 38	Article 38	Article 37
Where the Patent Administrative department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.	Where the patent administrative department under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.	If, after completing the substantive examination of an invention patent application, the patent administration department under the State Council finds that the application does not conform with the provisions of this Law, it shall notify the applicant and ask him or it to state his or its observations or amend the application within a specified time limit. If, without any justified reason, the applicant fails to respond within the time limit, the application shall be deemed to have been withdrawn.	Where the Patent Administrative Department Under the State Council, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making response is not met, the application shall be deemed to have been withdrawn.
Article 38	**Article 39**	**Article 39**	**Article 38**
Where, after the applicant has made the observations or amendments, the Patent Administrative Department Under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.	Where, after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.	If, after the applicant has stated his or its observations or made amendments, the patent administration department under the State Council still finds that the invention patent application does not conform with the provisions of this Law, it shall reject the application.	If after the applicant has made the observations or amendments, the patent administrative department under the State Council finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.

Article 39 Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the Patent Administrative department Under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of the date of the announcement.	**Article 40** Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of the date of the announcement.	**Article 40** Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the patent administration department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.	**Article 39** Where it is found after examination as to substance that there is no cause for rejecting the patent application for a invention, the patent administrative department under the State Council shall make a decision to grant the patent right for invention, issue the certificate of patent for invention, and register and announce it. The patent right for invention shall take effect as of upon the date of the announcement.
Article 40 Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the Patent Administrative department Under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	**Article 41** Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	**Article 41** Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administration department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.	**Article 40** Where it is found after preliminary examination that there is no cause for rejection of the application for a patent for utility model or design, the patent administrative department under the State Council shall make a decision to grant the patent right for utility model or the patent right for design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall take effect as of the date of the announcement.

Article 41 The Patent Administrative department Under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the said department rejecting the application, the applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant for patent. Where the applicant for patent is not satisfied with the decision of the Patent Reexamination Board, it or he may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic Of China.	**Article 42** The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administrative department under the State Council rejecting the application, the applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant. Where the applicant for patent is not satisfied with the decision of the Patent Reexamination Board, it or he may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic Of China.	**Article 42** The patent administration department under the State Council shall set up a Patent Reexamination Board. Where an applicant for patent is not satisfied with the decision of the patent administration department under the State Council reject his or its application for patent, such applicant may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant for patent of the decision. Where the applicant for patent who is not satisfied with the decision of the Patent Reexamination Board, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	**Article 41** The patent administrative department under the State Council shall set up a Patent Reexamination Board. Where an applicant is not satisfied with the decision to reject his or its application for patent issued by the patent administrative department under the State Council, such applicant may, within three months from the date of receiving the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the patent applicant of the decision. Where the patent applicant who is not satisfied with the decision of the Patent Reexamination Board, the applicant could, within three months from the date of receiving the notification, bring suit before the people's court.

Chapter V Duration, Cessation and Invalidation of Patent Right	Chapter V Duration, Cessation and Invalidation of Patent Rights	Chapter V Term, Termination and Invalidation of Patent Rights	Chapter V Term, Termination and Invalidation of Patent Rights
Article 42 The duration of patent right for inventions shall be twenty years, the duration of patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	Article 43 The duration of patent right for inventions shall be twenty years, the duration of patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	Article 43 The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.	Article 42 The duration of patent right for inventions shall be twenty years, and the duration of the patent right for utility models and patent right for designs shall be ten years, counted from the date of filing.
Article 43 The patentee shall pay an annual fee beginning with the year in which the patent right was granted.	Article 44 The patentee shall pay an annual fee beginning with the year in which the patent right was granted.	Article 44 The patentee shall pay an annual fee beginning with the year in which his or its patent right is granted.	Article 43 The patentee shall pay an annual fee beginning with the year in which the patent right is granted.

Article 44	Article 45	Article 45	Article 44
In any of the following cases, the patent right shall cease before the expiration of its duration: (1) where an annual fee is not paid as prescribed; (2) where the patentee abandons his or its patent right by a written declaration. Any cessation of the patent right shall be registered and announced by the Patent Administrative department Under the State Council.	In any of the following cases, the patent right shall cease before the expiration of its duration: (1) where an annual fee is not paid as prescribed; (2) where the patentee abandons his or its patent right by a written declaration. Any cessation of the patent right shall be registered and announced by the patent administrative department under the State Council.	In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2)if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administration department under the State Council.	In either of the following cases, the patent right shall be terminated prior to the expiration of its term: (1) if the annual fee is not paid as prescribed; or (2)if the patentee renounces his or its patent right by a written declaration. The termination of a patent right shall be registered and publicly announced by the patent administrative department under the State Council.
Article 45 Where, starting from the date of the announcement of the grant of the patent right by the Patent Administrative department Under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.	Article 46 Where, starting from the date of the announcement of the grant of the patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.	Article 46 Where, starting from the date of the announcement of the grant of a patent right by the patent administration department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.	Article 45 Where, starting from the date of the announcement of the grant of a patent right by the patent administrative department under the State Council, any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.

Article 46	Article 47	Article 47	Article 46
The Patent Reexamination Board shall examine the request for invalidation of the patent right promptly, make a decision on it and notify the person who made the request and the patentee. The decision declaring the patent right invalid shall be registered and announced by the Patent Administrative department Under the State Council. Where the patentee or the person who made the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court under the Administrative Procedure Law of the People's Republic Of China. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.	The Patent Reexamination Board shall examine the request for invalidation of the patent right promptly, make a decision on it and notify the person who made the request and the patentee. Where the patentee or the person who made the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court under the Civil Procedure Law of the People's Republic Of China.	For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administration department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.	For any request for invalidation of a patent right, the Patent Reexamination Board shall examine it promptly, make a decision on it and notify the person who makes the request and the patentee of the decision. The decision declaring the patent right invalid shall be registered and announced by the patent administrative department under the State Council. Where the patentee or the person who makes the request for invalidation is not satisfied with the decision of the Patent Reexamination Board declaring the patent right invalid or upholding the patent right, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court. The people's court shall notify the person that is the opponent party of that party in the invalidation procedure to appear as a third party in the legal proceedings.

Article 47	Article 48	Article 48	Article 47
Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. The decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed prior to the declaration of the patent right invalid; however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.	Any decision to declare a patent right invalid must be registered and announced by the patent administrative department under the State Council. Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. The decision declaring the patent right invalid shall have no retroactive effect on any judgment or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed prior to the declaration of the patent right invalid; however, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.	Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. Prior to the declaration of the patent right invalid, the decision to declare the patent right invalid shall have no retroactive effect on any judgement or ruling of patent infringement which has been pronounced and enforced by the people's court, on any decision concerning the handling of a dispute over patent infringement which has been complied with or compulsorily executed, or on any contract of patent license or of assignment of patent right which has been performed. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.	Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning. The decision declaring the patent right invalid shall have no retroactive effect on any judgment or mediation decision concerning patent infringement which has been issued and enforced by the people's court, as well as on any decision concerning disputes of patent infringement which has been enforced or compulsorily executed, or on any contract of patent license or assignment of patent right which has been performed prior to the declaration of the patent right being invalid. However, the damage caused to other persons in bad faith on the part of the patentee shall be compensated.

Article 47 (Continued)	Article 48 (Continued)	Article 48 (Continued)	Article 47 (Continued)
If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.	If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.	If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right makes no repayment to the licensee or the assignee of the patent right of the fee for the exploitation of the patent or of the price for the assignment of the patent right, which is obviously contrary to the principle of equity, the patentee or the assignor of the patent right shall repay the whole or part of the fee for the exploitation of the patent or of the price for the assignment of the patent right to the licensee or the assignee of the patent right.	If, pursuant to the provisions of the preceding paragraph, the patentee or the assignor of the patent right does not refund the damages for patent infringement, royalty fee for patent exploitation or patent assignment, which is obviously contrary to the principle of equity, the whole or part of above-mentioned fees should be refunded.

Chapter VI Compulsory License for Exploitation of Patent	Chapter VI Compulsory License for Patent Exploitation	Chapter VI Compulsory Licence for Exploitation of a Patent	Chapter VI Compulsory Licence for Patent Exploitation
Article 48 In any of the following cases, the Patent Administrative department Under the State Council may, upon the request of the entity which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model: (1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason; (2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act intended to eliminate or restrict competition.	**Article 49** In any of the following cases, the patent administrative department under the State Council may, upon the request of the entity which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model: (1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason; (2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act intended to eliminate or restrict competition.	**Article 49** In any of the following cases, the patent administrative department under the State Council may, upon the request of the entity or individual which is qualified for exploitation, grant a compulsory license to exploit the patent for invention or utility model: (1) where the patentee of an invention or utility model, after the expiration of three years from the grant of the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not sufficiently exploited the patent without any justified reason; (2) where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act eliminates or restricts competition.	**Article 48** In any of the following cases, the patent administrative department under the State Council may, upon the application of that entity or individual, grant a compulsory license to exploit the patent for the invention or utility model. (1) where the patentee after the expiration of three years from the date of granting the patent right, and the expiration of four years from the date of filing, has not exploited the patent or has not sufficiently exploited the patent without any justified reasons; (2) where it has been legally determined that the enforcement of the patent right by the patentee is an act of monopoly, to avoid or to eliminate the adverse effects caused to competition.

Article 49	Article 50	Article 50	Article 49
Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the Patent Administration Department Under the State Council may, as suggested by a competent department under the State Council, grant the entity designated by the department a compulsory license to exploit the patent for invention or utility model. In order to prevent, treat and control an epidemic disease, the Patent Administration Department Under the State Council may grant a compulsory license to exploit the patent for invention or utility model according to the provisions of the preceding paragraph.	Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may, as suggested by a competent department under the State Council, grant the entity designated by the department a compulsory license to exploit the patent for invention or utility model. In order to protect the health of the public, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model according to the provisions of the preceding paragraph.	Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administration department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.	Where a national emergency or an extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department under the State Council may grant a compulsory license to exploit the patent for invention or utility model.

Article 50	Article 51	Article 51	Article 50 (Newly added)
Where a drug for treating an epidemic disease has been granted a patent in China, and a developing country or a least developed country who have no or insufficient capability to manufacture the said drug, hopes to import the drug from China, the Patent Administrative department Under the State Council may grant an entity which is qualified for exploitation, a compulsory license to manufacture the said drug and to export it to the said country. Where the Patent Administrative department Under the State Council grants a compulsory license in accordance with the provisions of the preceding paragraph, the said department shall clearly set forth relevant requirements in the decision on compulsory license.	Where a drug for treating a transmittable or an epidemic disease has been granted a patent in China, and a developing country or a least developed country who have no or insufficient capability to manufacture the said drug, hopes to import the drug from China, the patent administrative department under the State Council may grant an entity which is qualified for exploitation, a compulsory license to manufacture the said drug and to export it to the said country. Where the patent administrative department under the State Council grants a compulsory license in accordance with the provisions of the preceding paragraph, the said department shall clearly set forth relevant requirements in the decision on compulsory license.	For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted patent right in China and to export it to the following country or region: (1)a least developed country; (2)a WTO member which has no or insufficient capability to manufacture the said drug, and has completed relevant procedures according to WTO treaties of which PRC is a member.	For the purpose of public health, the patent administrative department under the State Council may grant a compulsory license to manufacture a drug which has been granted a patent right in China and to export it to the countries or regions specified in related international conventions in which China is a contracting member.

Article 51	Article 52	Article 52	Article 51
Where the invention or utility model for which the patent right has been granted involves important technical advance of considerable economic significance in relation to another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the Patent Administrative department Under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the Patent Administrative department Under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	Where the invention or utility model for which the patent right has been granted involves important technical advancements of considerable economic significance in relation to another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administration department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administration department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.	Where the invention or utility model for which the patent right has been granted constitutes important technical advance of considerable economic significance compared with another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the patent administrative department under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model. Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department under the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 52	Article 53	Article 53	Article 52 (Newly added)
The exploitation of a compulsory license shall be predominately for the supply of the domestic market, except as otherwise provided for in Article 50, paragraph one of this Law. Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the public interest or to the use in remedy of an action of eliminating and restricting competition as determined by the judicial or administrative procedure.	The exploitation of a compulsory license shall be predominately for the supply of the domestic market, except as otherwise provided for in Article 49(2) and 51(1) of this Law. Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the public interest or to the use in remedy of an action of eliminating and restricting competition as determined by the judicial or administrative procedure.	Where the invention-creation covered by the compulsory license relates to a semi-conductor technology, the exploitation under the compulsory license is limited to the following situations: non-commercial public use; a compulsory license is necessary for the applicant due to an action of eliminating and restricting competition by the patentee as determined by the judicial or administrative procedure.	Where the invention-creation covered by the compulsory license relates to semi-conductor technology, the exploitation under the compulsory license is limited to the use for the purpose of public interest and the conditions specified in Article 48(2).
Article 53	**Article 54**	**Article 54**	**Article 53 (Newly added)**
The entity or individual requesting, in accordance with the provisions of Article 48 or Article 50 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.	The entity or individual requesting, in accordance with the provisions of Article 49 or Article 51 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.	The exploitation of a compulsory license shall be for the supply of the domestic market, except as otherwise provided for in Article 49(2) and 51 of this Law.	Except as otherwise provided for in Article 48(2) and 50 of this Law, the compulsory license is used mainly for the supply of the domestic market.

Article 54	Article 55	Article 55	Article 54 (Original Article 51)
The decision made by the Patent Administrative department Under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the Patent Administrative department Under the State Council may, after review upon the request of the patentee, terminate the compulsory license.	The decision made by the patent administrative department Under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, after review upon the request of the patentee, terminate the compulsory license.	The entity or individual applying, in accordance with the provisions of Article 49(1) or Article 52 of this Law, a compulsory license for exploitation shall furnish proof that it or he has made requests for a license from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time.	Any entity or individual applying a compulsory license in accordance with the provisions of Article 48(1) or Article 51 of this Law, shall provide proof that it or he has made requests for a license to the patentee to exploit the patent on reasonable conditions but was not licensed within a reasonable period of time.

Article 55	Article 56	Article 56	Article 55
Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others.	Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others.	The decision made by the patent administration department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administration department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.	The decision made by the patent administrative department under the State Council granting a compulsory license for exploitation shall be notified promptly to the patentee concerned, and shall be registered and announced. In the decision granting the compulsory license for exploitation, the scope and duration of the exploitation shall be specified on the basis of the reasons justifying the grant. If and when the circumstances which lead to such compulsory license cease to exist and are unlikely to recur, the patent administrative department under the State Council may, upon the request of the patentee, terminate the compulsory license after examination.

Article 56	Article 57	Article 57	Article 56
The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the Patent Administrative department Under the State Council shall adjudicate.	The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall adjudicate.	Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.	Any entity or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.

Article 57	Article 58	Article 58	Article 57 (Original Article 54)
Where the patentee is not satisfied with the decision of the Patent Administrative department Under the State Council granting a compulsory license for exploitation, or the entity or individual requesting a compulsory license for exploitation is not satisfied with the decision made by the Patent Administrative department Under the State Council rejecting its or his application, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. Where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the Patent Administrative department Under the State Council regarding the exploitation fee, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.	Where the patentee is not satisfied with the decision of the patent administrative department Under the State Council granting a compulsory license for exploitation, or the entity or individual requesting a compulsory license for exploitation is not satisfied with the decision made by the patent administrative department under the State Council rejecting its or his application, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. Where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the Patent Administrative department Under the State Council regarding the exploitation fee, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China.	Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. Where the parties fail to reach an agreement, the patent administration department under the State Council shall make a ruling.	Any entity or individual that is granted a compulsory licence shall pay the patentee a reasonable royalty fee for patent exploitation or handle the exploitation fee issue in accordance to the relevant provisions of international conventions in which China participates. The amount of the fee shall be decided by both parties upon consultation. Where the parties fail to reach an agreement, the patent administrative department under the State Council shall make a ruling.

		Article 59 Where the patentee is not satisfied with the decision of the patent administration department under the State Council granting a compulsory license for exploitation, or where the patentee or the entity or individual that is granted the compulsory license for exploitation is not satisfied with the ruling made by the patent administration department under the State Council regarding the fee payable for exploitation, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.	Article 58 Where the patentee is not satisfied with the decision issued by patent administrative department under the State Council on granting a compulsory license for patent exploitation, or where the patentee or the entity or individual that is granted the compulsory license for patent exploitation is not satisfied with the ruling made by the patent administrative department under the State Council regarding the royalty fee for exploitation, he or it may, within three months from the date upon receiving the notification, file suit to the people's court.

Chapter VII Protection of Patent Right	Chapter VII Patent Right Protection	Chapter VII Protection of Patent rights	Chapter VII Protection of Patent rights
Article 58 The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims. The extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs. The brief explanation may be used to interpret the drawings or photographs.	Article 59 The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims. The extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs. The brief explanation may be used to interpret the drawings or photographs.	Article 60 The scope of protection in the patent right for an invention or a utility model shall be determined by the contents of the patent claim. The specification and appended drawings may be used to interpret the patent claim. The scope of protection in the patent right for a design shall be determined by the product incorporating the patented design as shown in the drawings or photographs.	Article 59 (Original Article 56) The scope of protection for an invention patent or a utility model patent shall be determined on the basis of the patent claim which may be explained by use of the specification and appended drawings. The scope of protection for a design patent shall be determined by the product's design shown in the drawings or photographs. The brief statement of the patent could be used to interpret the design of the product shown in the drawings or photographs.

Article 59	Article 60	Article 61	Article 60
Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the patent administrative department to handle the matter.	Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the patent administrative department to handle the matter.	Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter.	Where a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties. Where the parties are not willing to consult with each other or where the consultation fails, the patentee or any interested party may institute legal proceedings in the people's court, or request the administrative authority for patent affairs to handle the matter.

		Article 61 (Continued)	Article 60 (Continued)
		When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.	When the administrative authority for patent affairs handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately. If the infringer is not satisfied with the order, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China. If, within the said time limit, such proceedings are not instituted and the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution. The said authority handling the matter may, upon the request of the parties, mediate in the amount of compensation for the infringement of the patent right. If the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.

Article 60	Article 61	Article 62	Article 61 (Original para 57 (2)
When the patent administrative department handling the patent infringement dispute considers that the infringement is established, it shall order the infringer to stop the infringing act immediately. If a party is not satisfied with the order made by the patent administrative department, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China; if, within the said time limit, such proceedings are not instituted and the order is not complied with, the patent administrative department may approach the people's court for compulsory execution.	When the patent administrative department handling the patent infringement dispute considers that the infringement is established, it shall order the infringer to stop the infringing act immediately. If a party is not satisfied with the order made by the patent administrative department, he may, within 15 days from the date of receipt of the notification of the order, institutes legal proceedings in the people's court in accordance with the Administrative Procedure Law of the People's Republic of China; if, within the said time limit, such proceedings are not instituted and the order is not complied with, the patent administrative department may approach the people's court for compulsory execution.	Where any infringement dispute relates to a patent for utility model, the people's court or the administrative authority for patent affairs may ask the patentee to furnish a patent right appraisal report made by the patent administration department under the State Council. The patent administration department under the State Council conducts a search, analysis and appraisal of the related utility models or design patents according to the request of patentee or interested party, and issue a patent right appraisal report. Patent right appraisal report is prima facie evidence for people's court and the administrative authority for patent affairs to determine the validity of the patent right.	Where any infringement dispute involves a invention patent for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the course of producing its or his product is different from the patented process. Where the infringement relates to a utility model patent or design patent, the people's court or the patent administrative authority may require the patentee to furnish a patent evaluation report issued by the patent administrative department under the State Council after searching, analyzing and evaluating the patent which may be used as evidence to determine or settle patent disputes.

Article 60 (Continued)	Article 61 (Continued)		
The patent administrative department handling the patent infringement dispute may, upon the request of the parties, mediate in the amount of compensation for the damage caused by the infringement of the patent right; if the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.	The patent administrative department handling the patent infringement dispute may, upon the request of the parties, mediate in the amount of compensation for the damage caused by the infringement of the patent right; if the mediation fails, the parties may institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.		
Article 61	**Article 62**	**Article 63**	**Article 62 (Newly added)**
Where any patent infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process. Where a patent infringement dispute relates to a patent for utility model or a patent for design, the patentee or the interested party shall furnish to the people's court or the patent administrative department a search report made by the Patent Administrative department Under the State Council.	Where any patent infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process.	If during the patent infringement dispute, the suspected infringer has evidence proving its or his technology or design belongs to prior art or prior design, no patent infringement shall be found.	During a patent infringement dispute, if the alleged infringer has evidence proving its or his technology or design belongs to the prior art or is a prior design, it will not constitute patent infringement.

Article 62	Article 63	Article 64	Article 63
Where the people's court or the patent administrative department trying or handling the patent infringement dispute decides that the technology or design exploited by the accused infringer belongs to prior art or prior design based on the evidences provided by the parties, the said exploiting act shall not be considered as constituting an infringing act.	Where a patent infringement dispute relates to a patent for utility model or a patent for design, the patentee or the interested party shall furnish to the people's court or the patent administrative department a search report made by the patent administrative department Under the State Council. The patentee or an interested party can after the utility model or design patent is granted request a search report from the patent administrative department under the State Council. The patent administrative department under the State Council must according to the request conduct a search of the related utility models or design patents, and according to the search result conduct analysis and appraisal whether it accords the requirements for grant of a patent, issue a search report and announce. The search report confirms the requirements for grant of a patent right for a utility model or external design is not in accordance with this law, but the patentee still claims its patent rights against an infringer, it must undertake obligation of compensation if it causes loss to the other party.	Where any person passes the patent of another person off as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than four times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 200,000 yuan. Where the infringement constitutes a crime, he shall be investigated for his criminal liability.	Where any person passes off others' patent, the infringer shall, in addition to bearing the civil liability according to law, amend his act ordered publicly by the patented related administrative authority. The illegal earnings shall be confiscated and a fine will be imposed of not more than four times of the illegal earnings; if there are no illegal earnings, the fine will not be more than RMB 200,000 yuan; where the infringement constitutes a crime, the infringer shall be liable for criminal liability.

Article 63	Article 64	Article 65	Article 64 (Newly added)
Where the patentee, knowing that the technology or design for which a patent right has been granted belongs to prior art or prior design, accuses other persons for infringing its or his patent right and institutes legal proceedings in the people's court or request the patent administrative department to handle the matter, the accused infringer may request the people's court to order the patentee to compensate for the damage thus caused to the accused infringer.	If during the patent infringement dispute, the infringer has evidence proving their technology or design belongs to presently existing prior art or a prior creation, this will not constitute patent infringement behaviour.	Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the administrative authority for patent affairs to make rectification, and the order shall be announced. His illegal earnings shall be confiscated and he may be imposed a fine of not no more than RMB 200,000 yuan.	The relevant patent administrative authority may, based on the evidence it obtains, query the related parties and conduct investigations concerning infringing activities when investigating the suspected passing-off matters; and may examine the place where the suspected infringement took place; view, reproduce any contracts, invoices, books and other materials related to the suspected infringement; examine the products related to suspected infringement, and may seal up or seize the products which has been proved to pass off patent rights. The parties should neither reject nor interfere the legal performance of duty by the patent related administrative authority, and should to assist and cooperate.

Article 64	Article 65	Article 66	Article 65
Where the patent administrative department handling the patent infringement dispute decides that the infringement is established and the infringer committed the infringement on purpose, the said department may, in addition to ordering the infringer to stop the infringing act immediately, impose the infringer on a fine of not more than RMB 100,000 yuan.	Where the patentee or interested party for the purpose of harming another's interests, without facts or a fair reason accuses another of infringing their patent right and institutes legal proceedings in the people's court or requests the patent administrative department to handle the matter, the accused infringer may request the people's court to order the patentee to compensate for the damage thus caused to the accused infringer.	The amount of compensation for the damage caused by the infringement of the patent right shall be determined through consultation by the parties. Where the consultation fails, it shall be assessed on the basis of the losses suffered by the patentee whose right was infringed or the profits, which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license. If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the amount of the exploitation fee, people's court may, according to the type of the patent right, the nature and gravity of the infringing act, determine a grant of damages no less than 10,000 yuan and no more than 1,000,000 yuan. The compensation for the damage caused by the infringement of the patent right shall include reasonable expense spent by patentee to stop the infringing act.	The amount of compensation for the damage caused by patent infringement shall be assessed on the basis of the loss actually suffered by the patentee, or the profits which the infringer has earned through the infringement if it is difficult to specify the above loss. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the royalty fee for patent exploitation. The amount of damage shall include the reasonable costs incurred for stopping the patent infringement. If it is difficult to determine the losses which the patentee has suffered, the profits which the infringer has earned, or the loyalty fee for patent exploitation, the people's court may award damages no less than 10,000 yuan and no more than 1,000,000 yuan depending on the type of patent right, the nature and gravity of the infringing act etc.

Article 65	Article 66	Article 67	Article 66 (Original Article 61)
Where any person passes off the patent of another person as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the patent administrative department to amend his act, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan; where the infringement constitutes a crime, he shall be prosecuted for his criminal liability	Where any person passes off the patent of another person as his own, he shall, in addition to bearing his civil liability according to law, be ordered by the patent administrative department to amend his act, and the order shall be announced. His illegal earnings shall be confiscated and, in addition, he may be imposed a fine of not more than three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan; where the infringement constitutes a crime, he shall be prosecuted for his criminal liability	Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, or during the legal proceedings, request the people's court to adopt measures for ordering the suspension of relevant acts. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions regarding preservation of property of the Civil Procedure Law of the People's Republic of China.	Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before filing a suit, apply to the people's court for an order to stop the relevant acts. The applicant shall provide a guarantee for the above-mentioned motions; if the applicant does not provide a bond, the application shall be rejected. Upon receiving the request, the people's court shall make a ruling within 48 hours where there are special circumstances that require extension, the court may extension the 48 hours. If a ruling is made to stop the related acts, this ruling should be enforced immediately. If the parties are not satisfied with the ruling, they could apply for a one-time review; the enforcement of the ruling will not be suspended during the course of review.

			Article 66 (Continued) If the applicant does not file a lawsuit within 15 days after the people's court issued an order to stop related acts, the people's court shall withdraw the prior ruling. If the application is in error, the applicant shall compensate to the opposite party for losses caused by stopping the relevant acts.

Article 66	**Article 67**	**Article 68**	**Article 67 (Newly added)**
Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the patent administrative department to amend his act, and the order shall be announced, with confiscation of illegal earnings and, in addition, he may be imposed a fine of up to three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan.	Where any person passes any non-patented product off as patented product or passes any non-patented process off as patented process, he shall be ordered by the patent administrative department to amend his act, and the order shall be announced, with confiscation of illegal earnings and, in addition, he may be imposed a fine of up to three times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 100,000 yuan.	In order to stop an act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings. After acceptance of the request, the people's court shall make a ruling within 48 hours. If the ruling is to adopt evidence preservation measures it must be immediately implemented. The people's court may order the applicant to provide a guarantee; if the applicant fails to do so, the application shall be rejected. If the applicant does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.	In order to prevent infringing activities, under the circumstance that the evidence might be destroyed or later be difficult to obtain, the patentee or a related injured party may before filing a law suit apply to the people's court for evidence preservation. The people's court may order the applicant to provide a guarantee for the application of evidence preservation, and if no guarantee is provided by the applicant, reject the application. Upon accepting the request, the people's court shall make a ruling within 48 hours; If the court rules to preserve evidence, this ruling should be enforced immediately. If the applicant does not file a lawsuit within 15 days after the people's court issued an order to preserve evidence, the people's court shall withdraw the prior ruling.

Article 67	Article 68	Article 69	Article 68
When handling patent infringement disputes, investigating and prosecuting the act of passing off the patent of another person or passing off a patent, the patent administrative department may exercise the following functions and authorities: (1) to inquire the parties involved, and to investigate the facts relevant to the alleged illegal act; (2) to inspect and duplicate the contracts, invoices, account books and other relevant materials related to the party's alleged illegal act; (3) to carry out an on-the-spot inspection of the site where the party's alleged illegal act took place; (4) to examine the products related to the illegal act and seal up or seize the products that are proved by evidences to infringe the patent right, pass off the patent of other person or pass off a patent. The parties shall assist and cooperate with the patent administrative departments in exercising the functions and authorities prescribed in the preceding paragraph in accordance with law, and may not refuse or impede them.	The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the losses suffered by the patentee. If it is difficult to determine the losses which the patentee has suffered, the amount may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine both the losses which the patentee has suffered and the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license.	The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	The period of limitation for filing a suit concerning the infringement of a patent right shall be two years, counted from the day on which the patentee or the interested parties became aware or should have become aware of the act of infringement. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, during the period from the publication of the application for the patent to the grant of patent right to the said invention is paid, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.

Article 68	Article 69	Article 70	Article 69
The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the losses suffered by the patentee. If it is difficult to determine the losses which the patentee has suffered, the amount may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine both the losses which the patentee has suffered and the profits which the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license.	Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe their patent right and that if such infringing act is not promptly prevented it will be difficult to avoid harm, they may before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and property preservation measures. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China. In relatively complicated cases the parties must be subpoenaed within 48 hours to conduct an inquiry, and a ruling issued within 5 days.	None of the following shall be deemed an infringement of the patent right: (I) Where, after the sale of a patented product that was made by the patentee or an entity/individual authorized by the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product; (2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;	None of the following shall be deemed an infringement of the patent right: (I) Where, after the sale of a patented product or products directly obtained by using the patented process, which was made by the patentee or an entity/individual authorized by the patentee, any other person uses, offers to sell, sells or imports that product; (2) Before the date of filing the patent application, any person who has already made the identical product, used the identical process, or made the necessary preparations for its making or using, continues to make or use it within the original scope only;

Article 68 (Continued)		Article 70 (Continued)	Article 69 (Continued)
The amount of compensation for the damage caused by the infringement of the patent right shall further include a reasonable expense the patentee has incurred in order to stop the infringing act. Where it is difficult to determine the losses suffered by the patentee, the profits which the infringer has earned through the infringement and the patent exploitation fee under contractual license, the people's court may set an amount of compensation of not less than RMB 5,000 yuan and not more than RMB 1,000,000 yuan in light of factors such as the type of the patent right, the nature of the infringing act and the circumstances.		(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation. (5) For the purpose of providing the information needed for the administrative approval, any entity or individual planning to manufacture a drug or a medical apparatus manufactures a patented drug or a patented medical apparatus.	(3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (4) Where any person uses the patent concerned solely for the purposes of scientific research and experiments. (5) For the purpose of providing the information needed for the administrative approval, manufacture, use, import of a drug or a medical apparatus, and exclusively for such manufacture any import of a patented drug or a patented medical apparatus.

Article 69	Article 70	Article 71	Article 70 (Original last para of Article 63)
Where any patentee or interested party has evidence to prove that another person is infringing or will soon infringe its or his patent right and that if such infringing act is not checked or prevented from occurring in time, it is likely to cause irreparable harm to it or him, it or he may, before any legal proceedings are instituted, request the people's court to adopt measures for ordering the suspension of relevant acts and the preservation of property. The people's court, when dealing with the request mentioned in the preceding paragraph, shall apply the provisions of Article 93 through Article 96 and of Article 99 of the Civil Procedure Law of the People's Republic of China.	In order to stop a act of patent infringement, under the circumstance that an evidence might become extinct or hard to obtain, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings. After acceptance of the request, the people's court shall make a ruling within 48 hours. In relatively complicated cases the parties must be subpoenaed within 48 hours to conduct a inquiry, and make a ruling within 5 days. If the ruling is to adopt property preservation measures it must be immediately implemented. The people's court may order the applicant to provide a guarantee; if the requester fails to do so, the application shall be rejected. If the applicant does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.	Any person who, purchases and, for production and business purposes, uses, offers to sell or sells a product manufactured and sold without authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.	Any person, who, for business purposes, uses, offers to sell or sells a patented product without knowing that it was made and sold without the authorization of the patentee, shall not be liable for any damages if he can prove that he obtained the product from a legitimate source.

Article 70	Article 71	Article 72	Article 71
In order to stop a patent infringing act, under the circumstance that an evidence might become extinct or hard to obtain hereafter, the patentee or the interested party may request the people's court for preservation of the evidence before instituting legal proceedings. After acceptance of the request, the people's court shall make a ruling within 48 hours; if the court rules to grant preservation measures, the execution thereof shall be started immediately. The people's court may order the requester to provide guarantee; if the requester fails to do so, the request shall be rejected. If the requester does not institute legal proceedings within 15 days after the people's court has adopted the preservation measures, the people's court shall lift the preservation measures.	The limitation for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, is paid during the period from the publication of the application to the grant of patent right, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.	Anyone who, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent which divulges State secrets shall be given administrative sanction by the unit to which he belongs or by the competent department at a higher level. If the case constitutes a crime, he shall be investigated for criminal liability in accordance with law.

Article 71	Article 72	Article 73	Article 72
Prescription for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act. Where no appropriate fee for exploitation of the invention, subject of an application for patent for invention, is paid during the period from the publication of the application to the grant of patent right, prescription for instituting legal proceedings by the patentee to demand the said fee is two years counted from the date on which the patentee obtains or should have obtained knowledge of the exploitation of his invention by another person. However, where the patentee has already obtained or should have obtained knowledge before the date of the grant of the patent right, the prescription shall be counted from the date of the grant.	Where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter exceeding 2 years without reasonable justification, the infringer does not have a duty to compensate the patentee or interested party for infringements that occurred before the date on which they filed suit. However, infringing conduct that continues after the patentee or interested party filed suit or requested the matter to be handled must be stopped. If the infringer pays a reasonable fee, they can continue exploiting the related patent.	Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.	Anyone who usurps the right of an inventor or designer to apply for a patent for a non-job-related invention-creation or usurps the other rights or interests of an inventor or designer prescribed in this Law shall be given administrative sanction by the unit to which be belongs or by the competent department at a higher level.

Article 72	Article 73	Article 74	Article 73
Where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter beyond the prescription for instituting legal proceedings, it or he may be granted a compensation for damages caused by an infringement act occurring 2 years before the date of instituting the legal proceedings or requesting the handling; Where the patentee or any interested party institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter 3 years after the expiration of the prescription for instituting legal proceedings, it or he shall not be entitled to a compensation for damages caused by an infringement act occurred before the date of instituting the legal proceedings or requesting the handling; in the above situation, where the infringing act still continues at the time of the institution of the legal proceedings or the request for handling, it or he may request the people's court or the patent administrative department to order the infringer to stop the infringing act immediately.	Where the relevant act, indication of intention of the patentee or any interested party makes the entity or the individual exploiting the patent thereof have reasons to believe that the patentee or the interested party will not claim its or his right over the exploitation, whereas it or he subsequently institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter, its or his claiming of right and it or he shall not be entitled to a compensation for damages caused by an act exploited before the date of instituting the legal proceedings or requesting the handling, nor shall it or he be entitled to request the people's court or the patent administrative department to order the entity or the individual to stop the exploitation of the act.	The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.	The administrative authority for patent affairs may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the administrative authority for patent affairs violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.

Article 73	Article 74	Article 75	Article 74
Where the relevant act, indication of intention or silence of the patentee or any interested party makes the entity or the individual exploiting the patent thereof have reasons to believe that the patentee or the interested party will not claim its or his right over the exploitation, whereas it or he subsequently institutes legal proceedings before the people's court or requests the patent administrative department to handle the matter, its or his claiming of right is obviously contrary to the principle of good faith, and it or he shall not be entitled to a compensation for damages caused by an act exploited before the date of instituting the legal proceedings or requesting the handling, nor shall it or he be entitled to request the people's court or the patent administrative department to order the entity or the individual to stop the exploitation of the act.	None of the following shall be deemed as infringement of the patent right: (1) Where, after the sale of a patented product that was made by the patentee or with the authorization of the patentee, or of a product that was directly obtained by using the patented process, any other person uses, offers to sell, sells that product; (2) A patent rights holder who has obtained a patent in China or a licensed person in other country or area after that patented products is manufactured or products obtained directly from that patented method are sold, imports that product, as well as uses, offers to sell, or sells that product, (3) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;	Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.	Where any State functionary working for patent administration or any other State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be investigated for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.

	Article 74 (Continued) (4) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (5) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation; (6) Where any person manufactures, uses or imports a patented drug or a patented medical apparatus solely for the purposes of obtaining and providing the information needed for the administrative approval of the drug or medical equipment, and any person manufactures, imports or sells a patented drug or a patented medical apparatus to the said person.		

Article 74 None of the following shall be deemed as infringement of the patent right: (1) Where, after the sale of a patented product that was made by the patentee or with the authorization of the patentee, or of a product that was directly obtained by using the patented process, any other person uses, offers to sell, sells or imports that product; (2) Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;	**Article 75** If the patent holder requests the people's court or patent administrative department under the State Council for an order prohibiting infringement of their patent rights, if by stopping implementing the related patent the infringer cause harm to the public interest, the people court or patent administrative department can not order the infringer to cease carrying out these actions. The infringer can then continue to carry out these actions, but they must pay a reasonable fee.		

Article 74 (Continued) (3) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations; (4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation; (5) Where any person manufactures, uses or imports a patented drug or a patented medical apparatus solely for the purposes of obtaining and providing the information needed for the administrative approval of the drug or medical equipment, and any person manufactures, imports or sells a patented drug or a patented medical apparatus to the said person.			

Article 75 Any person who, for production and business purpose, uses, offers to sell or sells a patented product or a product that was directly obtained by using a patented process, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.	**Article 76** Any person who, for production and business purpose, uses, offers to sell or sells a patented product or a product that was directly obtained by using a patented process, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the patentee if he can prove that he obtains the product from a legitimate source.		
Article 76 Where any entity or individual, without the approval of the Patent Administrative department under the State Council, files in a foreign country an application for a patent for invention-creation that is completed in China, no patent right shall be granted for the patent application for said invention-creation filed in China by it or him; where the secret of the State is divulged, the person concerned shall be prosecuted for his legal liability.	**Article 77** Where any entity or individual, without the approval of the patent administrative department under the State Council, files in a foreign country an application for a patent for invention-creation that is completed in China, no patent right shall be granted for the patent application for said invention-creation filed in China by it or him; where the secret of the State is divulged, the person concerned shall be prosecuted for their legal liability.		

Article 77 Where any person usurps the right of an inventor or creator to apply for a patent for a non-service invention-creation, or usurps any other right or interest of an inventor or creator, prescribed by this Law, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority at the higher level.	**Article 78** Where any person usurps the right of an inventor or creator to apply for a patent for a non-service invention-creation, or usurps any other right or interest of an inventor or creator, prescribed by this Law, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority at the higher level.		
Article 78 The patent administrative department may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the patent administrative department violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.	**Article 79** The patent administrative department may not take part in recommending any patented product for sale to the public or any such commercial activities. Where the patent administrative department violates the provisions of the preceding paragraph, it shall be ordered by the authority at the next higher level or the supervisory authority to correct its mistakes and eliminate the bad effects. The illegal earnings, if any, shall be confiscated. Where the circumstances are serious, the persons who are directly in charge and the other persons who are directly responsible shall be given disciplinary sanction in accordance with law.		

Article 79 Where any State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be prosecuted for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.	**Article 80** Where any State functionary working for patent administration or any other State functionary concerned neglects his duty, abuses his power, or engages in malpractice for personal gain, which constitutes a crime, shall be prosecuted for his criminal liability in accordance with law. If the case is not serious enough to constitute a crime, he shall be given disciplinary sanction in accordance with law.		
Chapter VIII Supplementary Provisions	**Chapter VIII Supplementary Provisions**	**Chapter VIII Supplementary Provisions**	**Chapter VIII Supplementary Provisions**
Article 80 Any application for a patent filed with, and any other proceedings before, the Patent Administrative department Under the State Council shall be subject to the payment of a fee as prescribed.	**Article 81** Any application for a patent filed with, and any other proceedings before, the patent administrative department under the State Council shall be subject to the payment of a fee as prescribed.	**Article 76** Rules for the implementation of this Law shall be formulated by the patent administration department under the State Council and submitted to the State Council for approval before they are put into effect.	**Article 75** Rules for the implementation of this Law shall be formulated by the patent administrative department under the State Council and submitted to the State Council for approval before they are put into effect.
Article 81 This Law shall enter into force on April 1, 1985.	**Article 82** This law shall enter force on 1 May 1985.	**Article 77** This law shall go into effect on.	**Article 76** This Law shall go into effect on 1 April 1985.

This publication was produced with the assistance of the European Union

www.ipr2.org