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Latest Developments of Patent System in Mainland China

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Ladies and gentlemen, Dear friends,

It is my great honor to be invited to this symposium and make a presentation on the latest developments of patent system in mainland China. My speech is divided into 3 parts:

(1) the formulation of Chinese Patent Law and its first revision
(2) the second revision of Chinese Patent Law and China’s accession to WTO
(3) latest developments of patent system in mainland China

1. The Formulation of Chinese Patent Law and Its First Revision

The first Chinese Patent Law was published in 1984 and formally entered into enforcement on April 1, 1985. The purpose of its formulation is to adapt to the government policy of promoting economy and opening-up. This law has absorbed the advantages of various patent systems while taken into consideration of Chinese practices. It follows the basic rules of Paris Convention and creates a sound basis for establishing and promoting the development of Chinese patent system.

In 1992, TRIPS agreement has reached its framework and been signed in draft. In order to enhance our protection level and be harmonized with TRIPS, China made important revision to its Patent Law. The revised patent law entered into force on January 1, 1993. This revision has greatly enhanced the protection level and as a developing country China provides the complete protection in the leading role. Like TRIPS, China prescribes that inventions in all technology fields are under protection. Patentee has the right of importation and there is strict limitation on granting compulsory license. The granted patent should have novelty, creativity, industrial applicability and the term of protection is 20 years. The terms of protection for utility model and design are 10 years from the date of filing. Patent description should make full disclosure to the technology solution and the burden of proof is on the defendant if an infringe case of process patent is filed against him. China’s patent protection level has been recognized by the world for its conformity with TRIPS.

2. Second Revision of Chinese Patent Law and China’s Accession to WTO

In November 2001, China has formally acceded to WTO, which opened a new era for China’s opening-up process. At the same time, it also raised new requirements for the development of domestic economy market and the harmonization of Chinese law system to the international standard. For the purpose of further harmonizing with basic rules of WTO and implementing the promises of Chinese government, Chinese Patent Law made its second revision. It increases the intellectual property awareness especially patent protection awareness and creates a sound social environment for the generation and promotion of inventions. This revision mainly includes:

(1) Patentee has the right to forbid others from offering for sale without his authorization, namely sales promotion activities before distribution. Therefore, patentee can eliminate infringements before its completion.
(2) It regulates that the final decisions for reexamination and invalidation of utility model and design applications or patents are no longer made by Patent Reexamination Board within SIPO but by the court. Thus it provides a more reasonable and justified administrative remedy procedure.

(3) It adds that in order to avoid irreplaceable damages, patentee can apply for provisional measures, such as stopping certain actions and ask for property save from damage, before the court. Therefore, he may stop infringement immediately and reduce the loss of patentees.

(4) It further improves the conditions for granting compulsory license for patent, which makes the conditions more transparent and easy to operate. This certainly will be beneficial to reach a reasonable balance between the interests of patentees and the public. For the purpose of streamlining the relations, some contents relating to compulsory license in the implementation regulations have been moved into the patent law.

In the aspect of effective enforcement, this revision has further strengthened the judicial and administrative channel for dealing with patent disputes. Besides that, it prescribes even stricter sanctions on patent infringement, counterfeiting or passing-off. Activities infringing patent and composing of crimes will be subject to criminal sanctions. This helps to improve the judicial and administrative enforcement from various aspects and enhances the protection level.

Since the second revision of Chinese Patent Law, Chinese patent system has made great progress. According to the latest statistics of SIPO, within the first 9 months of the year 2003, the patent office has received totally 219,002 patent applications, which is 45% increase comparing with the same period of the previous year. It is estimated that the total patent applications in 2003 will reach 300,000. Since April 1, 1985, China spent 14 years and 9 months to reach its first one million case while the second million only costed a little bit more than 4 years. In 2002, the applications for patent invention was over 80,000, among which over 40,000 are foreign applications and 22,590 were via PCT. We can expect that in the near future, the examination capacity of the office will be greatly enhanced and the quality will also keep improving. By the year 2010, the annual examination and granting capacity of the office for 3 kinds of patents will be over 50,000, among them the capacity for invention patent will be over 20,000. The substantive examination period for invention patent will shrink into 18 months while 6 months for utility model and design.

3. Latest Developments of Patent System in Mainland China

Considering the continuous reform and strengthening activities for patent protection system and its environment from both within and without, the necessity of updating patent law is without doubt. Although the second revision of patent law has been finished recently, the necessary preparations for a new round of patent law revision is already under way. I will introduce briefly in the following text on the latest considerations and progresses recently made in the formulation and improvement of mainland patent laws and regulations:

(1) Explore the possibility of patent protection for high-tech inventions

With the rapid development of information technology, mobile communication, bio-engineering,
environment engineering, automatic control, aviation and spaceflight and nanometer materials, the areas under patent protection are keep expanding. SIPO accelerates its research on the patentability of gene, trans-gene technology, e-business and computer software in accordance with this trend. Issues relating to the draft of patent applications in those fields and how to progress substantive examinations are also under discussion.

I. It is well known that, the differences between inventions and discoveries are no longer as strict as before in the patent laws of many countries. In 1980s, a lot of countries changed its patent law and examination guidelines and granted patent right to new process of medicines. At present, there is a trend that inherited materials such as gene sequence are patentable as long as they meet the requirements of applicability. EU directive (1998) provides that an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

In China, biotechnology is patentable while discovery is not. We think that naturally existing gene or its DNA fragments discovered from the nature is only a kind of discovery, so it can not be granted as patent. However, if it is the gene or DNA fragments isolated or extracted from the nature for the first time and the sequence of its basic group is not recorded in the prior art, then the gene or DNA fragment itself and its producing process can be granted patent right, provided that it can be precisely expressed, be valuable in industry and its commercial exploitation is not against social moral or public interests.

Due to the lack of patentability of “animals and plant varieties”, we also do not grant patent to trans-gene animals and plants. An indirect protection may be obtained for trans-gene animals and plants by means of effective extension of process patent.

II. The examination standard of invention patent relating to computer software still applies to business method. This means that computer program itself belongs to rules and processes of intellectual activities, so it can not be granted patent right. However, if the content of patent application is “to solve technological problems and to achieve technological effect through technological means”, then it is under protection of Chinese Patent Law.

III. The development of information technology. Although the application of internet did not make fundamental changes to traditional legal relations, we can not underestimate its influence on the present laws. Patent law is also facing the challenges of internet. Firstly, patentable subject matters relating to internet technologies are expanding; secondly, the prior art effect of internet information is controversial. This indicates that with the development of information technology, internet application has made a profound impact on the basic theories and practices of patent system. Researches on relevant issues like the prior art status of internet information have already been started.

(2) Formulation of Regulations on Service Technology Achievements (draft)

For the purpose of improving intellectual property law system, regulating and streamlining the property relations of technology achievements, SIPO suggested in 2001 to the Legal Affairs Office of the State
Council on the formulation of “Regulation on Service Invention Creation”. With this regulation, we can provide IP protection to technology achievements and promote the systematic flow of its IP rights. At the beginning of 2003, the State Council listed the regulation into its legislation plan 2003 as second level project. SIPO accelerated its related research, investigation and drafting work accordingly. The formulation of the regulation aims at encouraging scientific practitioners and enterprises to make innovations and utilize their creations. Thereafter, the IP competitiveness of enterprises will be enhanced and China’s IPR quantity and quality be increased. This will lead to the realization of our ultimate goal of developing advanced productivity and fulfilling the fundamental interests of our people in the vastest scale.

(3) Pay attention to the patent integration process in a worldwide scale

With the development of WIPO patent integration process, intellectual property rules and regulations in the international society, such as formulation of PLT, discussion of SPLT and PCT, have been changing continuously. Similarly, China’s domestic laws are also under incessant adjustment and improvement.

On October 3, 2001, the 30th PCT Member States Assembly adopted the decision of revising article 22 of PCT. According to the decision, since April 1, 2002, the time limit for international applications under PCT Chapter I entering national phase is prolonged from 20 months to 30 months from the priority date. This revision will be more beneficial to applicants of international applications and will provide them with longer time to consider whether to proceed with the national phase. China agrees with this revision. On December 28, 2002, the State Council of P. R. China issued No. 368 order “Decision of the State Council on the Revision of ‘Implementation Regulations of Chinese Patent Law’”. This order initiated the revision on the implementation regulations of Chinese patent law issued by the No. 306 order of the State Council. The revised implementation regulations entered into force on February 1, 2003.

This revision only involves article 101 and 108 “special regulation on international application” under Chapter 10 of the implementation regulations. It is an adaptation to the revision of PCT article 22. The No. 26 office decree prescribes that “any international application designating China, whose time limit of 20 months from priority date will be expired on or after February 1, 2003 and the applicant has not completed the formalities for national phase, the revised article 101 and 108 of implementation regulations of Chinese patent law shall apply.”

We are very concerned with the formal proposal submitted by USA at the WIPO member states assembly on September 2000 -- “suggestions on PCT reform”. We think that the present proposals submitted to PCT reform working group are still ideas, but in the next few years, they will be gradually turned into concrete solution for the revision of treaty and its rule. Moreover, at the 4th session of patent law standing committee held in November 2000, all the countries suggested that international bureau should start to make international coordination on the substantive requirements for patent granting in various national patent laws. In April 2001, the international bureau had drafted the first “substantive patent law treaty” and until now it has been revised for 5 times. We think that all those negotiations are aiming at promoting the integration of patent system. We have actively participated all the related discussions and negotiations and have made in-depth and careful research on those
defined PCT and patent system reform projects. We have also contributed our proposals to each reform project or aspect and have been actively seeking for the most favorable results for our country in the process of patent system reform. Our stand is that decisions on IP protection scale, level and means should be subject to the service of national interests. In fact, it reflects the national economy development and science advancement.


WTO member governments broke the deadlock on August 30, 2003 and reached an agreement on section 6 of Doha “Declaration on the TRIPS agreement and Public Health” (hereinafter as Public Health Declaration) relating to IP protection and public health. They agreed to make certain revisions on law in order to make those poor countries with insufficient or no manufacturing capacities in the pharmaceutical sector to get cheaper patented medicines produced under compulsory license system. This has eliminated the barriers of importing cheap medicine under the existing patent system. It reflected at least two matters: first, the intellectual property system under TRIPS framework is far from perfect; second, the coordination and negotiation on TRIPS revision will start soon. This agreement is not equal to the conclusion of problems, but rather a necessary procedure leading to the final solutions. According to this agreement, TRIPS council will start the preparation work for TRIPS revision before the end of 2003 and try to get its adoption in the following 6 months. Besides that, the members will also have to agree on making revisions on the basis of the agreement. Taking into consideration of the present dissidence and the past working efficiency of the Council, the completion of the agreement, which will makes it an operable rule, can not avoid difficult negotiations. Due to the mechanism of the Council and its heavy workload, it will be very difficult for TRIPS council to finish the revision within 6 months. In general, there are 3 prospects for the impending revision work:

(1) Finish on time. This will need great efforts from its members. They have to show their support to the agreement and express their political wills;

(2) The revision will progress slowly and reach the agreement after long term negotiations. This is also the most possible result. As mentioned above, there are different solutions to the problem. In order to reach the gap, developing countries did not insist on authorized explanation to article 30 of TRIPS agreement as originally proposed. Besides, those developed countries such as USA also made compromises on the extent of applicable medicines;

(3) Due to dissensions, the revision is continued from time to time and leads to a long term delay. This is not completely impossible.

I think that developing countries should insist on the first quick solution. Because this agreement is the primary achievements reached by developing countries rely on the flexibility of TRIPS. The achievements could only be consolidated by the revision of TRIPS and reach further results on this basis:

In order to solve the problem of public health fundamentally, developing countries must enhance their capacities and equip themselves with medicine manufacturing ability. According to the recent willing expression in TRIPS council by its members and chairman, the revision to TRIPS will take the form of informal negotiations. But, how to make sure of the member participation in a most extended scale is
still a question of concern.

5. Traditional Knowledge and TRIPS

Paragraph 19 of Doha “Ministerial Declaration” indicates that the council for TRIPS “in pursuing its work program, ……, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.” Since Doha conference, developed countries and developing countries have shown distinct interests conflicts and given different suggestions in this regard. How to evaluate the progress and what is the proposal for the next step should be a serious question for consideration to all the WTO members.

Since the signing of Convention on Biological Diversity (CBD), many countries, in conformity with the spirit of CBD, has formulated and improved their laws on the access to heritage resources and traditional knowledge (TK). In regard to patent law, a lot of countries require the applicants to make statements on the heritage resources and TK used in biotechnology while applying patents. The applicants should also provide proof of authorization and agreements on interests share. As one of the countries with richest biodiversity in the world, China is within the country list of accession to CBD in the first batch. Since the implementation of CBD in 1993, Chinese government has implemented actively and seriously a series of effective work. The concrete means of introducing 3 CBD rules into the Chinese Patent Law are also under consideration. Article 26 of Chinese Patent Law provides that:

“Where an application for a patent for invention or utility model is filed, 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 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 field of technology to carry it out; where necessary, drawings are required. The abstract shall state briefly the main technical points of the invention or utility model.

The claims shall be supported by the description and shall state the extent of the patent protection asked for.”

This indicates that we have the legal basis for requiring the applicants to provide resource information, information of authorization from the right holder and interests share contract with the resource right holder. We may initiate necessary legal procedures to regulate the provision of those information.

Ladies and gentlemen, dear friends, “accession” to WTO has provided an opportunity to accelerate China’s development. However, this is also a new challenge to relevant administration and regulation
work including intellectual property protection. It will need us and all the practitioners in the sector to recognize the situation and continue to work hard on that. We are willing to maintain friendly communications with friends in Hong Kong and Macao for the purpose of deepening mutual understanding. This will result in a comprehensive and quick improvement to the development of our intellectual property cause and contribution to the general social welfare.

1 We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

2 paragraph 11 of the agreement