



**International Chamber of Commerce**  
*The world business organization*

## **Comments on the Draft Third Amendment of the Patent Law in China dated December 27, 2006**

*Prepared by the Commission on Intellectual Property*

*Submission to the Legal Affairs Office of the State Council*

### **Introduction**

The International Chamber of Commerce (ICC) is pleased to present the following comments on the draft Third Amendment of China's Patent Law dated December 27, 2006. The current draft of the Third Amendment is of great interest to our organization and our member companies.

Our organization is encouraged by the efforts of the State Intellectual Property Office (SIPO) and the Legal Affairs Office of the State Council (LAOSC) in revising China's Patent Laws and appreciates the opportunity to share its thoughts and suggestions on the present draft Third Amendment. The draft Third amendment, when implemented, would improve the patent statute in many ways and bring the Law a significant step closer to internationally accepted standards. In particular, ICC is pleased with SIPO's amendments to Articles 64, 70, as well as some sections of Article 19.

At the same time, there remain concerns and questions with some of the proposed changes in the present draft Third Amendment. ICC has provided detailed comments on a number of articles in which it has concerns and hopes to receive further clarification. ICC submission also includes a proposal for the LAOSC to consider the addition of two new article (Articles 27-1 and 40-1) in its next draft of the Third Amendment.

ICC hopes that these comments - which will be available in both Chinese and English - will assist LAOSC as it continues its work toward finalizing the Third Amendment of the Patent Laws in China. Additionally, it looks forward to providing LAOSC with a Chinese translation of its attached comments in the very near future.

ICC further hopes that it will be allowed to provide comments to the amendments to the Implementing Regulations, the Examination Guidelines, and the Regulation on Patent Commissioning that will follow from the passage of the revised Patent Law in the State Council.

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## Comments on the December 2006 Draft for the Third Amendment of the Chinese Patent Law

Current Patent Law (2000 Version)	Amended Patent Law (Draft) (December 27, 2006)	Comments and recommendations
Chapter I General Provisions	Chapter I General Provisions	
<p><b>Article 1.</b></p> <p>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 and innovation of science and technology, for meeting the needs of the construction of socialist modernization.</p>	<p><b>Article 1.</b></p> <p>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 <b>and of economics and society</b>, for meeting the needs of the socialist modernization <b>and construction of an innovative country</b>.</p>	
<p><b>Article 2.</b></p> <p>In this Law, inventions-creations" mean inventions, utility models and designs.</p>	<p><b>Article 2.</b></p> <p>In this Law, inventions-creations" mean inventions, utility models and designs.</p> <p><b>“Invention” means any new technical solution relating to a product, a process or improvement thereof.</b></p>	<p><b>Comment:</b></p> <p>ICC proposes including “chemicals and chemical compositions” specifically as subject matter to be protectable by utility model, which would be in line with the situation in a number of European countries.</p>

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	<p>“Utility model” means any new technical solution relating to the shape, structure, or their combination, of a product, which is fit for practical use.</p> <p>“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.</p>	
<p><b>Article 3.</b></p> <p>The Patent Administration 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.</p> <p>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.</p>	<p><b>Article 3.</b></p> <p><b>People’s governments at all levels shall take effective measures to promote the creation, management, protection and application of patent rights.</b></p> <p>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.</p> <p><b>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</b></p>	

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	<p>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.</p>	
<p><b>Article 4.</b></p> <p>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 relevant prescriptions of the State.</p>	<p><b>Article 4.</b></p> <p>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 <b>the Law of the People's Republic of China on Guarding State Secrets and other</b> relevant prescriptions of the State.</p> <p><b>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.</b></p>	<p><b>Comment (see also Articles 20 and 76):</b></p> <p>ICC welcomes some of the changes in this article. However, the amended Article 4 must be considered in conjunction with the proposed Article 20 and 76. SIPO has provided some comments in relation to the proposed change and it is stated in the “Constructions” document that the purpose is to create rules to protect the interests and secrets of the state that are alike to the rules in the USA. ICC appreciates these efforts, but believe that the proposed changes are too burdensome and the consequences of making any mistakes are too draconic.</p> <p>ICC proposes that China should follow the path of a number of European countries, such as the UK, Germany and Netherlands. Such a change would also meet the purpose that SIPO has stated for the present amendment.</p> <p>ICC would also suggest that the law should provide that if a Chinese or International patent application is filed first in China, then approval from the Patent Administrative department Under the State Council should automatically be considered to having been granted</p>

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		<p>after a predetermined period, such as thirty days, in order for the applicant not to be forced to make a separate application for permission to file an application outside China. The filing of a national or international application in China should therefore be considered as fulfilling the requirements of Article 4.</p> <p>If the proposal is maintained, ICC proposes that similarly to the USA, it should be possible for an applicant to file a petition for retroactively be granted permission to file a patent application outside China, in situations where such a permission by error was not obtained prior to filing. This would be reasonable in view of the fact that only a very small fraction of patent applications relate to inventions that would be required to be kept secret to protect State Secrets etc.</p> <p>ICC also recommends that the Implementing Regulations should set out that the approval procedure shall be expedient in order to provide high efficiency and making it possible to obtain approval in e.g. thirty days.</p>
<p><b>Article 5.</b></p> <p>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.</p>	<p><b>Article 5.</b></p> <p>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. <b>However, it is not allowed that no patent right is granted for an invention-creation only</b></p>	

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	<p><b>the exploitation of which is prohibited under the laws of the State.</b></p>	
<p><b>Article 6.</b></p> <p>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.</p> <p>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.</p> <p>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</p>	<p><b>Article 6.</b></p> <p>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.</p> <p>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.</p> <p>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.</p>	



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shall apply.		
<p><b>Article 7.</b></p> <p>No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.</p>	<p><b>Article 7.</b></p> <p>No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.</p>	
<p><b>Article 8.</b></p> <p>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 applied for it shall be the patentee.</p>	<p><b>Article 8.</b></p> <p>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 <b>provided for</b>, 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.</p>	
<p><b>Article 14.</b></p> <p>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</p>	<p><b>Article 9.</b></p> <p><b>For an invention-creation which is completed under a scientific research project funded mainly with government investment, except that the invention-</b></p>	

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<p>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.</p> <p>Any patent for invention belonging to a Chinese individual or an entity under collective ownership, which is of great significance to the interest of the State or to the public interest and is in need of spreading and application, may be treated alike by making reference to the provisions of the preceding paragraph.</p>	<p><b>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.</b></p> <p><b>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-invention be spread and applied within the approved limits, and allow designated entities to exploit that invention.</b></p> <p><b>Concrete measures implementing the provisions of the present article are provided by the State Council.</b></p>	

<p><b>Article 9.</b></p> <p>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.</p>	<p><b>Article 10.</b></p> <p><b>Except for the circumstances provided in the present article, paragraph two, for any identical invention-creation, only one patent right shall be granted.</b></p> <p><b>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.</b></p> <p>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.</p>	<p>ICC appreciates the purpose of amended Article 10 to avoid double protection by both utility model and patent for the same invention. However, we believe that the present implementing regulations must be changed in such a manner that the abandonment of the utility patent caused by the grant of a patent is only effective as from the date of grant of the patent. If the present regulations are maintained, the invention will effectively not be provided with protection in the period from filing to the grant of the patent.</p>
<p><b>Article 10.</b></p> <p>The patent application right and the patent right may be assigned.</p> <p>Any assignment, by a Chinese entity or individual, of the right to apply for a patent, or of the patent right, to a foreigner must be approved by the</p>	<p><b>Article 11.</b></p> <p><b>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.</b></p> <p>For any assignment of <b>the right to apply for a patent, the patent application</b></p>	<p>ICC proposes that a mandatory registration requirement shall only apply where security issues or the secret of the State, respectively, is concerned.</p> <p>If the proposal is maintained, ICC believes that the assignment of the patent application or the patent right shall take effect as of the date of the signature of the assignment, not as of the date of registration</p>

<p>competent department concerned of the State Council.</p> <p>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.</p>	<p>or the patent right by a Chinese entity or individual to a foreigner, <b>a foreign enterprise or a other foreign organization, relevant procedures must be followed in accordance with provisions of the laws and administrative regulations.</b></p> <p>Where a <b>patent application</b> 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 <b>of the patent application or the patent right</b> shall take effect as of the date of registration.</p>	<p>as proposed in the draft.</p> <p>ICC firmly believes that the effectiveness of a transfer of any of these rights must apply as of the time when the parties involved sign the contract and not be dependent on the registration thereof by the authorities.</p>
<p><b>Article 11.</b></p> <p>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.</p> <p>After the grant of the patent right for a design, no entity or individual may,</p>	<p><b>Article 12.</b></p> <p>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.</p> <p>After the grant of the patent right for a design, <b>unless otherwise provided in this</b></p>	

<p>without the authorization of the patentee, exploit the patent, that is, make, sell or import the product incorporating its or his patented design, for production or business purposes.</p>	<p><b>Law</b>, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, <b>offer to sell</b>, sell or import the product incorporating its or his patented design, for production or business purposes.</p>	
<p><b>Article 12.</b></p> <p>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.</p>	<p><b>Article 13.</b></p> <p>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.</p>	
<p><b>Article 13.</b></p> <p>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</p>	<p><b>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.</b></p>	
	<p><b>Article 14.</b></p> <p><b>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</b></p>	

	<p><b>upon otherwise:</b></p> <p><b>(1). assigning the right to apply for a patent;</b></p> <p><b>(2) assigning or withdrawing the patent application;</b></p> <p><b>(3) assigning, abandoning or pledging the patent right; and</b></p> <p><b>(4). licensing others to exploit the patent.</b></p> <p><b>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.</b></p>	
<p><b>Article 15.</b></p> <p>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.</p>	<p><b>Article 15.</b></p> <p>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.</p>	

<p><b>Article 16.</b></p> <p>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.</p>	<p><b>Article 16.</b></p> <p>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.</p>	<p><b>Comment:</b></p> <p>ICC proposes that either this article should be deleted or to replace it by the following new wording:</p> <p>“The <b>state-owned</b> entity that is granted a patent right shall award to the inventor or creator of a service invention-creation <b>made in China</b> 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 <b>in China</b>. A private entity has no obligation to award a reward to the inventor or creator of a service invention-creation <b>made in China</b>”</p> <p>Reasoning for change:</p> <ol style="list-style-type: none"> <li>1. To clarify that the obligation under this article applies only to state-owned enterprises. It should also make clear that the obligation does not apply to joint ventures with the involvement of a private entity.</li> <li>2. To clarify that this applies to inventions made in China and benefits yielded in China.</li> </ol> <p>Alternatively, Article 16 could be removed since it may lead to heavy burden and high expense to administer reward systems. Inventor’s rewards can be handled by the single entities along own policies developed by each entity separately.</p>
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<p><b>Article 17.</b></p> <p>The inventor or creator has the right to be named as such in the patent document.</p>	<p><b>Article 17.</b></p> <p>The inventor or creator has the right to be named as such in the patent document.</p>	
<p><b>Article 18.</b></p> <p>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.</p>	<p><b>Article 18.</b></p> <p>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.</p>	

<p><b>Article 19.</b></p> <p>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 designated by the Patent Administration Department Under the State Council to act as his or its agent.</p> <p>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 to act as its or his agent.</p> <p>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</p>	<p><b>Article 19.</b></p> <p>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 <b>established in accordance with law</b> to act as his or its agent.</p> <p>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 <b>established in accordance with law</b> to act as its or his agent.</p> <p>The patent agency <b>and the employed patent attorney</b> 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.</p>	<p><b>Comment:</b></p> <p>ICC suggests that Article 19 be amended to allow foreign patent applicants the choice to</p> <ul style="list-style-type: none"> <li>- either use a patent agency or,</li> <li>- if they have a branch office or the like in China file and prosecute the application themselves through that office<sup>1</sup>, optionally by the use of a Chinese certified patent agent<sup>2</sup>.</li> </ul> <p>Article 19 as currently drafted would impose burdens on foreign inventors with regard to the acquisition of patents that are not imposed on Chinese inventors, which would create differential treatment inconsistent with TRIPS. The suggested language below would solve this concern. Proposed wording for Article 19:</p> <p>“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 <b>or patent agent approved</b> by the Patent Administrative department Under the State Council to act as his or its agent.</p> <p>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</p>
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<sup>1</sup> Under the U.S. Patent Law, for example, a foreign applicant may file and prosecute his or her own case or may be represented by an attorney or agent. See 37 CFR §1.31.

<sup>2</sup> Under the EPC an applicant not having a residence or their principal place of business in a contracting state must be represented by a professional representative (European Patent Attorney), See EPC articles 133 and 134.

<p>patent agency shall be formulated by the State Council.</p>	<p>The administrative regulations governing the patent agency <b>and the employed patent attorney</b> shall be formulated by the State Council.</p>	<p>a patent agency <b>or patent agent approved by the Patent Administrative Department Under the State Council</b> to act as its or his agent.</p> <p>The patent agency <b>or patent agent</b> 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 <b>or agent</b> shall bear the responsibility of keeping them confidential. The administrative regulations governing the patent agency <b>and patent agent</b> shall be formulated by the State Council.”.</p> <p>Such an amendment would require also amendments in the Regulation on Patent Commissioning to allow patent agents to work in companies and not only in patent agencies. ICC believes that such a change would be of great benefit to the patent profession in China because it will make it possible for patent agents to work inside both domestic and foreign companies that are active in China. Experience shows that in-house patent agents acquire skills that are difficult if not impossible to obtain as outside counsel, because the in-house patent agent is much more closely involved in business decisions and internal knowledge (often secret). Also, problems with conflicts of interest of a patent agency do not exist for a company using an in-house patent attorney. A fruitful exchange of patent agents between patent agencies and companies increases the dissemination of such skills and knowledge.</p>
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<p><b>Article 20.</b></p> <p>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.</p> <p>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.</p> <p>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.</p>	<p><b>Article 20.</b></p> <p>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 <b>Article 4 of this Law.</b></p> <p>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.</p>	<p>As provided above Article 20 must be view in combination with Articles 4 and 76. It is suggested that the filing of an international application in China by any Chinese entity or individual should be considered as fulfilling the requirements of Article 4. It should not be necessary for the applicant to apply separately for a permission to file outside China.</p> <p>This entails that the Patent Administrative department under the State Council must handle the international application as an application to file applications outside China.</p>
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<p><b>Article 21.</b></p> <p>The Patent Administration 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.</p> <p>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 contents secret.</p>	<p><b>Article 21.</b></p> <p>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.</p> <p><b>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.</b></p> <p>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.</p>	
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<p align="center"><b>Chapter II</b></p> <p align="center"><b>Requirements for Grant of Patent Right</b></p>	<p align="center"><b>Chapter II</b></p> <p align="center"><b>Requirements for Grant of Patent Right</b></p>	
<p><b>Article 22.</b></p> <p>Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.</p> <p>Novelty means that, before the date of filing, no identical invention or utility model has been publicly disclosed in publications in the country or abroad or has been publicly used or made known to the public by any other means in the country, nor has any other person filed previously with the Patent Administration Department Under the State Council an application which described the identical invention or utility model and was published in patent application documents after the said date of filing.</p> <p>Inventiveness means that, as compared with the technology existing before the date of filing, the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress.</p>	<p><b>Article 22.</b></p> <p>Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.</p> <p>Novelty means that, <b>the invention or utility model shall neither belong to the prior art, nor has any other person filed before the date of filing</b> 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 <b>announced in patent documents</b> after the said date of filing.</p> <p>Inventiveness means that, <b>as compared with the prior art</b>, the invention has prominent substantive features and represents a notable progress <b>for a person skilled in the relevant field of technology</b> and that the utility model has substantive features and represents progress <b>for a person skilled in the relevant field of technology</b>.</p>	<p><b>Comment:</b></p> <p>The definition of the prior art in the last paragraph of Article 22 should be clarified. To make sure that technology publicly published or publicly used be deemed as prior art – regardless of whether it is known to the public – ICC suggests the following revised wordings:</p> <p>“The prior art referred to in this law <b>comprises</b>/means any technology <b>or information made available or</b> known to the public before the date of filing of the application or any application for which priority is claimed by way of public disclosure in publications, public use or any other means in this country or abroad.”.</p>

<p>Practical applicability means that the invention or utility model can be made or used and can produce effective results.</p>	<p>Practical applicability means that the invention or utility model can be made or used and can produce effective results.</p> <p><b>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.</b></p>	
<p><b>Article 23.</b></p> <p>Any design for which patent right may be granted must not be identical with and similar 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.</p>	<p><b>Article 23.</b></p> <p>Any design for which patent right may be granted <b>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.</b></p> <p>Any design for which patent right may be granted must not be in conflict with any prior right of any other person.</p> <p><b>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</b></p>	<p><b>Comment:</b></p> <p>Amended Article 23 provides the same improvements as Article 22 for designs. However, the definition of prior art is in our view similarly insufficient.</p> <p>ICC has also noted that Paragraph 3 defines “prior design” which includes “any” design. This wording is not limited to designs of the same or similar product group of an application. In paragraph 1 for the definition of peculiarity, only the designs “in the relevant field of technology” are decisive for a designer to decide whether there is a sufficient level of peculiarity. It indicates two different standards for novelty and peculiarity.</p> <p>ICC therefore proposes the following wording of paragraph 3:</p> <p>“The prior design referred to in this law <b>comprises</b>/refers to any design <b>of the same or similar product group made available or</b> known to the public before the date of filing of the application or</p>

	<p><b>use or any other means in this country or abroad.</b></p>	<p>any application for which priority is claimed by way of public disclosure in publications, public use or any other means in this country or abroad.”.</p>
<p><b>Article 24.</b></p> <p>An invention-creation for which a patent is applied for does not lose its novelty where, within six months before the date of filing, one of the following events occurred:</p> <p>(1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;</p> <p>(2) where it was first made public at a prescribed academic or technological meeting;</p> <p>(3) where it was disclosed by any person without the consent of the applicant.</p>	<p><b>Article 24.</b></p> <p>Where an invention-creation for which a patent is applied for <b>became known to the public</b> in one of the following <b>manners</b>, within six months before the date of filing, <b>it is not deemed to constitute a prior art or a prior design referred to in this Law for the said patent application:</b></p> <p>(1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;</p> <p>(2) where it was first made public at a prescribed academic or technological meeting;</p> <p>(3) where it was disclosed by any person without the consent of the applicant.</p>	<p><b>Comment:</b></p> <p>The grace period defined in amended Article 24 applies not only to the determination of novelty, but also to the evaluation of inventive step. This may cause serious legal uncertainty. Also, it is not fully clear that the grace period only applies to publication or use made by the inventor/applicant or against his consent. It should be clarified to specifically exclude independently created inventions disclosed by a third party with no relationship or obligation to the applicant.</p> <p>ICC proposes the following wording of Article 24:</p> <p>“Where an invention-creation for which a patent is applied for is disclosed in one of the following events within six months before the date of filing, said disclosure does not constitute prior art or a prior design referred to in this Law for <b>determination of the novelty of</b> the said patent application:</p> <p>(1) where it was first exhibited <b>by the applicant or his predecessor/successor in title</b> at an international exhibition sponsored or recognized by the Chinese Government;</p> <p>(2) where it was first made public <b>by the applicant or his predecessor/successor in title</b> at a prescribed academic or technological meeting;</p>

		<p>(3) where it was disclosed by any person <b>obligated to the applicant to not disclose</b>, without the consent of the applicant <b>or his predecessor/successor in title.</b>”.</p>
<p><b>Article 25.</b></p> <p>For any of the following, no patent right shall be granted:</p> <p>(1) scientific discoveries;</p> <p>(2) rules and methods for mental activities;</p> <p>(3) methods for the diagnosis or for the treatment of diseases;</p> <p>(4) animal and plant varieties;</p> <p>(5) substances obtained by means of nuclear transformation.</p> <p>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.</p>	<p><b>Article 25.</b></p> <p>For any of the following, no patent right shall be granted:</p> <p>(1) scientific discoveries;</p> <p>(2) rules and methods for mental activities;</p> <p>(3) diagnostic, therapeutic and <b>surgical method for the treatment of humans or animals;</b></p> <p>(4) animal and plant varieties;</p> <p>(5) substances obtained by means of nuclear transformation;</p> <p><b>(6) designs mainly serving as a sign and made of the pattern, color or its combination of two-dimensional printed matter.</b></p> <p>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.</p>	<p><b>Comment:</b></p> <p>The exclusion in paragraph 1, item (5) of substances obtained by means of nuclear transformation is ambiguous and possibly in contradiction to the TRIPS agreement. Many substances used in diagnosis and treatment of diseases are made by nuclear transformation and protection for inventions in this area should not continue to be excluded.</p>

	<p><b>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.</b></p>	<p><b>Comment:</b></p> <p>"In respect of the last paragraph in Article 25, ICC suggests deleting this exclusion from patentability based on the following arguments:</p> <p>In the “Constructions” to the draft provided by SIPO it is stated that the introduction of this exclusion is based on concerns for the fulfilment of the objectives of the CBD, and it is explained that China will take measures in this respect to cover at least two aspects: (a) to establish a mechanism for the management of the genetic resources to prevent accession of such resources within the PRC without relevant approval and authorisation; and (b) to add relevant provisions to the patent law to stop the illegal procurement or use of genetic resources on which inventions may be based.</p> <p>ICC believes that the explicit exclusion from patentability as provided in the new paragraph 3 of Article 25 is in contradiction of Article 27.2 of TRIPS.</p> <p>In order to avoid misunderstandings ICC emphasizes that it fully supports the objectives of the CBD and CBD’s call for nations to implement their own systems to manage their genetic resources as they see fit and support the Bonn Guidelines in serving as a model.. ICC also abides by the CBD principle that intellectual property rights should be supportive of and not run counter to its objectives (CBD, Art. 16(5)).</p>
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		<p>But ICC does not believe that the measures proposed in the draft patent law will help in fulfilling the objectives of the CBD. On the contrary ICC believes that in the present situation these measures will run counter to the fulfilment of the objective of the CBD for “fair and equitable sharing of the benefits arising out of the utilization of genetic resources“, since these measures will introduce uncertainties about the validity of patents that in some way relates to genetic resources. Such uncertainties will be a disincentive for investing in the sustainable use of genetic resources and will diminish the possibilities for inventions relating to genetic resources to provide economic value in this area because of the uncertainty that is generated hereby.</p> <p>The patent right is a negative right and it does not allow the patentee to exploit the invention. To grant a patent does therefore NOT mean that “the criminal” can profit from his crime.</p> <p>To exclude such an invention may seem fair, but the only result will be that the invention will be available to everybody, and it would often be of benefit to society, if the invention is exploited (medicines, food, cosmetics, etc. are typically the type of inventions made from genetic materials). However, such products require large investments to develop to the market, and without an exclusive right nobody will make such investments (the NIH in the USA tried to grant non-exclusive licenses, but nobody wanted these).</p>
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		<p>ICC believes it would be more efficient to deal with such crimes by other means that deprive the violator the possibility to profit from the invention or prohibit others from legally exploiting it, if it is proven in court that the genetic material was knowingly acquired against the relevant laws, and makes it possible for third parties to make the necessary investments to bring the invention to the market for the benefit of society.</p> <p>ICC has noted that the wording of the proposal has been modified in comparison to the draft of July 31, 2006, but in ICC's view this change has made the exclusion from patentability even broader than in said draft, and this change is therefore not considered to be an improvement of the draft.</p> <p>In relation to the wording of the proposed paragraph 3, ICC believes that the term "genetic resources" is unclear especially whether or not the term refers only to physical material or also genetic information. It is also unclear how the phrase "the completion of which depends on genetic resources" should be interpreted. In many instances an invention needs to be tested on a genetic resource to establish if the invention works. Could such an invention be deemed to fall under this paragraph of Article 25?</p> <p>ICC has noted that SIPO will make clarifications in respect of these phrases in the implementing regulations and in the examination guidelines and hopes that it will be allowed to provide its comments in due time.</p>
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		<p>Finally, the proposal does not indicate if the new paragraph on genetic resources will have retroactive effect on patent rights granted prior to the law entering into effect.</p> <p>ICC fully supports any rational measures to support the CBD, but believes that the present proposal will generate very serious problems, and also believes that this proposal will not fulfil the objective indicated by SIPO for introducing the paragraph.</p>
<p><b>Chapter III</b> <b>Application for Patent</b></p>	<p><b>Chapter III</b> <b>Application for Patent</b></p>	
<p><b>Article 26.</b></p> <p>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.</p> <p>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.</p> <p>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 shall state briefly the main technical points of the invention or utility</p>	<p><b>Article 26.</b></p> <p>Where an application for a patent for invention or utility model is filed, <b>application documents</b> such as a request, a description and its abstract, and claims shall be submitted.</p> <p>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.</p> <p>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.</p>	<p><b>Comment:</b></p> <p>ICC recommends removing the entirety of Paragraph 4 of Article 26 from the draft amendment. The reasons for this are stated below. Please also refer to the comments regarding paragraph 3 of Article 25 which to a large extent applies also to paragraph 4 of Article 26.</p> <p>ICC fully supports the principles of access and benefits sharing (ABS) as one of the three major objectives of the United Nations Convention on Biological Diversity (CBD).</p> <p>ICC respects the sovereign right of states to control access to their own genetic resources pursuant to their national policies and via their own national legislation (Art. 3 CBD) and encourage the fair and equitable sharing of benefits extending from those resources (Art. 2 and 15 CBD).</p>

<p>model.</p> <p>The claims shall be supported by the description and shall state the extent of the patent protection asked for.</p>	<p><b>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.</b></p> <p>The abstract of <b>the description</b> shall state briefly the main technical points of the invention or utility model.</p> <p>The claims shall be supported by the description and shall <b>define</b> the extent of the patent protection asked for <b>in a clear and concise manner.</b></p>	<p>ICC firmly believes that national ABS frameworks, intellectual property regimes, and regulatory systems can enhance the sustainable use of genetic resources through innovation to commercialization, and thus provide significant societal benefit.</p> <p>However, the proposed requirement for the disclosure of the source of genetic resources for which “the completion of the invention depends” in Article 26, Paragraph. 4 of the present draft will in ICC’s view not effectively promote the objectives of the CBD.</p> <p>ICC has noted that SIPO in its comments to the draft indicates that discussions in the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) on this issue are being obstructed by developed countries. ICC respectfully disagrees with this conclusion.</p> <p>In ICC’s view, it is important to analyse the issue thoroughly before introducing a new requirement in patent laws in order to obtain a balanced solution that will achieve the objective of the instrument with as little damage as possible.</p> <p>ICC is pleased to note that the proposal uses the expression “source of said genetic resource”, an expression that it believes is more appropriate than many other that have been tabled in the international discussion. However, there is yet no internationally recognized meaning of this expression, which renders the expression ambiguous.</p>
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		<p>Only a small fraction of the genetic resources accessed and exploited are part of a successful commercial patented invention. Consequently, this action by China will not address the vast majority of cases where genetic resources were accessed, but never successfully brought to the point of patent application.</p> <p>To introduce a mandatory disclosure of source increases the complexity of the patent system. In the event that such information or its correctness could influence the patentability of an invention or the validity of a granted patent it will provide a new avenue of legal challenge to patents thus inviting unscrupulous competitors to use the patent system to harass inventors through unfounded claims in litigation for failure to satisfy a disclosure requirement. This will discourage business ventures, research, and development related to natural genetic resources and ultimately reduce the potential for benefits to be shared.</p> <p>Biotechnology companies rely on strong and predictable patent protection to assure their partners and potential investors that their venture is secure. These will not finance projects where patent rights can be frivolously challenged creating patent uncertainty or maybe even a gap in patent protection.</p> <p>It is remarked that genetic resources have been collected and exchanged between people for millennia and it is often quite uncertain, if known at all, what the origin or source of a biological/genetic resource may be, and that quite often track records are missing for materials that were collected legally many years – even centuries - before there was any discussions about the</p>
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		<p>CBD.</p> <p>It is not clear from the proposal what will be the consequences if the applicant is not able to provide the information required by the proposal. In this respect ICC believes that if the consequences would lead to the forfeiture of the right to have a patent granted, this would be a violation of TRIPS Article 29 that indicates the conditions that can be applied in respect of information in patent applications. ICC appreciates that it does not seem that the proposal suggests that the provision of such information is required for obtaining a patent (Article 2).</p> <p>ICC has also noted that SIPO will clarify these issues in the Implementing Regulations and Examination Guidelines that will be drafted later. ICC hopes that it will be given the opportunity to provide comments to these, and recommend that China should follow the path of several European countries in this respect and ensure that the lack of such information – either because the source was not known, or if it is later found that it was incorrect - should not influence the patentability of the invention or the validity of a granted patent.</p>
<p><b>Article 27.</b></p> <p>Where an application for a patent for design is filed, a 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.</p>	<p><b>Article 27.</b></p> <p>Where an application for a patent for design is filed, <b>application documents</b> such as a request, drawings or photographs of the design as well as <b>a brief explanation of the design</b> shall be submitted.</p>	<p><b>Comment:</b></p> <p>In European law the submission of a description, is optional. ICC proposes NOT to change this in China. To avoid any doubt it should at least be indicated clearly in the law that the description does not determine the scope of protection.</p>

		European law does not limit the scope of protection to only the same class of goods indicated in the application. ICC recommends introducing the same system in China, thereby removing the restriction of protection only to goods of the same class.
		<p><b>Comment:</b></p> <p>Between Articles 27 and 28, ICC suggests adding a new article which states:</p> <p>“The applicant for a utility model or design patent shall make a declaration that to the best knowledge of the applicant the application does not cover merely known technology. The applicant shall be held responsible for any wrong declarations made willfully or with gross negligence.”</p> <p><b>Reasons:</b></p> <p>Unfortunately, there are many situations where a distributor or competitor applies for a patent based purely on an existing product. The proposed declaration would aid in eliminating such applications. The “scooters” case and the Antioch cases have been cited in previous comments by others. Such abusive behaviours can be reduced by demanding that the applicant make a declaration.</p>
<p><b>Article 28.</b></p> <p>The date on which the Patent Administration 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</p>	<p><b>Article 28.</b></p> <p>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.</p>	

<p>the date of filing.</p>		
<p><b>Article 29.</b></p> <p>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.</p> <p>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.</p>	<p><b>Article 29.</b></p> <p>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.</p> <p>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.</p>	

<p><b>Article 30.</b></p> <p>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.</p>	<p><b>Article 30.</b></p> <p>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.</p>	
<p><b>Article 31.</b></p> <p>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.</p> <p>An application for a patent for design shall be limited to one design incorporated in one product. 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.</p>	<p><b>Article 31.</b></p> <p>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.</p> <p>An application for a patent for design shall be limited to one design incorporated in one product. <b>Two or more similar designs for the same product, or</b> 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.</p>	



<p><b>Article 32.</b></p> <p>An applicant may withdraw his or its application for a patent at any time before the patent right is granted.</p>	<p><b>Article 32.</b></p> <p>An applicant may withdraw his or its application for a patent at any time before the patent right is granted.</p>	
<p><b>Article 33.</b></p> <p>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.</p>	<p><b>Article 33.</b></p> <p>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.</p>	
<p style="text-align: center;"><b>Chapter IV</b></p> <p style="text-align: center;"><b>Examination and Approval of Application for Patent</b></p>	<p style="text-align: center;"><b>Chapter IV</b></p> <p style="text-align: center;"><b>Examination and Approval of Application for Patent</b></p>	
<p><b>Article 34.</b></p> <p>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</p>	<p><b>Article 34.</b></p> <p>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</p>	



<p>months from the date of filing. Upon the request of the applicant, the Patent Administration Department Under the State Council publishes the application earlier.</p>	<p>of filing. Upon the request of the applicant, the Patent Administrative department Under the State Council publishes the application earlier.</p>	
<p><b>Article 35.</b></p> <p>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 Administration 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.</p> <p>The Patent Administration 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.</p>	<p><b>Article 35.</b></p> <p>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.</p> <p>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.</p>	

<p><b>Article 36.</b></p> <p>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.</p> <p>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 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.</p>	<p><b>Article 36.</b></p> <p>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.</p> <p>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.</p>	<p><b>Comment:</b></p> <p>ICC proposes a new wording for 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 <b>that the Applicant is aware of</b> concerning the invention.</p> <p>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 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.”.</p> <p>The reasoning for this change is that the article is unclear as to whether an applicant must perform a patentability search and provide results to SIPO. The change clarifies that the applicant is required to submit references that he is aware of, but he is not required to perform a search.</p>
<p><b>Article 37.</b></p> <p>Where the Patent Administration 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</p>	<p><b>Article 37.</b></p> <p>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,</p>	



<p>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.</p>	<p>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.</p>	
<p><b>Article 38.</b></p> <p>Where, after the applicant has made the observations or amendments, the Patent Administration 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.</p>	<p><b>Article 38.</b></p> <p>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.</p>	
<p><b>Article 39.</b></p> <p>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 the date of the announcement.</p>	<p><b>Article 39.</b></p> <p>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.</p>	

<p><b>Article 40.</b></p> <p>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.</p>	<p><b>Article 40.</b></p> <p>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.</p>	
		<p><b>Comment:</b></p> <p>The present Rule 48 of the Implementing Regulations of the Patent Law makes it possible for a third party to submit observations concerning the patentability of an invention. ICC suggests introducing this possibility explicitly into the law.</p> <p>It is furthermore proposed that the Implementing Regulations must make it clear that the submission of any prior art in accordance therewith must not preclude such prior art from being relied upon in a later invalidation proceeding. An issued patent should be presumed valid over any prior arts that have been cited during the examination process, but that should not mean that such prior art may never be used again in a later proceeding, whether in front of SIPO or in a court.</p>

<p><b>Article 41.</b></p> <p>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 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.</p> <p>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.</p>	<p><b>Article 41.</b></p> <p>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.</p> <p>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 <b>under the Administrative Procedure Law of the People's Republic Of China.</b></p>	
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<p align="center"><b>Chapter V</b></p> <p align="center"><b>Duration, Cessation and Invalidation of Patent Right</b></p>	<p align="center"><b>Chapter V</b></p> <p align="center"><b>Duration, Cessation and Invalidation of Patent Right</b></p>	
<p><b>Article 42.</b></p> <p>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.</p>	<p><b>Article 42.</b></p> <p>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.</p>	<p><b>Comment:</b></p> <p>Article 42 provides that “the duration of patent right for inventions shall be twenty years.” ICC notes that the proposed amendment to Article 63(5) introduces an exemption for clinical trial for pharmaceuticals. In most countries, these exemptions are provided in combination with a patent term extension for the patented subject matter.</p> <p>However, such an extension is not being proposed in the present draft. Patented subject matter, which needs to undergo lengthy governmental authorization procedures prior to being marketed, experiences an erosion of the effective patent term by the authorization procedure. Other countries have introduced mechanisms for patent term extension for such products (e.g., for pharmaceuticals and agrochemicals). ICC therefore recommends that a mechanism for patent term extension is implemented for all subject matter which needs to pass lengthy governmental authorization procedures.</p>
<p><b>Article 43.</b></p> <p>The patentee shall pay an annual fee beginning with the year in which the patent right was granted.</p>	<p><b>Article 43.</b></p> <p>The patentee shall pay an annual fee beginning with the year in which the patent right was granted.</p>	

<p><b>Article 44.</b></p> <p>In any of the following cases, the patent right shall cease before the expiration of its duration:</p> <p>(1) where an annual fee is not paid as prescribed;</p> <p>(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 Administration Department Under the State Council.</p>	<p><b>Article 44.</b></p> <p>In any of the following cases, the patent right shall cease before the expiration of its duration:</p> <p>(1) where an annual fee is not paid as prescribed;</p> <p>(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.</p>	
<p><b>Article 45.</b></p> <p>Where, starting from the date of the announcement of the grant of the 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.</p>	<p><b>Article 45.</b></p> <p>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.</p>	<p><b>Comment:</b></p> <p>Article 45 sets out the conditions for attacking the validity of a granted patent. ICC believes that it would be an advantage to everybody, if the grounds for attacking a patent are specifically stated in Article 45. By this the grounds could be limited, such as in the European Patent Convention, in order to avoid harassment of patentees by unscrupulous competitors that challenge their patents on just any grounds.</p>

<p><b>Article 46.</b></p> <p>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 Administration Department Under the State Council.</p> <p>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. 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.</p>	<p><b>Article 46.</b></p> <p>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.</p> <p>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 <b>under the Administrative Procedure Law of the People's Republic Of China.</b> 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.</p>	<p><b>Comment:</b></p> <p>According to paragraph 2 of Article 46 of the Patent Law, Appeals from the decision of the Patent Re-examination Board of SIPO (PRB) are by way of legal proceedings in the People's Court against PRB with the respondent in the invalidation procedure before the PRB appearing as a third party in the proceedings. In contrast, ICC notes that the present Implementing Regulations, Rules 67-69, permit the patentee to reply to an allegation of invalidity.</p> <p>Drawing upon the experiences of Japan, USA, Australia and most European countries, where the parties to appeal proceedings are the original parties in the invalidation procedure – i.e., the opponent versus the patentee – SIPO was considering whether China should do the same through the Third Amendment.</p> <p>It is in ICC's view unfortunate that SIPO has not proposed such a revision in the present draft.</p> <p>ICC supports amending the patent law so that the parties to an appeal against an invalidation decision will be the original parties to the invalidation action. This is the most logical approach since the appeal is a continuation of the dispute between the parties. PRB should be considered as an intermediary and not a subject of accusation. PRB should, however, be available to make declarations when called upon by the courts to do so. Indeed, the right of PRB to appear as a third party should be explicitly stated. Additionally, the PRB should be entitled to continue any appeal proceedings in the</p>
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		<p>event the Respondent decides to withdraw.</p> <p>ICC would like to make another related comment on the procedure that is adopted following a decision by the courts on a PRB appeal. Under current practice, PRC courts only have the power to make a decision on the validity of the decision of the PRB. They do not have the independent right to invalidate the patent, which is the responsibility of the PRB. Therefore if a court decides that the PRB decision is wrong and the patent should be invalidated, for example, the matter then goes back to the PRB which then deals with the invalidation. This delays the implementation of the court decision and it would be more expeditious if courts had the power to invalidate the patent.</p> <p>ICC thus respectfully requests that the LAOSC consider the need for courts to be vested with the power to invalidate patents. More specifically, a court should have the power either to (i) reverse PRB's decision and revoke the patent on its own volition; or (ii) vacate PRB's decision and refer the case back to the Board for further factual investigation and determination. This authority would give courts more flexibility to adjudicate appeals of PRB decisions efficiently and effectively. Whether a court will enter a final decision in a particular case would depend largely on how well the facts of that case are set forth in the record.</p>
<p><b>Article 47.</b></p> <p>Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.</p>	<p><b>Article 47.</b></p> <p>Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.</p>	

<p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p>	
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<p style="text-align: center;"><b>Chapter VI</b></p> <p style="text-align: center;"><b>Compulsory License for Exploitation of Patent</b></p>	<p style="text-align: center;"><b>Chapter VI</b></p> <p style="text-align: center;"><b>Compulsory License for Exploitation of Patent</b></p>	
<p><b>Article 48.</b></p> <p>Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and conditions and such efforts have not been successful within a reasonable period of time, the Patent Administration Department Under the State Council may, upon the request of that entity, grant a compulsory license to exploit the patent for invention or utility model.</p>	<p><b>Article 48.</b></p> <p><b>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:</b></p> <p><b>(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;</b></p> <p><b>(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 and restrict competition.</b></p>	<p><b>Comment:</b></p> <p>The wording of the proposed Article 48(1) is to a large extent a recital of Art. 5A(4) of the Paris Convention. However, ICC believes that without the indication of importation being accepted as “exploitation” of the invention or utility model it is potentially contrary to TRIPS Agreement (Art. 27.1).</p>

<p><b>Article 49.</b></p> <p>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 grant a compulsory license to exploit the patent for invention or utility model.</p>	<p><b>Article 49.</b></p> <p>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, <b>as suggested by a competent department under the State Council, grant the entity designated by the department</b> a compulsory license to exploit the patent for invention or utility model.</p> <p><b>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.</b></p>	<p><b>Comment:</b></p> <p>ICC believes that the expression “to prevent” in paragraph 2 of Article 49 is very broad and may cover almost any product or process from simple cleaning apparatus to medicines and vaccines. ICC therefore suggests deleting that expression.</p>
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	<p><b>Article 50.</b></p> <p><b>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.</b></p> <p><b>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.</b></p>	<p><b>Comment:</b></p> <p>ICC generally supports the introduction of Article 50. It attempts to conform to the spirit of the DOHA agreements.</p> <p>ICC believes that in order to be in line with the DOHA amendments, the proposal should introduce protective measures to prevent the drugs thus exported to reenter into China and thereby deprive patentees the rightful benefits in China.</p>
<p><b>Article 50.</b></p> <p>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</p>	<p><b>Article 51.</b></p> <p>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</p>	<p><b>Comment:</b></p> <p>ICC believes that the wording of Article 51 is not fully consistent with TRIPS Article 31(l)(ii), which provides that when a compulsory license is granted to an earlier patent, the earlier patentee shall be entitled to a cross license to the technology claimed in a later patent.</p>

<p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p>	<p>This inconsistency would be removed by replacing the word “may” by the word “shall” in the second paragraph of Article 51. ICC therefore proposes the following new wording for Article 51:</p> <p>“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.</p> <p>Where, according to the preceding paragraph, a compulsory license is granted, the Patent Administrative Department under the State Council shall, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.”.</p> <p>ICC also believes that in order to be granted a compulsory license under Article 51 the conditions stated in Article 53 should be satisfied, meaning that that the compulsory license can only be granted, if the requestor provides evidence that it was not possible to obtain a voluntary license on reasonable terms within a reasonable time.</p>
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	<p><b>Article 52.</b></p> <p><b>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.</b></p> <p><b>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.</b></p>	<p><b>Comment:</b></p> <p>ICC supports the transfer to new Article 52 of these restrictions on compulsory licensing, which currently are set forth in Rule 72 of the Implementing Regulations to the Patent Law.</p>
<p><b>Article 51.</b></p> <p>The entity or individual requesting, in accordance with the provisions of this Law, a compulsory license for exploitation shall furnish proof that it or he has not been able to conclude with the patentee a license contract for exploitation on reasonable terms and conditions.</p>	<p><b>Article 53.</b></p> <p>The entity or individual requesting, in accordance with the provisions of <b>Article 48 or Article 50 of this Law</b>, a compulsory license for exploitation shall furnish proof that <b>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.</b></p>	<p><b>Comment:</b></p> <p>ICC proposes that Article 53 should also apply to compulsory licenses requested under Article 51 (cf. the comments to Art. 51).</p>

<p><b>Article 52.</b></p> <p>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.</p> <p>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 Administration Department Under the State Council may, after review upon the request of the patentee, terminate the compulsory license.</p>	<p><b>Article 54.</b></p> <p>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.</p> <p>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.</p>	
<p><b>Article 53.</b></p> <p>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.</p>	<p><b>Article 55.</b></p> <p>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.</p>	

<p><b>Article 54.</b></p> <p>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 Administration Department Under the State Council shall adjudicate.</p>	<p><b>Article 56.</b></p> <p>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.</p>	
<p><b>Article 55.</b></p> <p>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, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court.</p>	<p><b>Article 57.</b></p> <p>Where the patentee is not satisfied with the decision of the Patent Administrative department Under the State Council granting a compulsory license for exploitation, <b>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</b>, it or he may, within three months from the receipt of the date of notification, institute legal proceedings in the people's court <b>in accordance with the Administrative Procedure Law of the People's Republic of China.</b></p>	

	<p>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, <b>institute legal proceedings in the people's court in accordance with the Civil Procedure Law of the People's Republic of China.</b></p>	
<p><b>Chapter VII</b> <b>Protection of Patent Right</b></p>	<p><b>Chapter VII</b> <b>Protection of Patent Right</b></p>	
<p><b>Article 56.</b></p> <p>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.</p> <p>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.</p>	<p><b>Article 58.</b></p> <p>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.</p> <p>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. <b>The brief explanation may be used to interpret the drawings or photographs.</b></p>	

<p><b>Article 57.</b></p> <p>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</p>	<p><b>Article 59.</b></p> <p>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 <b>patent administrative department</b> to handle the matter.</p>	
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<p>authority handling the matter 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.</p> <p>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.</p>		
	<p><b>Article 60.</b></p> <p>When the <b>patent administrative department</b> handling the patent infringement dispute considers that the infringement is established, it <b>shall</b> order the infringer to stop the infringing act</p>	

	<p>immediately. If a party is not satisfied with the order made by <b>the patent administrative department</b>, 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 <b>patent administrative department</b> may approach the people's court for compulsory execution.</p> <p>The <b>patent administrative department handling the patent infringement dispute</b> 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.</p>	
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	<p><b>Article 61.</b></p> <p>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 <b>patent infringement dispute</b> relates to a patent for utility model <b>or a patent for design, the patentee or the interested party shall furnish to the people’s court or the patent administrative department</b> a search report made by the Patent Administrative department Under the State Council.</p>	<p><b>Comment:</b></p> <p>The current language limits the occasions for burden of proof reversal to method patents for new products only. This is insufficient. ICC suggests following wording to replace the current paragraph 1 of article 61:</p> <p>“Where an infringement dispute relates to a patent for a process of manufacturing and,          (a) if there is evidence supporting a <b>substantial likelihood</b> that an entity or individual is practicing the patented process, or          (b) if the process is for the manufacture of a new product; and an entity or individual manufactures an identical product, the entity or individual shall furnish proof to show that the process used in its or his manufacturing is different from the patented process.”.</p>
	<p><b>Article 62.</b></p> <p><b>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.</b></p>	<p><b>Comment:</b></p> <p>Article 62 does not clarify whether decisions made by administrative authorities over prior art and prior design are binding for the courts and vice versa.</p> <p>ICC suggests clearly stating in this article that courts decisions are binding on the PAD.</p> <p>ICC further suggests that the people’s court should be authorised to consider the patentability or lack of patentability based on any ground mentioned in the Patent Law as a revocation ground.</p>

	<p><b>Article 63.</b></p> <p>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.</p>	
	<p><b>Article 64.</b></p> <p>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.</p>	<p><b>Comment:</b></p> <p>Articles 45 and 46 of the TRIPS agreement state that the measures taken against infringements shall provide an effective deterrent and provide an adequate compensation for the injury suffered. ICC therefore suggests introducing a lower limit of RMB 50,000, and not setting any upper limit for a fine as it believes that RMB 100,000 is too low to act as an effective deterrent and in many cases does not adequately compensates the patentee for the injuries suffered.</p> <p>ICC suggests the following wording:  “ .....in addition to ordering the infringer to stop the infringing act immediately, impose the infringer on a fine of not less than RMB 50,000.”</p>

<p><b>Article 58.</b></p> <p>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 administrative authority for patent affairs 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 50,000 yuan. Where the infringement constitutes a crime, he shall be prosecuted for his criminal liability.</p>	<p><b>Article 65.</b></p> <p>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 <b>patent administrative department</b> 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 <b>100,000</b> yuan; where the infringement constitutes a crime, he shall be prosecuted for his criminal liability.</p>	<p><b>Comment:</b></p> <p>Same comments as those for article 64.</p>
<p><b>Article 59.</b></p> <p>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 amend his act, and the order shall be announced, and he may be imposed a fine of not no more than RMB 50,000 yuan.</p>	<p><b>Article 66.</b></p> <p>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 <b>patent administrative department</b> to amend his act, and the order shall be announced, <b>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</b> yuan.</p>	<p><b>Comment:</b></p> <p>Same comments as those for article 64.</p>

	<p><b>Article 67.</b></p> <p><b>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:</b></p> <p><b>(1) to inquire the parties involved, and to investigate the facts relevant to the alleged illegal act;</b></p> <p><b>(2) to inspect and duplicate the contracts, invoices, account books and other relevant materials related to the party's alleged illegal act;</b></p> <p><b>(3) to carry out an on-the-spot inspection of the site where the party's alleged illegal act took place;</b></p> <p><b>(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.</b></p> <p><b>The parties shall assist and cooperate with the patent administrative departments in exercising the functions and authorities prescribed in the</b></p>	<p><b>Comment:</b></p> <p>In view of the fact that many of the patent infringement cases are not simple, it is highly recommended that the function of PAD be made clearer with stronger enforcement authority. ICC suggests providing some sanctions or penalties for the parties that provide false evidence or statement and impede or refuse to cooperate with the PAD. Otherwise, it is highly doubtful whether PAD will be effective in handling the disputes with full cooperation by the parties, and its ineffectiveness will lead to under utilization and waste of resources.</p> <p>On the same time, it is important for the PAD to keep confidential the business information of the accused infringer while inspecting, duplicating and handling his documentations.</p>
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	<p><b>preceding paragraph in accordance with law, and may not refuse or impede them.</b></p>	
<p>Article 60.</p> <p>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 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.</p>	<p><b>Article 68.</b></p> <p>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. <b>If it is difficult to determine the losses which the patentee has suffered</b>, 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.</p> <p><b>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.</b></p> <p><b>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</b></p>	<p><b>Comment:</b></p> <p>ICC proposes to remove the cap on damages of RMB 1,000,000. The court should have the discretion to impose a higher sum if it sees fit in the particular circumstances of a case, such as for wilful infringement or obvious copying, etc.</p> <p>It also proposes to increase the minimum..</p>

	<p><b>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.</b></p>	
<p><b>Article 61.</b></p> <p>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.</p> <p>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.</p>	<p><b>Article 69.</b></p> <p>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.</p> <p>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.</p>	

	<p><b>Article 70.</b></p> <p><b>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.</b></p> <p><b>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.</b></p> <p><b>The people's court may order the requester to provide guarantee; if the requester fails to do so, the request shall be rejected.</b></p> <p><b>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.</b></p>	<p><b>Comment:</b></p> <p>ICC welcomes the addition of this article to the patent law. With these changes, the pre-existing injunction remedy against an infringer has been preserved. Additionally, the remedies have been expanded to give a patentee – whose patent is under infringement and there is reason to believe that circumstances exist where the evidence of infringement may be destroyed – the ability to request the people’s court to grant a preservation of evidence ruling. The court is required to act on such request within 48 hours. If the preservation measure is granted, the patentee can act immediately to safeguard the incriminating evidence and start a legal proceeding against the infringer within 15 days of such action.</p> <p>However, as to the power of the court to require a guarantee, it would be helpful to set forth in this article a standard or a calculation method to guide the court in determination of the amount of the guarantee.</p>
<p><b>Article 62.</b></p> <p>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</p>	<p><b>Article 71.</b></p> <p>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</p>	<p><b>Comment:</b></p> <p>The proposed 2 years prescription period appears to be unduly short. There are many factors need to be taken into consideration, and much preparation work to be done before initiating legal proceedings. ICC would suggest changing the prescription period to at least 6 years.</p>

<p>obtained knowledge of the infringing act.</p> <p>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.</p>	<p>knowledge of the infringing act.</p> <p>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.</p>	
	<p><b>Article 72.</b></p> <p><b>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</b></p>	<p><b>Comment:</b></p> <p>ICC is concerned with the limitation for recovery of damages for past infringement to “two years before the date of instituting the legal proceeding”. ICC respectfully suggests that a longer period of time be considered. It would suggest a period of at least 6 years.</p>

	<p>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.</p>	
	<p><b>Article 73.</b></p> <p>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</p>	

	<p><b>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.</b></p>	
<p><b>Article 63.</b></p> <p>None of the following shall be deemed as infringement of the patent right:</p> <p>(1) Where, after the sale of a patented product that was made or imported 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 or sells that product;</p> <p>(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;</p>	<p><b>Article 74.</b></p> <p>None of the following shall be deemed as infringement of the patent right:</p> <p>(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 <b>or imports</b> that product;</p> <p>(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;</p>	<p><b>Comment:</b></p> <p>Article 74 (1) now provides that it would not be deemed “infringement” when a person “imports” a product that was made by the patentee... “or a product that was directly obtained by using the patented process.” This provision allows the importation of patented products without permission by the patentee, thus introducing a regime of international exhaustion.</p> <p>The introduction of international exhaustion on national basis is in the view and experience of ICC not beneficial to international trade and investments, or to innovation in the long term.</p> <p>The dramatic increase in patent applications filed by domestic companies and individuals in high tech sectors shows that China itself could well stand to lose on a regime of international exhaustion.</p>

<p>(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;</p> <p>(4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation.</p>	<p>(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;</p> <p>(4) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation;</p> <p><b>(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.</b></p>	<p>ICC proposes therefore the following revision to (1):</p> <p>(1) Where, after the sale of a patented product that was made or imported by the patentee or with the authorization of the patentee, or of a product that was directly obtained by using the patented process practiced by the patentee or with the authorization of the patentee, any other person uses, offers to sell, or sells that product.</p> <p>ICC has noted the comments in respect of Article 74(5) in the “constructions” offered by SIPO, but nevertheless submits that the proposed Article 74 (5) is unfairly one-sided because it only allows for development of the drug by a third party during the patent term. It does not provide any balancing provisions such as patent term extension which permits innovator companies to obtain a partial restoration of the term of the relevant patent to account for the period lost due to the lengthy regulatory review process.</p> <p>The EU and the US have introduced the Bolar system and patent term extension/supplementary protection certificates system. The co-existence of these two measures serves to balance the system. Therefore ICC strongly urges that should the Bolar provision be put into the Chinese law, the provisions for patent term restoration/supplementary protection certificates must also be added as a part of the Chinese law, without which the Bolar system would not adequately be balanced.</p>
<p>Any person who, for production and business purpose, uses or sells a patented product or a product that was directly obtained by using a patented process,</p>	<p><b>Article 75.</b></p> <p>Any person who, for production and business purpose, uses, <b>offers to sell</b> or sells a patented product or a product that was</p>	

<p>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.</p>	<p>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.</p>	
<p><b>Article 64.</b></p> <p>Where any person, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent that divulges an important secret of the State, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority concerned at the higher level. Where a crime is established, the person concerned shall be prosecuted for his criminal liability according to the law.</p>	<p><b>Article 76.</b></p> <p>Where <b>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;</b> where the secret of the State is divulged, the person concerned shall be prosecuted for his <b>legal</b> liability.</p>	<p><b>Comment:</b></p> <p>ICC believes that the sanctions provided in Article 76 are too severe. As indicated in connection with Articles 4 and 20, these three articles must be seen together. ICC proposes that sanctions, such as refusal of the patent right should only apply in cases concerning secrets of the State, whereas for other cases, where the applicant by mistake did not obtain the permission prior to filing a patent application in a foreign country, it should be possible for the applicant subsequently to file a petition for obtaining a permission to file in a foreign country retroactively. This would correspond to the situation in the USA.</p> <p>ICC also proposes that in line with Art. 20, the application of Article 76 should be limited to Chinese entities and individuals.</p>
<p><b>Article 65.</b></p> <p>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</p>	<p><b>Article 77.</b></p> <p>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</p>	

<p>sanction by the entity to which he belongs or by the competent authority at the higher level.</p>	<p>by the entity to which he belongs or by the competent authority at the higher level.</p>	
<p><b>Article 66.</b></p> <p>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.</p> <p>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.</p>	<p><b>Article 78.</b></p> <p>The <b>patent administrative department</b> may not take part in recommending any patented product for sale to the public or any such commercial activities.</p> <p>Where the <b>patent administrative department</b> 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.</p>	
<p><b>Article 67.</b></p> <p>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</p>	<p><b>Article 79.</b></p> <p>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</p>	

<p>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.</p>	<p>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.</p>	
<p style="text-align: center;"><b>Chapter VIII</b> <b>Supplementary Provisions</b></p>	<p style="text-align: center;"><b>Chapter VIII</b> <b>Supplementary Provisions</b></p>	
<p><b>Article 68.</b></p> <p>Any application for a patent filed with, and any other proceedings before, the Patent Administration Department Under the State Council shall be subject to the payment of a fee as prescribed.</p>	<p><b>Article 80.</b></p> <p>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.</p>	
<p><b>Article 69.</b></p> <p>This Law shall enter into force on April 1, 1985.</p>	<p><b>Article 81.</b></p> <p>This Law shall enter into force on April 1, 1985.</p>	<p><b>Comment:</b></p> <p>Article 81 appears to imply that all the amendments will apply retroactively.</p> <p>ICC proposes that the LAOSC consider introducing transitional regulations in respect of some of the amendments.</p> <p>The proposal is based on the fact that not all pending applications may comply with all the new provisions of the Third Amendment, and the applicants should not be penalized, since such applications were filed before the provisions of the Third Amendment came into existence.</p>

## **Specific issues not addressed in current law**

### **(1) Judicial review of the decision rendered by Patent Review Board (PRB)**

It was suggested that SIPO may further change the draft of the revised patent law to allow the party, who is not satisfied with the decision rendered by the PRB (e.g. a decision on invalidation action) to file a civil litigation against the other interested party rather than PRB. This arrangement is to relieve PRB from being a defendant in an administrative litigation. However, the plaintiff in a civil litigation cannot request the court to revoke an administrative decision in the claim. As a result, the civil court, which tries a civil cases may not render a civil judgment to revoke the administrative decision and make the PRB reopen the review proceeding. It is a civil litigation procedural issue, to which no feasible solution is available yet. ICC suggests that the current administrative litigation approach remains unchanged;

### **(2) Contributory and indirect infringement**

The Draft is lacking rules on contributory and indirect infringement, and ICC has noted that SIPO in the “Construction” document states that this is on purpose because it is not believed to be the time for introducing such rules. ICC regrets this, and respectfully proposes that the LAOSC reconsiders this position.

**Document n° 450/1022**

1 March 2007

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ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC was founded in 1919. Today it groups thousands of member companies and associations from over 130 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



## 针对 2006 年 12 月 27 日中国《专利法》第三修正案草案意见

知识产权委员会制订

递交国务院法制办公室

### 介绍

国际商会（ICC）在此非常荣幸地向2006年12月27日的中国《专利法》第三修正案草案发表下列意见。第三修正案的当前版本对我组织及我组织成员企业关系重大。

国家知识产权局（SIPO）和国务院法制办公室（LAOSC）欢迎我组织参与中国《专利法》的修订工作，我单位很珍惜这次对第三修正案当前草案交换各种想法和建议的机会。第三修正案在实施后将会对专利法规的各个方面起到推动作用，并将大大缩短与各项国际公认标准的距离。特别要提到的是，国际商会非常赞赏国家知识产权局对第 64 条、70 条以及第 19 条某些内容的修订。

但与此同时，有关第三修正案当前草案某些变化的问题和疑虑依然存在。国际商会已在一些相关条款中提出了详细的相关意见，希望对这方面给予进一步的澄清，并在其递交的文件中建议国务院法制办公室在第三修正案的下一份草案中增加两条新的内容（第 27 条第 1 款和第 40 条第 1 款）。

国际商会希望这些将以中英双语提供的意见能够有助于国务院法制办公室对中国《专利法》第三修正案的定稿工作。

国际商会还希望以后有机会就国务院修订版《专利法》通过后将涉及的《专利法实施细则》、《审查指南》和《专利代理条例》的修正案提供意见。

世界商业组织  
国际商会（ICC）

## 针对 2006 年 12 月 27 日中国《专利法》第三修正案草案意见

2006 年 12 月修改稿	意见和建议
第一章 总则	
第一条	
第二条	<p><b>意见:</b></p> <p style="padding-left: 40px;">国际商会建议将“化学品及化学组合物”作为实用新型可保护主题，这将与许多欧洲国家当前的做法保持一致。</p>
第三条	
第四条	<p><b>意见（另见第 20、76 条）</b></p> <p>国际商会欢迎本条的某些变化，但修改后的第 4 条必须结合拟订的第 20、76 条一起考虑。国家知识产权局已就拟订修改提供了一些意见，并在“解释”文件中说明对第 4 条的修改是为了增加保护国家利益和机密的规定，类似于美国的相关规定。国际商会对此努力表示赞赏，但认为拟订的修改太过繁琐，而且容易产生错误的后果。</p> <p>国际商会建议中国借鉴英国、德国、荷兰等欧洲国家的做法，这一改变也符合国家知识产权局阐明的当前修正案的宗旨。</p> <p>国际商会还建议该法应规定如果中国或国际专利首先在中国申请，国务院专利行政部门的批准应被视为在一定的时期内（如 30 天）自动授予，以免申请人不得不另行要求允许其在中国以外的地区提出申请，所以，全国性或国际性申请在中国的提出应被视为满足了第 4 条的要求。</p> <p>如果上述建议得到采纳，国际商会建议应允许申请人在申请提出前由于失误没有获得许可的情况下，可以被追溯授予</p>

2006年12月修改稿	意见和建议
	<p>在中国以外地区提出专利申请的许可，这类似于美国的做法。考虑到只有一小部分专利申请与为了保守国家机密而被要求保密的发明相关，上述做法应该是合理的。</p> <p>国际商会还提议《专利法实施细则》应规定批准程序要快速、简便，以体现较高的办事效率，最好在30日内就能给予批准。</p>
第五条	
第六条	
第七条	
第八条	
第九条	
第十条	<p>国际商会赞赏为避免相同的发明受到实用新型和专利的双重保护而对第10条进行的修订。但是，我们认为当前的实施细则必须改为专利授权引起的对实用专利的放弃仅从专利授权日开始生效。如果仍保留当前的规定，从提交申请到专利授权这段时间内发明将得不到有效的保护。</p>
第十一条	<p>国际商会建议，强制登记要求只有在涉及安全问题或国家机密时才适用。</p> <p>如果上述建议得到采纳，国际商会认为专利申请或专利权的转让应从转让签字日期起生效，而不是从草案中提出的注册日期起生效。</p> <p>国际商会坚决认为任何该等权利的转让必须在有关各方签订相关合同时生效，而不应取决于有关部门对该等权利的注册。</p>
第十二条	

2006年12月修改稿	意见和建议
第十三条	
第十四条	
第十五条	
第十六条	<p><b>意见：</b></p> <p>国际商会建议将该条 或 换为下列内容：</p> <p>“被授予专利权的<b>国有</b>单位应当对<b>在中国产生的</b> 务发明 的发明人或 人给予 ，发明 实施后， 其在中国推 应用的 和取得的 效益，对发明人或 人给予合理的 。 有单位 务向<b>在中国取得的</b> 务发明 的发明人或 授 。”</p> <p>变 理由：</p> <ol style="list-style-type: none"> <li>1. <b>澄清本条</b>项下义务仅与<b>国有企业</b>相关；同样应该澄清的是该项义务不适用于<b>私人</b>企业参与的合资。</li> <li>2. 澄清本条适用于在中国产生的发明和取得的利益。</li> </ol> <p>如果不采用上述意见，可以<b>去掉第 16 条</b>，因为它有可能对行政授奖体系<b>造成沉重</b>的负担和高额费用。对发明人的奖</p>

2006年12月修改稿	意见和建议
	赏可由各个单位 其自定的政 行。
第十七条	
第十八条	
第十九条	<p><b>意见:</b></p> <p>国际商会建议将第19条修订为允许外国专利申请人:</p> <ul style="list-style-type: none"> <li>- 或 利用专利代理机 或</li> <li>- <del>如果在中国有分支机构或机构可自通过机构, 选择中国注册专利代理</del><sup>4</sup> <b>提和办理申请</b></li> </ul> <p>当前草案中的第19条将会在专利取得方面对外国发明人<b>造成</b>中国发明人所没有的压力, 这是一种<b>差别待遇</b>, 与TRIPS协议不符。为解决这一问题, 我们建议第19条的<b>措辞</b>改为如下内容:</p> <p>“在中国没有经常<b>居所</b>或营业所的外国人、外国企业或外国组织在中国申请专利或办理<b>其他</b>专利事务得, 应当<b>委托</b>指定由国务院专利行政部门<b>批准的</b>代理机构<b>或</b>专利<b>律师</b>为其代理。</p> <p>中国的单位或个人在国内申请专利或办理<b>其他</b>专利事务的, 可以委托由国务院专利行政部门<b>批准的</b>代理机构<b>或</b>专利<b>律师</b>为其代理。</p> <p>专利代理机构和专利<b>律师</b>应<b>遵守</b>法律、行政法规, <b>按照</b>被代理人的委托办理专利申请或<b>其他</b>专利事务。对被代理人发明<b>创造</b>的内容, <b>除</b>专利事情已经公布<b>或者</b>公告的以外, 负有保密责任。专利代理机构及专利代理<b>律师</b>的<b>具体</b>管理办法由国务院规定。”</p> <p>这项修订还要求对《专利代理条例》进行修订, 允许专利代理人<b>进入</b>企业而不仅仅在专利代理机构<b>中</b>工作。国际商会</p>

<sup>3</sup> 例如**根据**美国《专利法》, 外国申请者可以自行办理专利申请或由**律师**或代理人代理办理, 见 37 CFR §1.31.

<sup>4</sup> **根据** EPC, 在签约国不具有住所或主要营业场所的申请者必须由职业代表人代表 (欧洲专利律师), 见 EPC 第 133 和 134 条。

2006年12月修改稿	意见和建议
	<p>认为这一改动大大有益于中国的专利代理业，为这将有可能专利代理人在于中国的国内及国外企业中可以工作。过的示，代理机构内的专利代理人很（不可能）获得企业内的专利代理人所能取得的能，为企业内的专利代理人企业内部并参与商业决。另外，用企业内部专利代理也不会存在关于专利代理机构利益的问题。而专利代理机构与企业间有成效的专利代理人交换将会增进这种能和的。</p>
第二十条	<p>如上所述，第20条必须与第4和第76条结合起考虑。建议任何中国的单位或个人对国际申请的提出应被视为满足第4条的要求，申请人没有必要另行取得在外国提出申请的许可。</p> <p>这一，国务院专利行政部门必须将国际申请作为在国外提出申请的申请理。</p>
第二章 授予专利权的条件	
第二十一条	
第二十二條	<p><b>意见：</b></p> <p>第22条最后一中对现有 的定 应加以澄清。为保 已公开发表或公开 用的 被视为现有 ， 该是 为公 所了解，国际商会建议采用下列修订内容：</p> <p>“本法所 现有 ，是 指申请日以前在国内外通过在出版物上公开发表、公开 用或任何其 方 为公 可 获得或所知的 或 。”</p>
第二十三條	<p><b>意见：</b></p> <p>修订后的第23条对外 的改进与第22条一 ，但我们认为现有 的定 同 不 分。</p> <p>国际商会还注意到第3段对 “任何” 的“现有 ”进行了定 ，该定 的内容不 于一项应用的相同或相似产品 的外 。在第1 有关 特性的定 中，只有“ 相关 ”的 对于 定是 有 分的 特性</p>

2006年12月修改稿	意见和建议
	<p>才有决定性的作用，这表明新 性和 特性有两个不同的标准。</p> <p>此，国际商会建议第 3 的内容修改如下：</p> <p>“本法所 的现有 ，是 /指申请日以前在国内外通过在出版物上公开发表、公开 用或其 方 为公 可获得或所知的相同或相似产品组的任何 。”</p>
第二十四条	<p><b>意见：</b></p> <p>修订后的第 条中的 期不仅适用于新 性的 定，也适用于对 性的 ，这种情况在法 方面会 成 重的不 定性。另外， 期是 只适用于发明人 申请人的公开或 用或 是 其意 的公开或 用这一 上也是不 全明 的。对该条应给予澄清， 体阐明不 由和申请人没有关系或对申请人没有 务的第三方公开的 发明。</p> <p>国际商会建议第 24 条修改如下：</p> <p>“专利申请的发明 在申请日以前六个月内，以下列方 一为公 所知的，对该专利申请的新 性 定而 不视为本法所 的现有 或 现有 ：</p> <ul style="list-style-type: none"> <li>( ) 申请人或其前 后的所有权持有 在中国政 主办或 认的国际 会上 出的</li> <li>( ) 申请人或其前 后的所有权持有 在规定的学 会议或 会议上首次发表的</li> <li>( ) 对申请人或其前 后的所有权持有 有保密 务的任何 人 申请人或其前 后的所有权持有 同意而其内容的。” </li></ul>
第二十五条	<p><b>意见：</b></p> <p>第 1 段第 (5) 项中有关通过用 和变换方法获得的物 的 外条款 不清，可能与 TRIPS 议 。在 的和 中 用的许多物 通过 转化取得，不应 对该 发明的保护。</p>

对于第 25 条的最后一段，国际商会建议 可专利性的 外条款，依 如下：

国家知识产权局提供的对本草案的“解释”，该 外条款 于对实现《生物多样性公 》（CBD） 标的考虑，而且对于这一 ，中国将采取相关 施， 涉及两个方面：（a）建 一种 理机制， 在中 人 和国 内 相关批准和授权 可 该 （b）增加专利法的相关条款， 可能以发明为 的 的非法获取 或 用。

国际商会认为新修订的第 25 条第 3 规定的明示可专利性 外条款与 TRIPS 第 27.2 条相 。

为了避免引起误解，国际商会强 其 全 持 CBD 的 标和 CBD 所 的各国应实行各自的体系， 各自认为适当的方 理其 ，并 持《 准则》。国际商会还 守 CBD 提出的“知识产权应对其 标起 持作用而不是 向作用”的 则（CBD 第 16 条第（5）款）。

但是，国际商会不认为专利法草案中提出的 施有助于实现 CBD 的 标。相 ，国际商会认为在当前的情况下，这 些 施在“公 、公正地分 利用产生的利益”方面与 CBD 的 标 而 ， 为对于某种程 上与 相关的专利的有效性 说，这些 施将会引出一些不 定 ，这些不 定 将会 制 可持 利用方面的 ，并且由于这些不 定 所 成的不 定性，与在这方面提供 的 相关的发明 率也将 。

专利权是一种 定权利， 并不意 专利权人一定可以实施发明，只是专利权人以外的其 人 许可不可以实施发明。所以专利权的授予不意 “ ”能够从其 行中得利。

将这种发明 在外 起 似 很公 ，这 一 的 一结果将是 个人 可以采用该发明（ 品、 品、化 品等 是 型的 自 的发明），并且在该发明得到实施时 会有益于 会。但是，这些产品 要大的 进行 发 后才可以 向 ，而在不 有专有权的情况下任何人 不会进行这 的 （美国国家 生 院 发放非专有 许可，但没有人想要这种许可）。

国际商会认为如果在法 中 明 的有意取得 了相关法 ，并且任何第三方有可能进行必要的 该发

	<p>明向以会，采用其段（如法法从该发明中获利或其人合法实施该发明）对这种行为将会有效。</p> <p>国际商会已注意到与2006年7月31日的草案相比，当前草案的内容已进行了修改，但在其，该变当前草案中可专利性的外上述草案大，所以认为该变对草案没有改进。</p> <p>对于拟订第3款的内容，国际商会认为“”一并不明，特别是法定该仅指物理还是物理也。另外，“的成依赖于”这一如何解释也不明。许多情况下，一项发明要在上进行该发明是有效，该发明是可于第25条的这一款项下</p> <p>国际商会了解到国家知识产权局将在实施细则和审查指南中对这些内容进行澄清，希望时有机会就此发表自己的意见。</p> <p>最后，提案没有说明新加的有关的一对在本法生效前授予的专利权是有追溯效力。</p> <p>国际商会全支持对CBD有利的任何合理施，但同时认为当前的提案将会产生非常重的问题，并认为该提案不会实现国家知识产权局将该纳修正案所要到的的。</p>
<p><b>第三章 专利的申请</b></p>	
<p>第二十六条</p>	<p>意见：</p> <p>国际商会建议从修正案草案中一个第26条的第4，将述如下，并请有关第25条第3的意见，在很大程度上也适用于第26条第4。</p> <p>国际商会全支持“获取及利益则”（ABS）作为联合国《生物多样性公约》（CBD）的三大标一。</p> <p>国际商会重各国各自的国家政通过各自的国家法对自有获取进行制的主权（CBD第3条），并各国公、公正地分自这些的利益（CBD第2、第15条）。</p>

	<p>国际商会坚定地认为国家的 ABS、知识产权制 和 体系能够 进通过商业化 新进行的 的可持利用，并 此产生可 的 社会效益。</p> <p>但是，在国际商会 ，当前草案第 26 条第 4 中“发明的 成依 于”的 的公开要求不能有效地进 CBD 标的实现。</p> <p>国际商会注意到国家知识产权局在其对本草案的意见中指出世界知识产权组织（WIPO）和世界 易组织（WTO）就本问题的 受到了发 国家的 ，但国际商会 地表示不同意此 法。</p> <p>国际商会认为，在将新要求纳 专利法 前对这个问题给予 分的考虑非常重要，这 才能得出 的解决方案，在实现 定 标的同时将 的可能性 到最 。</p> <p>国际商会非常高 地注意到提案采用了“所述 的 ”这一表 法，认为这一表 法 已 在国际性 中列出的其 许多表 法 为适当。但是， 前国际上不存在该表 法的公认 ，所以 的 较不明 。</p> <p>在可以获取并利用的 中只有很 部分能产生 的商业专利发明，所以中国的这一 不会解决 被获取但从 成 进 专利申请的大 案例。</p> <p>的强制公开要求增加了专利体系的 性。如果这种 或其正 性能 发明的可专利性或已授权专利的有效性， 专利将迎 一个新的法 ，别有用 的 会借助专利体系，利用公开要求 得到满足这一借 ，以并 的主 进行 发明人。由此，与天然 有关的商业 动及 和开发 动将会受到 制，最 产生可分 利益的 力。</p> <p>生物 企业依 强有力且可 见的专利保护 合作 和 在 们的项 是有保 的。如果有 个项 的专利权会 易受到 疑进而 成专利权的不 定性，或在专利保护方面出现中 ，企业是不会对这种项 的。</p> <p>请注意，人们对 的 和交换 动已存在了 年 ，但人们 知 也 不能 定生物 的可 能 ，而且在有关《生物多 性公 》（CBD）的 发生 前的许多年 个 个世 ， 合法 的追溯记 已 失。</p>
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	<p>提案中并没有说清 如果申请人不能提供提案要求的 后果将会 。在这个问题上，国际商会认为如果该后果将致 失 有被授予专利的权利，这将 TRIPS 议第 29 条，该条规定了专利申请中 方面的适用条件。</p> <p>从表面上 ，提案并 指出取得专利必须要提供这种 （第 2 条），国际商会对此表示赞赏。</p> <p>国际商会还明 国家知识产权局将在以后起草的《专利法实施细则》和《审查指南》中对这些问题给予澄清。国际商会希望能有机会对这些问题提出自 的意见，并建议中国在这方面应借鉴 个欧洲国家的作法，保 的 （不明或后 发现 先的 不正 ）不会 发明的可专利性或已授权专利的有效性。</p>
第二十七条	<p><b>意见：</b></p> <p>欧洲法 不强制要求必须提供简要说明。国际商会建议中国不要在该问题上进行修改。为了避免任何疑问，法应明 规定简要说明不会决定保护的 。</p> <p>欧洲法 没有 保护 仅 定于申请 中指出的相同产品类别，国际商会建议中国引 相同的体系，从而取 保护 仅 于相同类别的产品这一 制。</p>
新建议条款	<p><b>意见：</b></p> <p>国际商会建议在第 27 和 28 条 间新增一条，内容如下：</p> <p>“实用新型或 专利申请人应作出 申请人所知申请并非仅 已知的 的 明。申请人应就其 意做出或 其重大 而做出的任何错误 明 任。”</p> <p>：</p> <p>人 的是，现实中存在许多 商或 仅 现有产品就申请专利的例 ，而上述 明要求则会有助于 这种申请。在以前的意见中已 提到过 “ ” 和 “Antioch” 这 的案例，这种 用专利申请的行为可通过要求申请人做 出 明加以 。</p>
第二十八条	



第二十九条	
第三十条	
第三十一条	
第三十二条	
第三十三条	

<b>第四章 专利申请 的审查和批准</b>	
第三十四条	
第三十五条	
第三十六条	<p><b>意见：</b></p> <p>国际商会建议将第 36 条的内容修改如下：          “发明专利的申请人请求进行实 审查的时 ，应当提交在申请日前<b>申请人所知的</b>与其发明有关的参考 。</p> <p>发明专利已 在外国提出过申请的，国务院专利行政部门可以要求申请人在指定期 内提交与该国审查其申请进行的 或 审查结果的 。 正当理由 期不交的，该申请 被视为 。”</p> <p>做出这一修改的 是该条对于申请人是 必须要进行可专利性 并向国家知识产权局提交结果并不明 。改动后的内容明 要求申请人提交其所知的参考 ，但不要求其进行 。</p>
第三十七条	
第三十八条	
第三十九条	
第四十条	
	<p><b>意见：</b></p> <p>当前的《专利法实施细则》中的第 48 条规定有可能 第三方提交与发明的可专利性相关的意见 述，国际商会建议将这种可能性明 纳 《专利法》。</p> <p>我们进一步建议《实施细则》必须明 规定 该条例提出任何现有 不得 该现有 在以后的 效 程序</p>



	中作为依。已授权的专利应被定为相对于审查期间已被引用的任何现有有效，但这并不意该等现有在以后的程序中不会在国家知识产权局或法中次用。
第四十一条	

<p><b>第五章 专利权的期、中和效</b></p>	
<p>第四十二条</p>	<p><b>意见:</b></p> <p>第 42 条规定“发明专利权的持 时间是二十年”。国际商会注意到第 63 条第 (5) 款的拟定修改内容引 了对 品的 免,但在大多 国家,这种 免 和专利主题的专利保护 期结合 用。</p> <p>然而,当前的草案没有提到专利 期,专利主题在上 前 要 过 的政 授权程序,授权程序会 用专利有效期的时间。其 国家已 引进了 这些产品(如 品和 用化学品)的专利有效期得到 的机制。国际商会 此建议对所有 要 过 的政 授权程序的专利保护主题实行专利有效期 机制。</p>
<p>第四十三条</p>	
<p>第四十四条</p>	
<p>第四十五条</p>	<p><b>意见:</b></p> <p>第45条规定了向已授权专利的有效性提出 疑的条件。国际商会认为如果第45条能够明 地规定 疑专利的理由,这一 对任何人 说 是有利的。 疑的理由应该有所 制(例如《欧洲专利公 》的做法),这 就可以避免别有用的 以任何所 的理由对专利权提出 疑 专利权的 有 。</p>
<p>第四十六条</p>	<p><b>意见:</b></p> <p>《专利法》第 46 条第 2 款,由国家知识产权局专利 审委员会( )的决定引起的上 要通过人 法院发起 对 的法 程序, 效 程序中的被 在法 程序中要作为第三方出 。相 下,国际商会注意到当前的《实施细则》第 条规定允许专利权人对专利 效的指 做出 应。</p> <p>日本、美国、 大利 和大多 欧洲国家的 ,上 程序的当事人为 效 程序的 当事人,也就是专利权人及 对方,国家知识产权局在考虑中国是 应该通过第三修正案实行相同的做法。</p>

	<p>但在国际商会，很，国家知识产权局在当前的草案中没有做出这的修订。</p> <p>国际商会持将《专利法》修订为对效的决定提出上的当事人将为效的当事人。这是最合的，为是当事人间的。应被视为中间人而非主体。不过，应时法的要求，做出相关的明。作为第三方出的权利应给予明规定。另外，如果被决定，应有权任何上程序。</p> <p>国际商会意就在法院对的上做出决定后通过的程序发表相关意见。当前的做法，中国法院仅有权就决定的有效性做出决定，但权专利失效，后是权力。所以，如果法院决定的决定错误，专利应被效，事情最后还是到这，由其理效事，但这会法院决的行，所以如果法院有权专利效，法院决的行会快。</p> <p>此，国际商会希望国务院法制办公室考虑是应该向法院授予专利效的权力。体地，法院应该有这一权力以便(i)转PRB的决定并其自的意专利权，或(ii)PRB的决定失效，将案件交委员会进行实际的查和决定。这将法院能够加、高效且强有力地对PRB的决定进行决。对于某个特定案件，法院是会得出最决将主要取决于审记中案件的事实情况如何。</p>
第四十七条	

<b>第六章 专利实施的强制许可</b>	
第四十八条	<p><b>意见:</b></p> <p>拟订的第 48 条第 (1) 款的内容很大程度上是对《 公 》第 5A 条第 (4) 款的 述, 国际商会认为如果不说明进被认为是对发明或实用新型的“实施”, 有可能会 TRIP 议 (第 27 条第 1 款)。</p>
第四十九条	<p><b>意见:</b></p> <p>国际商会认为第 49 条第 2 款的“ ”一 意 非常 , 可以涉及从简单的清 用 到 品和 在内的 任 何产品或过程, 所以国际商会建议 该 。</p>
第五十条	<p><b>意见:</b></p> <p>国际商会大体上对第 50 条表示 持, 该条内容符合 DOHA 议的 。</p> <p>国际商会认为, 为了与 DOHA 修正案保持一致, 提案应引 保护性 施 如此 出的 品 次进 中国, 从而 专利权 失 在中国的正当利益。</p>
第五十一条	<p><b>意见:</b></p> <p>国际商会认为第 51 条的内容与 TRIPS 的第 31 条第 (1) 款 (ii) 项不 全相符, 后 规定了当较 的专利被授予强制许可时, 该较 专利权人应有权取得在较 的专利中主 的 的相 许可。将第 51 条第 2 中的“可以”一 换为“应该”一 就可以 上述不符 。国际商会 此建议第 51 条的内容如下:</p> <p>“一项取得专利权的发明或 实用新型 前已 取得专利权的发明或 用新型 有 意 的重大 进步,</p>

	<p>其实施 有 于前一发明或 实用新型的实施的，国务院专利行政部门 后一专利权人的申请，可以给予实施前一发明或 实用新型的强制许可。</p> <p>在依 前款规定给予实施强制许可的情 下，国务院专利行政部门 前一专利权人的申请，应当给予实施后一发明或 实用新型的强制许可。”</p> <p>国际商会还认为，为了 第 51 条的规定取得强制许可，第 53 条规定的条件必须得到满足，这就意 只有请求人提供 明其不可能在合理的时间内以合理的条件取得非强制许可时才可以被授予强制许可。</p>
<p>第五十二条</p>	<p><b>意见：</b></p> <p>国际商会 持将授予强制许可的 制条件转 到新的第 52 条，这些 制条件当前 在《专利法实施细则》的第 72 项规定中。</p>
<p>第五十三条</p>	<p><b>意见：</b></p> <p>国际商会认为第 53 条还应适用于第 51 条项下的可请求强制许可（ 较 对第 51 条的意见）。</p>
<p>第五十四条</p>	
<p>第五十五条</p>	
<p>第五十六条</p>	
<p>第五十七条</p>	

<p><b>第七章 专利权的保护</b></p>	
<p>第五十八条</p>	
<p>第五十九条</p>	
<p>第六十条</p>	
<p>第六十一条</p>	<p><b>意见：</b></p> <p>当前的 将 任 的情 仅仅 定于新产品的方法专利，这还不够。国际商会建议以下列内容 换当前的第 61 条第 1 ：</p> <p>“专 利 权 涉 及 产 品 制 方 法 的 发 明 专 利 的 ， 并 且</p> <p>(a) 如果 有 持 单 位 或 个 人 正 在 实 施 该 专 利 方 法 这 一 实 可 能 性 或</p> <p>(b) 如果 该 方 法 制 的 是 新 产 品 ，</p> <p>制 同 产 品 的 单 位 或 个 人 应 当 提 供 其 产 品 制 方 法 不 同 于 专 利 方 法 的 明 。”</p>
<p>第六十二条</p>	<p><b>意见：</b></p> <p>第 62 条 没 有 澄 清 行 政 机 做 出 的 对 现 有 和 现 有 的 决 定 是 对 法 有 力 ， 然 。</p> <p>国 际 商 会 建 议 本 条 应 明 规 定 法 决 对 专 利 行 政 部 门 有 力 。</p> <p>国 际 商 会 进 一 步 建 议 人 法 院 应 被 授 权 在 《 专 利 法 》 中 提 到 的 作 为 效 理 由 的 任 何 理 由 考 虑 可 专 利 性 的 有 。</p>
<p>第六十三条</p>	
<p>第六十四条</p>	<p><b>意见：</b></p>

	<p>TRIPS 议的第 45 和 46 条规定，对 权采取的 施应 有有效的 力，并对 受 提供 分的 。</p> <p>此，国际商会建议 定 50,000 人 的 款下 ，不 任何 款上 ， 为国际商会认为 100,000 人 的 款 太 ，不 有有效的 力，而且在很多情况下也不足以 专利权人所 受的 失。</p> <p>国际商会建议改为下列内容： “ 了 权人 权行为外，向 权人 以不 于人 50,000 的 款。”</p>
第六十五条	<p><b>意见：</b></p> <p>与 对第 64 条的意见相同。</p>
第六十六条	<p><b>意见：</b></p> <p>与 对第 64 条的意见相同。</p>
第六十七条	<p><b>意见：</b></p> <p>考虑到许多专利 权案件 不简单，国际商会强 建议专利行政部门的作用应 为明 ，并应 有 加强有力的 行 权，而且对于提供 明或 述且 或 与专利行政部门合作的当事人，应 有相应的制 或 段，则 的 ，专利行政部门是 能够取得当事人的全力 合，有效 理 权 就非常 人 疑了，而且 效的结果将 致 的不 分利用和 。</p> <p>同时，专利行政部门在 查、 制和 理被 权人的 时对其商业 保守 密也是很重要的。</p>
第六十八条	<p><b>意见：</b></p> <p>国际商会建议 100 人 的上 。法院在审理案件时应该有权 案件的 体情况（如 意 权或明 等） 以 高的 款。</p> <p>国际商会还建议提高 款的下 。</p>

第六十九条	
第七十条	<p><b>意见:</b></p> <p>国际商会欢迎将该条 加到《专利法》中。这些变 对 权人的 先存在的 得到保留, 另外, 这些 已 到 专利权人能够在其专利权正受到 , 且其有理由认为存在 权 可能被 的情 时请求人 法院做出 保全的 定。人 法院应在 48 小时内对该请求做出行动。如果法院 定允许实施保全 施, 专利权人可以 采取行 动保存 , 并在 定后 15 日内提起 对 权人的 。</p> <p>但是对于法院提出的 保要求, 最好在本条中 定一个标准或 方法, 以便法院 定 保的 。</p>
第七十一条	<p><b>意见:</b></p> <p>拟定的 2 年的 时效期间实在是太短了, 在这方面有许多 要考虑, 而且在提起 前 要进行大 的准 工 作。国际商会建议将 时效期间改为 6 年。</p>
第七十二条	<p><b>意见:</b></p> <p>国际商会很关注追溯 权的 时效 定为“法 程序开始日 前两年”。国际商会认为上述时间应 , 建议 改为 6 年。</p>
第七十三条	
第七十四条	<p><b>意见:</b></p> <p>第 74 条第 (1) 款规定了“进 ”由专利权人生产的产品 “或 通过 用专利工 获得的产品” 不被视为 “ 权”。这一规定允许在 取得专利权人允许的情况下进 专利产品, 所以引 了专利权的国际 制 。</p> <p>在国际商会 , 引 国家 面上的国际 制 对国际 易和 不利, 对 新也不利。</p>

	<p>高 国内企业和个人专利申请的较大增 示出中国本 可能会 国际 制 受到 失。</p> <p>此，国际商会建议将第（1）款修改如下：          （1）专利权人制 或进 或 专利权人许可而制 或进 的专利产品或依 专利方法 获得的产品 出后，          用、许 或 该产品的的专利产品或 有专利权人授权的专利产品 后，或在 通过采用专利权人实施的          或由专利权人授权的专利工 取得的产品 后，任何其 人 用、提出 或 该产品的。</p> <p>国际商会已注意到国家知识产权局提供的“解释”中 对第 条第（ ）款的意见，但依然认为拟订的第 条第          （ ）款 有不公正的 向性， 为该款只允许第三方在专利权有效期间进行 品 制，但 没有提供任何 规定，如          专利有效期 ，该 期可以 有专利权的企业部分追 由于 的审批程序过程而失 的专利有效期间。</p> <p>欧 和美国已 采用了 Bolar 体系和专利期 / 保护 体系。这两项 施的结合 用可以对专利系 起到          作用。 此，国际商会强 中国法 采用 Bolar 规定，而且专利期 保护 的规定也必须纳 中国法          ，没有这些规定 Bolar 体系不能得到 分的 。</p>
第七十五条	
第七十六条	<p><b>意见：</b></p> <p>国际商会认为第 76 条规定的制 太过 。必须将第 76 条和第 4、第 20 条结合在一起 。国际商会建议专利权          等制 只适用于涉及国家机密的案件，但在其 的案件中，如果申请人由于失误没有在国外进行专利申请 前获得许          可，应允许该申请人 后进行申 ，以取得追溯允许其在国外进行专利申请的许可，这 做美国的情况相一致。</p> <p>国际商会还建议为了与第 20 条保持一致，第 76 条的适用应仅 于中国的单位和个人。</p>
第七十七条	
第七十八条	
第七十九条	

第八章 则	
第八十条	
第八十一条	<p><b>意见：</b></p> <p>第 81 条好 示所有的修正案 有追溯适用效力。</p> <p>国际商会建议国务院法制办公室考虑对于某些修正案采用过 性规定。</p> <p>提案所 于的事实是并非所有的 决申请 可能符合第三修正案的所有新规定，而申请人不应由此受到 ， 为这 些申请是在第三修正案的规定生效 前提出的。</p>

## 特定的目前法律中未涉及的问题

### (1) 对专利复审委员会（PRB）的决定进行的司法审查

建议国家知识产权局会对修订后的《专利法》草案做进一步的变，允许对专利复审委员会做出的决定（如有关效的决定）不的当事人对外的相关当事人提起事，这专利复审委员会在行政中就不会作为被了。但是，事中的不能请求法院行政决定，所以审理事案件的事法院不能通过事决行政决定并专利复审委员会重审程序。这是一个事审程序问题，前对此没有可行的解决办法。国际商会建议当前的行政制保持不变

### (2) 共同侵权及间接侵权

本草案有关同权及间接侵权的规定。国际商会注意到国家知识产权局在“解释”文件中这是有意而为，为采用这些规定的时间还不成。国际商会对此表示，并请国务院法制办公室对这一情况重新考虑。

[450/1022 号文件

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